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CONSIDERATIONS ON THE ADMISSIBILITY OF STATE AID IN THE EU − INTERPRETATION PROBLEMS OF PUBLIC FUNDS TRANSFER

ROZWAŻANIA O DOPUSZCZALNOŚCI POMOCY PUBLICZNEJ W UE − PROBLEMY INTERPRETACYJNE TRANSFERU ŚRODKÓW PUBLICZNYCH

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Summary: The purpose of the article is to analyse the admissibility of granting state aid in the European Union from the perspective of meeting the Treaty condition for the use of public resources. The category "granted by a Member State or through state resources", involves two different tests, which have been only further developed and specified in the most recent case law. Unfortunately, the case law and legal commentaries have not always drawn a clear distinction between these two levels. Firstly, it is necessary to ascertain whether the measure is "imputable" to the Member State. The second part of the double test involves ascertaining whether the measure in question leads to a burden on the state budget. This criterion too derives from the language of Article 107 par. 1 of the Treaty on the Functioning of the European Union (TFEU) and the necessity of restricting the definition of the term "State aid". This division will be maintained to the extent in this paper.

Keywords: European Union, imputability, Member State, state aid, state resources.

Streszczenie: Celem artykułu jest analiza dopuszczalności udzielania pomocy publicznej w Unii Europejskiej z punktu widzenia spełnienia warunku traktatowego dotyczącego wykorzystania środków publicznych. Kategoria definicyjna pomocy przyznanej przez państwo członkowskie lub przy użyciu zasobów państwowych obejmuje dwa różne testy, które zostały dopiero dopracowane i określone w najnowszym orzecznictwie. Niestety, w orzecznictwie i komentarzach prawnych nie dokonano wyraźnego rozróżnienia między tymi dwoma poziomami. Po pierwsze, konieczne jest ustalenie, czy dany środek można „przypisać" państwu członkowskiemu. Druga część tego podwójnego testu polega na sprawdzeniu, czy dany środek prowadzi do obciążenia budżetu państwa. Również to kryterium wynika z brzmienia art. 107 ust. 1 Traktatu o funkcjonowaniu Unii Europejskiej (TFUE) i konieczności dopre-

cyzowania definicji pojęcia „pomoc publiczna". Podział ten zostanie utrzymany w zakresie przedstawionym w niniejszym artykule.

Słowa kluczowe: Unia Europejska, przypisywalność, Państwo Członkowskie, pomoc publiczna, środki publiczne.

1. Introduction

In accordance with Article 107 par. 1 of the Treaty on the Functioning of the European Union (TFEU, 2016), any aid granted by a Member State or through any state resources in any form may be considered incompatible with the internal market. This premise clearly shows that state aid within the meaning of the Treaty provisions is not financial support for enterprises from private sources, such as bank credits or loans from financial institutions. Such private aid to enterprises is not covered by EU subsidy law (Nicolaides, 2019b, pp. 121-137). Prohibition of providing aid within the meaning of art. 107 par. 1 TFEU concerns aid resulting in the transfer of state resources to an enterprise (Nicolaides, 2019a, pp. 15-28; Podsiadło, 2016, pp. 72-90). However, the wording in the relevant provision implies the question of whether to assume that a certain measure constitutes state aid within the meaning of art. 107 par. 1 TFEU, is it necessary to meet both the criterion for the granting of aid by a Member State and the criterion for the use of state resources, or, on the contrary, is it enough to meet only one of the two criteria? According to the literal interpretation of this provision, based on the functor of inseparable alternative "or", the case law of EU courts initially considered an alternative approach (Judgment of the Court of 22 March 1977…, para 22; Judgment of the Court of 29 February 1996…, paras 18-20; Judgment of the Court of First Instance of 18 January 2005…, para 77). Then, the development of case law can be seen in the direction of "from an alternative to a cumulative approach" (Ebner and Gabaro, 2007, p. 20). Currently, the cumulative approach dominates, according to which a given aid measure may be classified as state aid within the meaning of art. 107 par. 1 TFEU, it must, first, be allocated directly or indirectly from state resources and, secondly, be assigned to a Member State (Carullo, 2013, pp. 453-463). Therefore, neither national support which is not related to a direct or indirect transfer of state resources (burden on state resources) nor any aid measure which cannot be attributed to a Member State will be considered as state aid.

