

LEGAL FRAMEWORK OF STATE AID IN THE EUROPEAN UNION MARKET

Abstract

State aid policy is a type of EU competition policy that symbolizes the braking system of industrial sector strategies that impede competition in the Single Market of the European Union. The determination of conditions and the procedure for controlling state aid are carried out to protect free competition in this specific market, applying the principles of market economy and stimulating economic development. It is necessary to ensure transparency in the granting of state aid, as well as respecting the provisions of the public law related to the state aid institute. It is fascinating to apply state aid to certain areas, such as regional aid, research, development and innovation assistance, environmental aid and assistance in taking risk capital. It is crucial that the economic life of the European Union be harmonized with the legislative framework of the communitarian law, which will also be the subject of the research presented in this paper.

Keywords: law, State aid policy, competition, European Union.

1. Introduction

The International commercial law is primarily created by the international legislator in an organized way (through international conventions) or spontaneously, autonomously (through the creation of business customs, standard, type contracts, collections of uniform legal terms, clauses and arbitration practices, etc.).²

Especially appealing the field of competition law is both because of its specificity and its actuality. The importance of competition is, traditionally, emphasized by the elasticity of demand, as well as the

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² S. Carić *et al.*, *Privredno pravo*, Univerzitet Privredna akademija, Fakultet za ekonomiju i inženjerski menadžment, Novi Sad 2011., 4.

disproportion between the needs and desires of consumers, and their ability to pay.³

With the adoption of the first acts of competition law, the most important goals of this policy of the European Union were proclaimed: protection of consumers' interests, reduction of prices and increase in the quality of products and services, open market economy with free competition, distribution of economic power to a broader circle of commercial entities, redistribution of financial resources and wealth, establishment of optimal efficiency at microeconomic and macroeconomic level and development of European economy, increase of social well-being, protection of economic entities from undisclosed these activities of competitors, balanced regional growth in the monitored markets, highest possible employment rate in the society, strengthening of internal and external competitiveness of the European economy.⁴

State aid policy is a unique part of competition policy, which implies the prohibition of subsidies or any form of state aid to certain companies that significantly distort competition, both in the domestic market and internationally. There are, of course, exemptions here, only if the companies in practice have proven positive business on the territory of the economic community. State aid policy is a type of competition policy of the European Union, which enables the monitoring of government policy in support of its national companies.⁵ It symbolizes the braking system of industrial sector strategies, which impede competition in the Single Market of the European Union.

The notion that the Single Market of the European Union is threatened by the insufficiently examined state aid policy is quite correct. Violation of competition on the market can find justification only within the framework of state authorities. State aid policy represents a means of dominance on the market without physical, regulatory and fiscal barriers.⁶

State aid policy differs from any other national policy, as well as from the Commission's policy of restrictive practice, monopoly or merge. The goals of its regulation relate to the government or the state, not to the enterprises. The issue of granting state aid to business entities is significant because of its economic effects (whether the purpose for which

³ B. Rakita, *Međunarodni marketing*, Ekonomski fakultet, Beograd 2003., 233.

⁴ R. Baldwin, C. Wyplosz, *The Economics of European Integration*, McGraw-Hill, London 2006., 48.

⁵ The concept of a state in the law of EU competition is viewed very widely because, in addition to the state itself, it implies its bodies and local communities. Also, the term includes public law institutions, public and private enterprises and institutions founded by the state, or through which it creates direct control over the business.

⁶ Often, state aid policy is perceived as an instrument for fragmenting the market that is justified by a state epithety.

aid is granted is whether the competition has been violated) because any situation in which state aid is granted creates a risk of corruption.⁷

2. Legal aspects of state aid in communal law

Under global competitiveness, we mean the ability of the country to stimulate, economic, institutional and social action, the successful appearance and the survival of its companies in the world market, and the result of the interaction, firm-government, the ability to change the conditions of competitiveness on a global, world level.⁸

Legal aspects of state aid are a necessary instrument for monitoring competitiveness. The Tenth Competition Policy Report of 1981 relates to state aid policy. The idea was to highlight the need for assessing state aid policy, and possible ban, so as not to have a recurrence on the part of national authorities. The fact is that the adequately used state aid policy can be useful in achieving the objectives of the founding contracts, such as market integration, reduction of economic and regional disparities, or coordination with other forms of competition policy.

