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List of abbreviations

“CJEU” – Court of Justice of the European Union

“ECJ” – European Court of Justice

“EEAG” - Environmental and Energy Aid Guidelines

“GATT” – The General Agreement on Tariffs and Trade

“GC” – General Court

“RES” – Renewable Energy System

“SAS” – State Aid Scoreboard

“SGEI” – Service of General Economic Interest

“TFEU” – Treaty on the Functioning of European Union

1. INTRODUCTION.

The development of State aid policy is generally associated specifically with the European Union, however, the actual history of regulation of State subsidies goes back a long before the EU was established. One of the earliest examples of the attempts to regulate State aid is presumed to take place in the 15th century during the voyages of Christopher Columbus, which were financially supported by Spain with the hope to discover a sea route to Asian continent that would increase the flow of goods to Europe.¹

The fundamental systems of legal thought devoted to the effects of State aid on trade relations between States began to develop by the 1700s and in the 19th century the clear concept of ‘subsidising State’ emerged as a result of World Wars and series of global financial crises, the times when State subsidies and trade protectionism became an integral part of national economic policies². The first proposal for international regulation of subsidies that directly or indirectly effect imports and the attempt to impose a ‘standstill’ obligation failed: they were enshrined in the Havana Charter, which was not ratified in the end. Only the 1947 GATT Agreement adopted later provided that any subsidy that distorts trade requires notification on the nature, impact and rationality of it.

It is the Treaty of Paris that established the system of State aid control in the European Union State aid in 1951, which for the first time included provisions prohibiting subsidies and aids granted by States on the common market. The new rules for State aid were applied for the first time in the field of intra-Community trade and were aimed to prohibit granting subsidies for export of goods within the EU.³

1.1 Effects of State Aid on the economy of Member States.

In accordance with the foundations of economic theory and with the constituent Treaties of the EU since 1951, State aid, if granted without any restrictions, is more likely to cause harm rather than promote to economic prosperity and general welfare. The potential negative effects of State aid are the following:

- Distortion of competition by giving privileges to undertakings on a selective basis and placing them in more favorable position on the market;
- Development of deceptive State aid culture when businesses expect to receive State support every time they face financial difficulties;

¹ Stuart E Roginska-Green I, Sixty Years of EU State Aid Law and Policy: Analysis and Assessment (2018) 91-92

² *ibid*

³ Thomas Kenneth P., "The development of the State aid regime" (1997) 2-3 <http://aei.pitt.edu/2742/1/002541_1.pdf> accessed 20 March 2019

- Breaking the balance between the mechanisms of market supply and demand.⁴

At the same time, the positive effects of State aid should not be deprived of attention. State aid serves as a tool of development and improvement of the industrial sector within the European Union in the regions with low economic indicators in order to attract foreign investments, create working places and contribute to further prosperity of the area in general. State aid constitutes a great value in the field of innovation, research and development. As this field requires constant large-scale funding, EU members participate in carrying such expenditures through granting aid to corporations acting in digital, scientific, technological spheres developing new services or goods or improving existing ones. Universities, in certain cases, are entitled to receive State aid, except as funding university's core activities, such as teaching and non-commercial research.

The question on whether the State aid constituting an advantage for an undertaking to which it is granted can be regarded as an actual benefit within Article 107 (1) TFEU is ambiguous.⁵ The opinions on the advantages and overall benefits of State aid vary dramatically and really depend on the area and scope of its evaluation in every specified case. For example, there is an interesting analytical assessment carried out for the period 1992-2011 of the effects of State aid on the sustainable overall economic growth of the European Union. In accordance with this assessment report, the State aid showed no direct effectiveness neither in fostering the general economic development nor in serving as a tool for attracting investments.⁶

Current European legislation, in general, does not allow Member States to grant any aid through State resources in any form as it such support is presumed as distorting or threatening to distort competition by strengthening the position of certain undertakings and giving them unjustified privilege over competitors. It also impacts trade between Member States and, therefore, may be inconsistent with the internal market. Any type of State aid is prohibited, except when it can be justified mainly by considerations of common economic interest for all Member States or for being an indispensable contribution to general economic development for a State or Union. There is a formed view that State aid is mainly associated with harmful effects rather than advantages and the legislation of the EU has always stressed that all aid measures shall by default be considered as incompatible with the common market, providing, however, a wide margin for exceptions to this rule.