The purpose of the article is to analyse the admissibility of granting state aid in the European Union from the perspective of meeting the Treaty condition for the use of public resources.

2. The criterion of state resources

As regards the criterion of state resources, it should be stated that these resources will constitute the funds and assets of central government institutions. The same applies to the funds or assets of regional and local authorities. The scope of the concept of "state resources" is determined by the case law of EU courts. In the *Preussen Elektra* case, which concerned German provisions on the promotion of renewable energy obliging public and private enterprises involved in the energy supply to buy energy from renewable sources at a high minimum price, the Court found no state aid within the meaning of art. 107 par. 1 TFEU due to the failure to fulfil the condition of the direct or indirect transfer of state resources, despite the fact that the aid was granted by the state (Judgment of the Court of 13 March 2001…, paras 59 and 61). The Court emphasized that in order for a measure to qualify as state aid, it must confer an advantage on the enterprise granted by the state and include a direct or indirect transfer of state resources. In the case described, the Court found that the obligation imposed on private enterprises to purchase renewable energy at fixed minimum prices that were higher than the market value of this type of energy did not involve any direct or indirect transfer of state resources to enterprises producing this type of energy. Therefore, the distribution of the burden arising from the fixing of minimum prices between different private enterprises cannot be regarded as a direct or indirect transfer of state resources.

State resources are a concept that is understood in an economic, broad and narrow sense (Clayton and Segura Catalan, 2015, pp. 260-270). The economic significance refers to the transfer of resources that occurs as a result of the intervention of a public institution. These resources may or may not come from a public or state-controlled budget – interference by a public institution that redistributes resources is important. Broadly speaking, aid granted from state resources is any advantage granted through state interference, including regulation, which fulfils this condition regardless of the transfer of state resources (Judgment of the Court of 30 January 1985…, paras 14-18).

The Court ruling in the *Preussen Elektra v Schleswag* case adopted a narrow understanding of state resources, according to which state resources are resources belonging to the state budget and budgets of local government units or to the budget of any public enterprise or private institution created or controlled by the state (Koenig and Kühling, 2002, pp. 7-18). The narrow understanding of state resources is based on the concept of control that the state exercises over these resources. State resources are resources under state control. Similarly, in the *Stardust Marine* ruling, the concept of state resources was further clarified by requiring such resources to remain under public control at all times and to be available to competent public authorities (Judgment of the Court of 16 May 2002…). The subject of the assessment was aid in the form of loans, sureties and capital contributions granted by the SBT company from the Credit Lyonnais group to Stardust Marine enterprise, which operated in the charter and yacht management. The funds of public enterprises, which

included Credit Lyonnais and its daughter company, were subject to state control and remained at its disposal, which meant that it was financing from state resources. Furthermore, the Court emphasized in this case that the mere fact of establishing an enterprise in the form of a private law company does not mean that the measure adopted by that enterprise cannot be imputable to the State.

However, another issue is the public entity disposal of private funds. This situation was clarified in the ruling of the Court in the *Pearle* case, which concerned the imposition by a professional corporation of public law (i.e. the Central Industrial Council for Qualified Traders) of contributions to enterprises operating in the field of optical services to finance the advertising campaigns of these enterprises (Judgment of the Court of 15 July 2004…). In that ruling, the Court emphasized the requirement that the state could be assigned a transfer of resources. The subject matter of the case was to decide whether the financing an advertising campaign by a professional corporation for the optical sector constituted state aid where the benefits were not directly granted by the state but through a private entity that the state had designated to perform a specific role. The Court considered that an important element in assigning given actions to the state is to prove that the action taken by the private entity was part of a policy defined by public authorities. In this case it was not, as the public authority (professional corporation) was only responsible for collecting contributions intended for the organization of the advertising campaign, and the funds arising from these fees were not made available to other public institutions. The situation would be different if the funds for the advertising campaign were transferred by a fund which was established on the basis of a state decision and provisioned from compulsory contributions of a tax or parafiscal nature.