Under Article 107 of the Treaty⁹ on the functioning of the European Union (from now on: the Treaty), any aid granted by a Member State or its State resources which distorts or threatens to compete with the favor of an undertaking or certain of its products is contrary to the Single Market to the extent that it changes the exchange between Member State. State aid policy is not opposed to the market in question: when state aid relates to a social character and when it is granted to an individual consumer without discriminating against the originating product, and when it is allowed in the case of rehabilitation as a result of a natural disaster, and the consequence of extraordinary circumstances. Assistance is defined here as any positive or negative action of a state that represents a monetary measure to achieve a particular goal. This financial step may consist of doing, such as subsidies, or omissions, such as tax exemption.¹⁰

It is about the following legal and economic situations. The first is where state aid promotes the economic development of an area where the standard of living is below average, or where there is severe

⁷ State aid - deliberate investment or hidden corruption?, http://www.istinomer.rs/pictures/wledit_pdf/622770574875176.pdf, last visited August 3, 2016.

⁸ J. Kozomara, *Tehnološka konkurentnost*, Ekonomski fakultet, Beograd 1994., 50.

⁹ The Treaty on the Functioning of the European Union, Consolidated version, *Official Journal of the European Union*, C 115/47.

¹⁰ This includes exemption from social and pension insurance costs, loan guarantees under very favorable conditions and coverage of exploitation losses.

unemployment.¹¹ Job creation assistance may be approved by the Commission when evaluating, the goal is not crucial, but the impact of the measure on the competition.¹² The second is where state aid is used to promote a particular project of common European interest in removing a severe economic disorder in a Member State. The third case is in the situation where state aid is used to facilitate the development of individual or commercial regions unless it distorts the conditions of exchange in a measure that would be contrary to the common interest. The fourth case is recognized when state aid is used to promote culture and preserve cultural and artistic heritage, with the requirements of respecting the basic rules of competition. Other categories of assistance include those identified by the Council with a qualified majority on the proposal of the Commission.¹³

3. Control of state aid policy

Effective implementation of competition law is created by the joint action of the European Commission and national competition authorities that form the European Network of Competition Authorities.¹⁴ When it comes to the decision-making process whether a state aid is contrary to competition or not, we have a notification process that involves the publication and delivery of state aid policy implemented by a particular government in the industrial sector. An urgent need to find out whether the strategy in question leads to a distortion of trade between the Member States.

The period that occurs between the application of the state aid itself and the sending of a notification to the Commission often makes the problem of the promptness of the treatment. The Commission instructs the case manager to supply facts related to the State aid policy that is the subject of the examination. In this period there is information about the characteristics of state aid.¹⁵

¹¹ The Commission has defined the cumulative conditions for obtaining state aid: the aid cannot be higher than a certain percentage of total investment, while the rate depends on the difficulty of the situation (the assistance cannot exceed 75% of the total investment, that is, from 130,000 euros). The same must be assessed by an adequate method, it should not relate to the territory of the whole country, but only to the regions, and its effect must be evaluated by economic sectors.

¹² Help is especially prohibited that makes the establishment of the company more difficult.

¹³ M. Cini, L. McGowan, *Competition Policy in the European Union*, Palgrave Macmillan, Basingstoke 2008², 138.

¹⁴ S. Ahn, „Competition, Innovation and Productivity Growth: A Review of Theory and Evidence“, *OECD Working Papers: No. 317*, Economics Department 2002., 102.