⁴ Stuart E Roginska-Green I, *Sixty Years of EU State Aid Law and Policy: Analysis and Assessment* (2018) 3

⁵ Bacon K, *European Community Law* (Oxford University Press, 2009) 14

⁶ Tunali, Ç B Fidrmuc, J , *State Aid Policy in the European Union. Gender, Work And Organization* (2015) 53, 1143–1162

1.2 Aim of State aid policy of the EU.

The purpose for State aid lies in its definition. It can be defined the use by the State of its funds, resources or other means to support private undertakings in selected sectors or regions with the aim of promoting economic development of such. Not only business entities can be subject to State aid, but also publicly funded institutions, such as universities and colleges.

The leading aim of State aid policy is to promote and encourage fair competition on the EU market by preventing Member States from subsidizing enterprises in any biased way. The procedures of implementation and enforcement of State aid policy in the Union have significantly developed since the Treaty of Paris was adopted and now present a complex holistic system.

The aim of this Master thesis is to create a clear analysis of the procedure of how the rules on State aid regime of the EU are practically applied and to provide an extensive evaluation of the role of national courts of Member States, the European Commission and the Court of Justice of the European Union at each stage of this process.

The subsidiary aim of the work is to provide an overview of the procedure of the implementation this specific policy and its particular qualities at different stages of implementation: at the EU-level, as well as at the national level of Member States. The thesis will be based not only on current legislation that shapes a framework for State aid policy of the EU, but also on the broad case study introducing the principles of realization of it in judicial practice and difficulties which occur in the process. In order to examine new developments in improving State aid enforcement in new sectors, the work will provide examination of the recent decisions of the Commission on proposals for aid and on the judgements of the European Court of Justice in both landmark cases and the latest controversial cases in which questions on the interpretation of European legislation in the field have been raised.

The main questions of this research are:

1. Why such matter as State aid requires comprehensive regulation both at national and the Union level?
2. How the State aid policy is implemented and enforced in the EU?
3. Which roles and competencies do the national courts of Member States, the European Commission and the Court of Justice of the European Union have in the enforcement of State aid policy? Which procedural complexities this process has?

2. LEGAL FRAMEWORK AND IMPLEMENTATION OF EUROPEAN STATE AID POLICY.

2.1 Definition of State Aid under TFEU.

Neither TFEU nor the relevant Commission's regulations provide a uniform definition of the term 'State aid'. The main features of a measure that can characterize it as State aid can be derived from Article 107 (1) TFEU: it should be granted by Member State, it gives privilege to certain undertakings and has effect of distortion of competition.

National courts and the Commission developed jointly in their practice a 'State aid test' on the basis of the criteria laid down in the paragraph above to be applied to define whether a certain measure corresponds to the term of 'State aid'. This test is applied both by national authorities of Member States when evaluating if their financial contributions for supporting undertakings in specific fields or sectors have to be notified to and approved by the Commission, and by the Commission when, before proceeding to assessment, it has to initially define that a measure notified to it is State aid and falls under its competence as provided in Article 108 TFEU. The Commission starts assessment procedure if a measure notified to it meets all four criteria of the test. Before proceeding with 'State aid test' itself, the Commission should make sure that the measure proposed is actually a State aid to which the test can only be applied. To this end it firstly carries out the two-step assessment on general State Aid relevancy of the proposed project.⁷

1. The main issue to begin with is to determine whether a measure has economic character. Under Article 107 (1) TFEU only undertakings can receive State aid. So the first step is to establish that the entity intended to receive potential aid is an undertaking. CJEU in its case law provided a definition of an undertaking, which is every entity carrying out economic activity, regardless of the means of its funding and of its legal status⁸.
2. When it is established that it is an undertaking acting as a recipient of funds and, consequently, that its activity is of economic nature, the Commission takes next step: it needs to determine if a particular State support involves State aid or shall be otherwise classified.

⁷ The Interreg Baltic Sea Region Programme 2014-2020 Factsheet 4: Guidance on State aid definition p.2. < [https://www.interreg-baltic.eu/fileadmin/user_upload/For_projects/State_aid/State_aid_factsheet_4 - Guidance on State aid definition FINAL.pdf](https://www.interreg-baltic.eu/fileadmin/user_upload/For_projects/State_aid/State_aid_factsheet_4_-_Guidance_on_State_aid_definition_FINAL.pdf) > accessed 10 January 2019

⁸ Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECLI:EU:C:1991:161, para 21

Only after the Commission proceeds to the next stage, which is the ‘State aid test’ itself. The official web-site of European Commission displays the definition of State aid as a privilege granted on behalf of Member States by official authorities in any form to undertakings on a selective basis.⁹ Basically, the stages of the text resemble the logical check of the characteristics provided above in the definition above.