State aid can therefore be provided through funds belonging to both private and public enterprises (Langenfeld and Alexander, 2013, pp. 362-370). As the Court explained in the *Steinike und Weinlig v Commission* case applying the provisions of art. 107 par. 1 of the Treaty, the impact of aid should be taken into account, not the status of the institution entrusted with the task of distributing and managing public aid (Judgment of the Court of 22 March 1977…). Therefore, no distinction should be made between cases in which aid is granted directly by the state and cases in which the aid is granted via a public or private entity which has been designated or created by the state (Judgment of the Court of 16 May 2000…, para 50; Judgment of the Court of 8 May 2003…, para 33; Judgment of the Court of 29 April 2004…, para 52). The status of a particular entity is not considered to be decisive for the application of the Treaty rules on State aid (Judgment of the Court of 16 May 2002…, para 129; Judgment of the Court of 15 July 2004…, para 95). The mere fact that it is a public entity does not automatically entail the application of art. 107 par. 1 TFEU, just as it is not excluded by the fact that the actions were taken by a private entity (Judgment of the Court of First Instance of 20 September 2007…, para 139).

2.1. Are EU funds state resources?

In view of the above, it should be stated that the decisive factor in determining the origin of state aid is not the origin of the funds, but the existence of direct or indirect state control over them (Judgment of the Court of 14 October 1987…, para 17; Judgment of the Court of First Instance of 12 December 1996…, paras 56 and 60; Judgment of the Court of First Instance of 6 March 2002…, para 57). The question therefore arises whether, in the case of aid from EU sources, there is a condition for the transfer of funds from state resources? Within the meaning of art. 107 par. 1 of the Treaty, are the resources of the European Union state resources? The explanation of this issue can be found in the ruling of the Court of Justice in the *Norddeutsches Vieh- und Fleischkontor* case stating that the incorrect allocation of a Community tariff quota did not constitute public aid, since the term "state resources" derives from the assumption that the resources from which the aid is granted come from the Member State and not from the "Community" (Judgment of the Court of 13 October 1982…., para 22). On the other hand, however, when "Community" measures come under the control of a Member State, as in the case of the European Structural Funds, they are treated as state resources (Nicolaides, 2005, pp. 133-140). Two conclusions can therefore be drawn based on the case law.

Firstly, funds from European Union sources that are administered by the Member States should be assessed not from the point of view of the provisions relating to state aid, but from the point of view of the EU provisions that refer directly to these measures and establish the appropriate legal interpretation for them. This conclusion is derived from the fact that it is possible to identify specific instruments and funds of the European Union, over which the Member States have no influence, and the only body responsible for their implementation is the European Commission. This is the case, for example, with the Horizon 2020 program, Member States do not have any power to influence the selection and financing of implemented projects, their competences are determined by general obligations to conduct administrative procedures. These funds do not come from the state and from state funds, but from the European Union and EU sources and are granted on the basis of EU law, and not on the basis of the national law of the Member State concerned. State aid rules should only be included if EU funding is complemented by national funding, which may lead to an unjustified distortion of competition or the functioning of the internal market.

Secondly, in a situation where a Member State has at least partial control over the allocation of funds from EU sources, if a Member State has an impact on the way these funds are spent, EU sources should be seen as State resources (Nicolaides, 2018, pp. 2-18). Therefore, compliance of the actions financed by the Structural Funds with the conditions for the admissibility of public aid is ensured by including provisions on state aid in the procedure of the approval and implementation of programs financed by EU funds. An explicit obligation that operations subject to financing from the European Union funds comply with EU regulations on state aid is imposed by Regulation of

the European Parliament and of the Council (EU) No 1303/2013 (Nicolaides, 2013, pp. 41-45). In addition, in the case of investments directed to enterprises, the rates of the financial contribution of structural funds are adjusted to the ceilings regarding the amount of state aid specified in the conditions of admissibility of aid. This means that art. 107 par. 1 TFEU applies to activities co-financed by the European Union structural funds, since the allocation of measures from such funds depends on the discretion of the Member State. Exclusion from the Treaty rules on state aid can only take place if certain resources do not constitute state resources. This applies if the aid is financed from the resources of the European Union or the resources of international financial institutions (e.g. the European Bank for Reconstruction and Development) and the Member State is not able to directly or indirectly control these measures.