¹⁵ If the State aid investigation is positive and approved the decision obtained is published in the Commission's Official Journal. Negative and conditional decisions are published in the Official Journal of the L series. The duration of the investigation by the Commission takes place within six months.

The Commission has the opportunity to conduct an informal investigation of state aid policy, where there is no subsequent review at the Court of Justice of the European Union. Article 108 of the Treaty defines the activities of the Commission and the Court in the matter of decision-making. It is pointed out that the Commission, in cooperation with the Member States, reviews the granted assistance, proposes measures to improve the development and functioning of the common market. If the aid awarded is not by the Unified Market and that its abuse is evident, the Commission shall decide to terminate this assistance.

If a Member State, after this, does not apply the adopted decision, the Commission or interested party shall send a complaint to the Court of Justice, which has a period of three months, to make its decision on the issue of the particular legal matter. Control of the behaviour of business entities as state aid users must be implemented. Article 107 sets out the conditions for granting state aid, while Article 108 regulates the regime of state aid issued. Adequate implementation in the economic life of state aid is of great importance for the existence of a fair market competition, especially in such a broad and specific space for the competition of competitors.

The Competition Directorate has become a critical factor in controlling state aid over time. Its staff is highly motivated to achieve the objectives of competition policy, the purpose of which is to establish a competitive and integrated European economy, which together strengthens the functioning and importance of the European Union.¹⁶ Competition policymakers did not understand the seriousness of the abuse of state aid, until the recession in 1973, when the Commission was forced to take a serious approach to this situation.

The Commission, as the guardian of the right of a competition of the European Union, faced numerous notifications, but not with the cooperation of the member states themselves. The year of 1985 is significant for this topic, since this year the State Aid Act was passed, which besides legal had a statistical significance. It was precisely this legal regulation that established a trend in the movement of state aid, which, on average, among all member states at the time, by the beginning of the nineties, amounted to 15% of public expenditures and 4% of GDP. This act has determined the basic principles of state aid. It is envisaged that certain state aid is not fair in all its forms, that the effectiveness of the policy has to be proven and that the transparency of all aspects of state aid must always be a priority. The evolution of state aid policy has been shaped by three sub-components of this strategy: regional state aid policy, sectoral state aid policy, and general state aid policy.

¹⁶ F. Mancini, D. Keeling, "Democracy and the European Court of Justice", *The Modern Law Review*, Vol. 57, 2/ 1994., 175-190.

4. State aid policy in the EU practice

Competition is not an isolated phenomenon, but an interdisciplinary phenomenon that arises from the internal and external environment, and links business strategy, macroeconomic policy, legal and regulatory reform, education, motivation of management and workers, and many other economic, business and social factors to create a single strategic plan and competitiveness policies in order to create higher added value.¹⁷ State aid policy, as part of the competition policy in the European Union market, is often placed on the test of verification of its legitimacy and compliance with the legislative framework of the public law.

The Landesbanken example illustrates the case of state aid granted to German and Austrian banks to raise as many loans as possible on more favourable terms than their competitors. After the investigation, the Commission decided that in the present case it was an unfair state aid aimed at extorting competition from the loan market. On the other hand, the European Commission approved € 38 million assistance to an Italian Fiat carmaker to improve the knowledge of workers who were on the verge of failure, due to rationalization in production and the introduction of more modern processes.

Also, in 2003, the Commission approved state aid for 293 million euros for a joint research of companies (Motorola, Philips, STMicroelectronics) in the development of technology based on the production of integrator circuits of nanometer dimensions. The regional state aid policy lays down its legal basis in Article 107 of the Treaty, and it refers to state aid that promotes the development of economic regions with the low standard of living and high unemployment. The Dutch government approved regional state aid to SCI Systemes to build a factory for RS computers and accessories needed by Hewlett-Packard.