When it is established that an undertaking carrying out economic activity receives support involving State Aid, a measure representing this such support is subject to further assessment under ‘State aid test’. The Commission begins to consider a measure as State aid when the following criteria are met:

1. A measure must be initiated by State, granted by official institutions representing State and financed through State resources as set in Article 107 (1).
2. A measure must be selective, meaning the one intended only for a certain beneficiary and should have effect of distortion of competition.

If to examine the definition of State aid even deeper, it is important to State that even the mentioned criteria do not limit this term as all industries and economies are constantly developing. This process leads to the creation of more and more instruments to facilitate the activity of various undertakings in new sectors.

Article 107 TFEU indirectly embraces a wide scope of measures that may be regarded as State aid by providing opportunity to refer to exceptions in paragraphs 2 and 3; this makes a concept of State aid much broader than its legal definition meaning that the variety of financial benefits comprised by these exceptions is, actually, very wide. Measures, through which public authorities of Member States can guarantee lawful aid to undertakings can be classified into direct and indirect financial measures. Direct financial measures include, for example, different types of loans, contributions, injections and investments, interest rate subsidies, etc.¹⁰ Recently, in November 2018, the Commission adopted decision that granting support by Greece and Bulgaria for the project of construction and further operation of a cross-border gas interconnector in the amount of EUR 240 million of direct financial contribution to the respective joint venture established for the project is in line with the State aid policy of the European Union.¹¹

⁹ Official website of European Commission <http://ec.europa.eu/competition/State_aid/overview/index_en.html> accessed 14 January 2019

¹⁰ Bacon K, European community Law on State Aid (Oxford University Press, 2009) 27

¹¹ European Commission Press Release Database, *State aid: Commission approves public support for natural gas interconnector between Greece and Bulgaria* <http://europa.eu/rapid/press-release_IP-18-6342_en.htm> accessed 11 December 2018

Another type of State support is represented by indirect financial measures. These measures may include exemption from various fees, deferments of payments, exemption from obligations to pay forfeits and fines, waiver of public debts and compensation by State means of private arrears, ignoring continual non-payment of taxes, charges and other required payments.

It is a common practice for the Commission to find tax exemptions or reduction of tax rates as State aid measures. The examples of such taxation privileges are full exemption from taxation¹², general reduction of tax for undertaking, reduction of social security taxes paid for employees, postponement of tax payments etc.

Although, in most cases, State aid is provided by public authorities through financial contributions and assistance, it is not the only way for the State to grant its support. The provision of goods and services by the State to an undertaking on preferential conditions or at reduced price may also be regarded as State aid, as well as taking by a State of an obligation for public services payments. These measures may include for example the sale of State-owned land, economic advantages for undertakings in conclusion of supply agreements with public undertakings, preferential tariffs for State supply.

¹² Case C-284/12 Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH [2013] ECLI:EU:C:2013:755

2.2 Classification of measures constituting State aid and grounds for their implementation.

State aid policy of the European Union has been developing for decades and faced many modification to form the modern framework. Measures that represent State aid within the legal framework of the European Union can be classified in many ways on the basis of different criteria. The most comprehensive classification of them can be made on the basis of the area of sectoral implementation of such aid.

1. Regional State aid is one of the earliest and one of the most developed by now fields of European State aid. The State aid policy regarding regional aid was not from the beginning the same as it is now, having gone through major developments.

The process of establishment of current regional aid rules began in the seventies from the development by the Commission of the coordination principles which continue to be applied today. These principles include *inter alia*¹³:

1. The principle of transparency and regional uniqueness;
2. Uniform limits for the strength and concentration of State aid measures;
3. The considerations to sectoral consequences;
4. The preliminary assessment of State aid arrangements;
5. The preference for aid measures, aimed at multi-sectoral regional development.

Among the TEU and TFEU, the significant legal sources of regional State aid rules are the regional aid guidelines. The first Guidelines were issued by the Commission in 1998 initiating the first stage of regional State aid rules modernization.