3. Criterion for assigning an aid measure to a Member State

The second criterion, which should be considered inseparably from the criterion of state resources, is the allocation of the aid measure to the Member State. That support granted from resources that are considered "state resources" could qualify as state aid within the meaning of art. 107 par. 1 TFEU, it must be imputable to the state itself (Judgment of the Court of 20 November 2003…, para 24; Judgment of the Court of 22 June 2006…, para 127; Judgment of the Court of First Instance of 5 April 2006…, para 101; Judgment of the Court of First Instance of 10 April 2008…, para 64). This criterion is met when the granting of public aid depends on the decision of the Member State authorities (Ghazarian, 2015, pp. 171-177).

A distinction should be made between the situation in which aid is provided directly by state authorities and the situation in which aid is provided by an intermediate body (Struckmann, Forwood, and Kadri, 2016, pp. 258-269). A specific aid measure is granted directly by state authorities when certain authorities are directly involved in providing the aid, which is especially the case when they take decisions whose purpose or effect is the granting of the aid. According to the Court of Justice of the European Union, within the meaning of the Treaty provisions governing public aid, the state is a concept that covers central, regional and local administrations, regardless of their status and degree of independence (Iliopoulos, 2018, pp. 19-27). In the second case, aid may be provided, for example, by public enterprises or non-state agencies. In the *Compagnie nationale Air France* case, the court pointed out that involvement in the decision to grant aid to a public sector entity is necessarily attributable to the state, even if it is an entity that retains autonomy from the legislative or executive authorities (Judgment of the Court of First Instance of 12 December 1996…, paras 56-62).

Distinguishing the situation in which aid is provided by entities belonging to the public sector or entities that retain autonomy from legislative or executive authorities is functionally justified as EU competition law cannot allow the creation of autonomous institutions dealing with the allocation of state aid. It is not enough that the state exercises general control over the entity directly providing aid and that

it has the potential to decide on the directions of activities undertaken by such entity. The point is that the state should be directly involved in granting the given aid to the beneficiary and that it should pressure the entity granting the aid or otherwise interfere in the process discussed here (Pérez Rodríguez, 2016, pp. 207-227). In turn, whether in a particular case this kind of state interference actually took place should then be scrupulously examined and verified. Therefore, if a given specific aid is provided by an entity controlled by the state or by a local government unit (and thus falling within the notion of "state" for the purposes of art. 107 par. 1TFEU and whose resources and financial means are therefore considered as "state resources") or if such aid is provided by a private entity doing so based on "state resources", and these entities operate in a particular case in an individual and autonomous manner, without any involvement and influence of the state (local government units) on a given specific act of granting aid, such an aid- as not imputable to the State − cannot be considered granted by the "State or through state resources" within the meaning of art. 107 par. 1 TFEU.

4. Conclusions

The scope of application of Article 107 par. 1 of the Treaty depends on the interpretation of the concept of state aid in terms of EU competition law, in particular in the context of the obligation to notify it to the Commission, which is laid down in Article 108 par. 3 TFEU. When analysing the structure of the treaty provision, it should be stated that the concept of State aid consists of four elements. These are cumulative conditions, which means that failure to meet at least one of them causes the lack of grounds for recognizing a given state intervention as public aid. State aid must: be granted by the state and from state sources, favour certain enterprises or production branches, bring economic benefits to the enterprise in any form, and exert real or potential influence on competition and trade between Member States of the European Union. The indicated conditions are not defined in both the Treaty and the provisions of the secondary law on state aid, however they were all the subject of many interpretations that were made in the application of Article 107 and Article 106 par. 2 TFEU by the European Commission and the courts of the European Union.

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