The Commission took the view that there were violations of the rules of local investment and competition, in case other investors did not receive tax relief. In May 2004, the European Commission ordered the Danish public service TV2 to repatriate the aid granted to it by the state in the money, as this support was used for antipropaganda against media competitors and frequency manipulation. When providing assistance that alleviates the living conditions of the region, there should be no imposition of conditions of exchange that could endanger effective competition in the European Union market. These two aspects of regional policy are trying to reconcile. One-quarter of the total state aid granted in the territory of the member states of the European Union is precisely the one that belongs to the regions.

¹⁷ J. Rosić, P. Veselinović, *Nacionalna ekonomija*, Ekonomski fakultet, Kragujevac 2008., 39.

In the case of a favourable fiscal agreement between Ireland and Apple, the European Commission concluded that Apple had obtained unlawful tax benefits from Ireland in the form of beneficial tax arrangements. Such facilities are available on a selective basis for this company over a period. The particular treatment has led Apple to pay income tax at an effective tax rate of 1 percent on the European profit for 2003, to reach a marginal 0.005 percent in 2014.¹⁸ According to the Commission's view, the two companies belonging to the Apple Group (Apple Sales International and Apple Operations Europe) have directed their profits internally to the fictitious "head office". The minimum part of the profits earned by these two companies was taxed in Ireland, while the remaining large portion was allocated to those above "central", where it avoided taxing.¹⁹

State aid policy contains the four principles underlying its implementation by the Competition Directorate and was determined in 1971 in the Regional Aid Resolution. The first law represents a balanced regional aid policy in line with the needs and development of the region, compared to the best among them. This illustrates assistance to areas facing a decline in industrial development and their convergence with leading development centres in the territory of a Member State so that residents have equal conditions for living and working. To this end, regional maps are created to help distribute the aid properly. The second principle is recognized through the transparency of local support, the third through the possibility of quantifying it, and the fourth through the specificity of assistance for each region in particular.

Over time, there has been systematic and continuous work on improving the legal framework for specific sectors such as financial services, energy, telecommunications, the pharmaceutical industry²⁰, the market of "smart" phones²¹, transport. The economic and financial crisis has led to an increase in the participation of the state in the market life of business entities. For example, state aid in the banking sector amounted to 1.6 trillion euros, or 13% of the EU's GDP, from 2008 to 2012. The contribution of this type of competition policy is essential for the survival of the common market's integrity. Member States have created a sustainable strategy of state aid policy by 2020, in the form of a permanent program with a focus on defined goals.

¹⁸ Ireland has provided unlawful tax relief to Apple, worth as much as 13 billion euros; European Commission, State Aid, Press Release, Brussels August 30, 2016.

¹⁹ Apple made arrangements with Ireland to pay a tax of around 500 euros for every million euros of profit.

²⁰ The Commission's fight in the field of copyright protection, in particular for the protection of generic companies engaged in the production of antidepressants and drugs for cardiovascular diseases.

²¹ The so-called Patent War between Motorola and Samsung.

The general government policy category contains all those aid schemes or aid schemes that can not be classified as a sectoral or regional one. The Commission and the Competition Directorate are authors of various legal acts, including the Legal Framework of the State Union for R&D, 1985. The State Aid for Growth, Employment and Competitiveness Act was adopted in 1993, when this policy became a horizontal state aid policy, with a primary emphasis on small and medium-sized enterprises.

An essential aspect of the relationship between the government and industry at the national level is the regulation of the state-owned sector: electricity generation and distribution, gas distribution, water supply, transport, postal services, and telecommunications. In time, the Commission wished to enforce competition rules in the area of so-called natural monopolies. The task of the Commission was to subtract the state's exclusive control over these areas. The importance of introducing competition in this area is excellent. It is obvious here that it provides the necessary support to the technological development of these areas, with all social and financial sorts, such as new jobs and a reduction in the cost of citizens.