In the same year, the European Council enabled the Commission to adopt the block exemption regulation alongside with the development of a new framework for providing aid measures to large-scale investment projects. The 1998 modernization process introduced the modification procedures, which would limit the scales for granting State aid to large investment projects in comparison with the highest aid ceiling for each specific region.

In 2006, the next phase of State aid rules modernization began with the adoption of the guidelines for regional aid 2007-2013. The primary aim of this modernization was to adjust State aid system in the view of new Eastern European countries becoming members of the EU. The

¹³ Merola M Donzelli S, 'The reform of regional aid: trends and challenges from a legal perspective' (2014) ERA Forum 15: 263 < <https://link-springer-com.uaccess.univie.ac.at/article/10.1007/s12027-014-0350-3> > accessed 05 December 2018

second Guidelines established the new global coverage ceiling for regional aid and specified the criteria for distribution of such aid to relevant areas. In addition, the 1998 rules on large-scale investment projects were reviewed: instead of the previous limits for regional aid to such large investment projects, the detailed assessment of the compatibility of aid by the Commission became the key ground in the determination of the scope of aid to be granted even in case with significant investments. Another important novation was the adoption of block exemption regulation. The regulation exempted safe and transparent regional aid schemes from an obligation to notify the Commission on proposed aid measures.

The crucial point in developing modern State aid policy, which is currently applied, was European economic crisis in 2009. Before the 2009 Crisis the Commission applied soft law approach regarding State aid, however, moved to more enhanced and structured policy after. Up until the crisis the Commission did not recognize State aid as an instrument for industry development. Only when the crisis hit European economy, the need to stimulate private undertakings increased as it the support of the recovery of the internal market became a matter of urgency. The purpose of "common European interest" became especially

To this end, in July 2014 the new guidelines, issued by the Commission for the period 2014-2020, entered into force. The guidelines provided for a new State aid modernization strategy. It is a significant document in the development of EU State aid policy as it represents the first major step towards changing the approach to the intervention of governmental subsidies in European internal market.

The new 2014-2020 guidelines have several exceptions regarding the fields of application.¹⁴ Firstly, according to Guidelines, regional aid to synthetic fibres and steel sectors is considered to be incompatible with the internal market. Secondly, the guidelines do not apply in the fisheries, agricultural, transport and energy sectors, as well as to the State aid granted to the airports.

2. Environmental and Energy Aid. State aid in energy sector is one of the most sensitive areas where State aid is applicable. Regional aid cannot be granted to develop energy sector in economically unstable regions. European Union Law does not forbid granting aid to energy, coal and steel enterprises, however, the restrictions of Articles 107 and 108 TFEU must be fulfilled. The main legal instruments that had become significant grounds for State aid in energy sector are the General Block Exemption Regulation and the Guidelines on State aid for energy and the

¹⁴ Guidelines on regional State aid for 2014-2020 [2013] paras 9-11

environment of 2014. In addition, Treaty establishing the European Atomic Energy Community must be taken into account in defining aid for energy infrastructure.

The fields of environment and energy, the same as regional aid, fell under the policy of European State aid modernization. For this objective, European Commission issued Environmental and Energy Aid Guidelines 2014 – 2020. Environmental and energy policies became extremely interrelated during the last decade, especially in promoting and developing renewable energy sources. Commission recognized as one of its fundamental objectives the reaching of resource and energy efficiency. Making and maintaining sustainable and effective energy systems, that includes substitution of outdated energy systems, integration of RES into common energy market, require significant financial contributions and facilities from Member States, including, for example, exemptions from environmental taxes.¹⁵ Enhancing environmental protection, countering climate change and reducing negative environmental impacts of the use of natural resources, including energy, are some the main targets of the EEAG.¹⁶ Within the scope of Article 107 (3) TFEU the Commission shall regard environmental and energy State aid as compatible with the internal market only if such aid will significantly contribute to achievement by the EU of its objectives in relevant areas providing, also, that these aid measures do not have direct negative effects on competition.¹⁷ The examples of this types of State aid are the following: aid for environmental studies, aid for RES, aid for waste management, aid for energy infrastructure, exemption from environmental taxes etc.¹⁸

3. Coal and steel State aid. In coal and steel sectors, until 2003, the Treaty establishing the European Coal and Steel Community prohibited granting any subsidies in any form as they are one of the most profitable ones in general. After, due to the needs of common interest in industry development, such aid became allowed, however, with appropriate limitations. State aid in coal sector may be classified into three following categories: for the speed-up of the closure of unprofitable coal mines¹⁹, for maintaining an access to coal reserves and for the overall reduction of activity in coal industry²⁰, for covering the exceptional costs which arise in the processes of closing coal mines and coal industry shortage, such as environmental and social

¹⁵ Environmental and Energy Aid Guidelines 2014 – 2020 Consultation paper [2013] p.2 < http://ec.europa.eu/competition/State_aid/legislation/environmental_aid_issues_paper_en.pdf > accessed 15 December 2016)

¹⁶ Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01) p.5 (c,d) < [https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52014XC0628\(01\)&from=EN](https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52014XC0628(01)&from=EN) > accessed 16 December.