Under Article 106 of the Treaty, regardless of whether they are public, public sector enterprises must not in any way interfere with competition in the area in which they operate. This article is widely interpreted by the concept of enterprise and state. In addition to public companies, there are companies engaged in activities of general interest, firms with exclusive rights and fiscal monopolies. It should be noted that the rights under Article 106 of the Treaty cannot be granted unless they are under Articles 101 and 102.

Accordingly, the Court of Justice of the European Union explicitly prohibits the granting of this type of rights in the field of telecommunications and television frequencies, in which way the abuse of a dominant position by state television occurs. For a company to have the opportunity to perform activities of general interest, the Commission has defined three criteria. These criteria require a cumulative fulfilment of the following elements: continuous satisfaction of the needs of the broadest range of users, products and services, equal conditions for all, and provision of services at cost price without significant profit.

The Court of Justice of the European Union has taken the view that the production, transport, and distribution of electricity at a single price for all consumers by the same criteria is a specific area and that the application of exclusionary competition rules would disrupt the desirable market situation. According to the provisions of Article 106, there are situations for which the Court has determined that they may be conditioned by the exclusion of competition, if such a state is necessary, and this case represents one of the foreseen exceptions to the general competition rules.

5. Instead of the conclusion

There are three guidelines for the proper coordination of industrial and competition policy: they must not be understood as an incompatible policy, but must be based on the principles of communal law, the new industrial policy must be entirely in the context of economic and monetary union, and industrial policy competences must be the result of a more extended phase integration of the European market, which implies alliance between the state and the market.²² A government-backed government takes precedence over its competitors.²³

The objective of the state aid policy in the Single Market of the European Union is to assist the Member States in the legal and economic regulation of this assistance by creating a budgetary framework. The correct policy of public expenditure with its transparency should contribute to the development of investment projects of European interest. Administrative constraints should be reduced in the implementation of the correct state aid policy with the characteristics of the non-aggravation of competition and exchange in the common market, and seek to prevent business entities from taking on the roles of the actors of misuse of this type of assistance.

Interesting forms of state aid in local aid, assistance in research, development, and innovation, aid for environmental protection and support in taking risk capital in today's economic enterprises are interesting. These forms have varying shapes, depending on the space, society and time in which they occur.

It is necessary to permanently strive for harmonization of the legal matter of the participating states of the Unified Common Market with the communal law in the relevant legal issues related to the implementation of the state aid policy in real life, by legitimate expectations and legislative frameworks, as universal regular principles.

²² W. Sauter, *Competition Law and Industrial policy in the EU*, Clarendon Press, Oxford 1997., 85-111.

²³ For more information see: http://ec.europa.eu/competition/state_aid/overview/index_en.html, last visited 18.01.2016.

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PRAVNI OKVIR DRŽAVNE POMOĆI NA TRŽIŠTU EVROPSKE UNIJE

Rezime

Politika državne pomoći predstavlja vrstu politike konkurencije Evropske unije, koja simbolizuje kočioni sistem strategija industrijskih sektora, koje vode ometanju konkurencije na Jedinstvenom tržištu Evropske unije. Određivanje uslova i postupak kontrole državne pomoći odvijaju se u cilju zaštite slobodne konkurencije na ovom specifičnom tržištu, primenom načela tržišne ekonomije i podsticanja privrednog razvoja. Potrebno je obezbediti transparentnost pri dodeli državne pomoći, kao i poštovanje odredbi komunitarnog prava koje se odnose na institut državne pomoći. Veoma je interesantna primena državne pomoći kod pojedinih oblasti, kao što su regionalna pomoć, pomoć za istraživanje, razvoj i inovacije, pomoć za očuvanje životne sredine i pomoć prilikom preuzimanja rizičnog kapitala. Od ključnog značaja je uskladiti privredni život Evropske unije sa legislativnim okvirom komunitarnog prava, što će predstavljati i predmet istraživanja prezentovan u ovom radu.

Ključne reči: pravo, politika državne pomoći, konkurencija, Evropska unija.