¹⁷ *ibid* p.23

¹⁸ *ibid* p.18

¹⁹ Council Decision 2010/787/EU of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines [2010] < http://ec.europa.eu/competition/consultations/2009_coal/ecorys_study_final_report.pdf > accessed 10 December 2018

²⁰ K Bacon, *European Community Law* (Oxford University Press, 2009) 404

liability coverage²¹. Case study can easily demonstrate that the Commission strictly controls steel sector because granting State aid to steelmaking enterprises requires more detailed assessment than, for example, in cases with waste reduction, in which the objective of common interest can be distinguished easily. Thus, in December 2017 the Commission completed its investigation of granting by Italian Government two loans in total amount of €700 million to the largest Italian steelmaking company ILVA S.p.A to cover the needs for its financial activity.²² The Commission found these loans to be illegal aid as the rules on State aid provide only for supporting long-term competitiveness on undertaking but not for covering all financial debts of a steel company.²³

4. Research, development and innovation aid is one of the most demanded types of State aid nowadays in many European countries. Reaching strong, competitive research area through promoting and enhancing scientific industry and technology is determined as the objective of the EU.²⁴ Construction of research institutions, sponsoring research and development projects, funding of innovation clusters and activities are specific measures covered by European State aid rules and regarded as compatible with the common market by the Commission.²⁵

The following types of State aid are also common and recognized within the framework of European State aid policy:

5. Agricultural and fisheries aid

6. Transport aid

7. Media and communications aid

8. Risk capital aid

9. Employment aid

Every year European Commission issues annual State Aid Scoreboard – a general statistical internal Commission's report on the total expenditures on all existing types of State

²¹ ECORYS final report 'An Evaluation of the Needs for State Aid to the Coal Industry post 2010' (2008) < http://ec.europa.eu/competition/consultations/2009_coal/ecorys_study_final_report.pdf > accessed 16 December 2018

²² Official website of European Commission, Press release 'State aid: Commission concludes in-depth investigation on support to Italy's largest steelmaker ILVA S.p.A. in A.S. and orders recovery on two measures that involved illegal State aid' (2017) <http://europa.eu/rapid/press-release_IP-17-5401_en.htm> accessed 17 December 2018.

²³ *ibid*

²⁴ TFEU Article 179 (1)

²⁵ Communication from the Commission — Framework for State aid for research and development and innovation [2014] para 12 < <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> > accessed 17 December 2018

aid measures. SAS is drafted on the basis of annual expenditure estimates reports of Member States, excluding aid granted according to the *de minimis* regulation and most of aid of common European interest and for railway service.²⁶ The latest SAS was issued in 2017 and it clearly gives a light on the overall trends in State aid, on the effects of implementation of State Aid Modernization Policy, on the changes in rates in different Member State and the general dynamic in total EU expenditures on State aid in each sector for the period of eight years.

²⁶ European Commission's State Aid Scoreboard 2017: Results, trends and observations regarding EU28 State Aid expenditure reports for 2016 (Brussels, 29 November 2017) p.1 < http://ec.europa.eu/competition/State_aid/scoreboard/State_aid_scoreboard_%202017.pdf > accessed 17 December 2018

2.3 Is there a difference between State Aid and subsidy?

The Treaty establishing European Coal and Steel Community of 1951 already included the term of ‘aid’ but the term ‘subsidy’ was also used in the text of its provisions. Article 4 (c) of the ECSC Treaty, which is now substituted by Article 107 TFEU, also recognized ‘subsidies and aids granted by State’ as incompatible with the internal market for coal and steel at that stage of European integration.²⁷

The ECSC Treaty did not provide a direct definition for both terms. The initial usage of these terms in the same article can give a clear idea that subsidies and aid are different measures, although they are related by similar notion. In Article 107 TFEU the term ‘subsidy’ is not used anymore, leaving only the term of aid. It follows from this simple analysis of legal texts that the term ‘aid’ has a wider scope of application and comprises inter alia subsidies. In the light of Article 107(1) subsidies can be regarded as a form of aid that can potentially be granted by Member States.

The matter of the definition of the term ‘subsidy’ was referred to the ECJ in *Steenkolenmijnen* case in 1961. In its judgement the ECJ defined that in the ECSC Treaty the term ‘aid’ has broader notion than ‘subsidy’.²⁸ While aid is aimed at and granted for a particular objective, the achievement of which necessarily requires help from a State, subsidy, according to ECJ’s Statement, is mainly defined as a payment ‘made in cash or in kind’ different from the payment made by consumers or purchasers for certain goods or services and provided to support an undertaking. Therefore, the concept of aid is much wider than just a subsidy because State aid does not only include subsidies as direct payments to undertakings, but also comprises other measures that can minimize regular the charges included in the budget of undertakings, for example, tax reductions. Such measures are not payments and cannot be considered as subsidies but they have the same advantageous effect on the position of an undertaking as subsidies do.²⁹

In a nutshell, State aid comprises a wide range of measures to support undertakings through State powers and resources, including subsidies, but not limited to subsidies only.

²⁷ Treaty establishing the European Coal and Steel Community, ECSC Treaty, Article 4 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11951K:EN:PDF>> accessed 10 March 2019

²⁸ Stuart E Roginska-Green I, *Sixty Years of EU State Aid Law and Policy: Analysis and Assessment* (2018) 163

²⁹ Case 30-59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community* [1961] ECLI:EU:C:1961:2 19

2.4 Exceptions to the application of the rules on State Aid.

De minimis aid

TFEU does not provide clear definition of State aid and this can be even considered as a legislative advantage: the presence of a definition might have limited the scope of control over competition on European market. The Treaty only establishes the list of measures that may be regarded as consistent with the internal market leaving a wide discretion for interpretation of such measures depending on the case and circumstances. In addition, Article 108 (3) imposes obligation on all Member States to inform the Commission about any intention to grant State aid in any form, achieving in such way the overall control over the matter of aid and subsidies in the EU. However, total control over State aid did not prove to be efficient in every case. This made the Commission rethink the approach towards the definition of State aid, namely the scope of measures falling under strict control of the Commission, as well as the balance between the amounts of approved State aid and fair competition. Every year States submit notifications of their planned aid measures. It takes a lot of time for the Commission to assess these proposals especially when many cases require opening of formal investigation procedure. If the Commission evaluated even absolutely minimal aid, it would be overloaded and would not be able to adopt decisions within any reasonable time periods established by law. To this end, in 2006 the Commission adopted *de minimis* Regulation on aid in relatively small amounts. The Regulation exempted Member States from their standstill obligation. They could implement aid measure directly without having to wait for the Commission's positive decision under Article 108 (3) TFEU if such measure falls within *de minimis* aid: aid in the amount below the fixed limit granted to single undertaking over defined period of time.³⁰

Commission Regulation on *de minimis* aid of 2013, which substituted the previous regulation one, is currently in force. The main difference of the updated Regulation is, first of all, the higher ceiling established for the amount of *de minimis* State aid. During a three-year period a single undertaking is allowed to receive maximum EUR 200 000 State aid so that it can be regarded as *de minimis* aid.³¹ The Commission considered this sum to be 'safe' for maintenance of adequate competition and left the decisions for aid in small amounts at Members' discretion.

³⁰ 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 p.1 < http://ec.europa.eu/competition/State_aid/legislation/de_minimis_regulation_en.pdf > accessed 27 December 2018

³¹ Ibid p.3

There may be a new argument for the dispute on the notion of State aid as *de minimis* regulation can provide a different look at the definition of State aid from the new angle. This regulation excludes from the scope of standstill obligation all aid measures below EUR 200 000 limit. As mentioned above, State aid is mainly defined by its mandatory characteristics fixed in Article 107 TFEU. *De minimis* Regulation may basically add a new criteria for a measure to constitute State aid: such aid should constitute at least EUR 200 000 or, if it is not granted in a form of direct payment, be equivalent to this financial minimum. On the other hand, aid in the amount of less than EUR 200 000 still constitutes State aid, however, according to *de minimis* Regulation such aid cannot affect competition on the market and for this reason does not require notification. Is it possible that in future *de minimis* aid will be excluded from the scope of ‘State aid’ in legal theory? There may be a space for a dispute: State aid in relatively small amount does not threaten to distort competition on the modern European market but ‘distortion of competition’ is one of the essential conditions of the definition of State aid. At the current stage *de minimis* aid is still a State aid that does not require to be notified to and approved by the Commission under Article 108 (3) because it is granted in relatively small amounts.

The General Block Exemption Regulation

In June 2017 the new General Block Exemption Regulation³² was adopted by the European Commission. The GBER includes a wide range of aid measures singled out in a separate regulation for the important feature they all have in common: all those measures fulfill the objective of common European interest and are mainly aimed at promotion of public investments for infrastructure, such as for regional airports³³, ports³⁴, cultural heritage³⁵ that can enhance State’s welfare, create more working places and, at the same time, do not threaten to distort competition. These purposes serve as legitimate grounds for inclusion of respective measures into the list of exceptions under TFEU and, therefore, the GBER provides for a simplified procedure for granting State aid for the mentioned purposes to accelerate the process of their implementation. The Regulation exempts Member States from an obligation to preliminary notify the Commission of the intention to grant such State aid.³⁶

³² Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs [2017]

³³ *ibid* Article 56a

³⁴ *ibid* Article 56b

³⁵ *ibid* Article 53 (a)

³⁶ Official website of European Commission, European Commission Fact Sheet, State aid: Commission widens scope of the General Block Exemption Regulation – frequently asked questions <http://europa.eu/rapid/press-release_MEMO-17-1342_en.htm> accessed 13 March 2019

According to the official statistics of the Commission given in annual State Aid Scoreboard (2018), approximately 96% of all new aid measures presented since 2015 fell under the GBER and, in 2017, the part spent on aid measures under the GBER from overall State aid expenditures constituted 48%.³⁷

³⁷ State Aid Scoreboard 2018: Results, trends and observations regarding EU28 State Aid expenditure reports for 2017 (Brussels, 07 January 2019) 7

2.5 European Union rules on State Aid.

2.5.1 Main provisions of the TFEU on State aid.

Section 2, Articles 107-109 TFEU constitute the general framework for regulation of State aid in the European Union. These articles establish the framework of the State aid policy of the EU constituting primary legislation in the field. The secondary legislation on State aid developed *inter alia* by the Commission is only clarifying and complementing the provisions of the former.

Article 107 (1) TFEU generally prohibits any aid granted by Member State in any form that gives unequal advantage to its beneficiaries and distorts or threatens to distort competition on the European internal market.³⁸ It generally prohibits any aid granted through State resources or directly by Member States for the purposes other than those listed in the limited list of exceptions provided in paragraphs 2 and 3 of the Article in question. Although Article 107 is designed to establish almost overall control over State aid and leave limited discretion in this field for Member States, there are certain areas of the economy that require State funding and TFEU takes it into consideration by establishing exceptions for State aid which is compatible with internal market.

Article 107 (1) begins with a phrase ‘save as otherwise provided by the Treaty’ which makes this article subject to the earlier provisions of the TFEU that allow State aid in specific areas. These are the areas of the common agricultural policy as provided in Article 42 TFEU, common transport policy, common fisheries policy and State security and defense.³⁹ Article 107 (2) TFEU sets de jure exemptions to the general rule of Article 107 (1) and determines individual social aid, compensation for harm caused by natural disasters and emergencies and compensation for economic losses caused by the division of Germany as State aid compatible with the internal market of the EU. Other types of State aid must, firstly, correspond to the purposes listed in Article 107 (3) TFEU, including, but not limited to facilitation of economic growth in undeveloped regions, projects of common interest for the EU, purposes of culture and cultural heritage conservation and, secondly, can be implemented only after the Commission recognizes them as compatible with the internal market. Except as otherwise provided by the Treaty, there is the other possible derogation from Article 107 which is provided by Article 108 (2). In the event of occurrence of exceptional circumstances a Member State may apply to the Council of

³⁸ Consolidated version of the Treaty on the Functioning of the European Union [2008] Article 107 (1)

³⁹ Stuart E Roginska-Green I, Sixty Years of EU State Aid Law and Policy: Analysis and Assessment (2018) 22

Ministers of the EU for a decision to recognize the aid measures that such State is planning to grant compatible with the internal market regardless of the provisions of Article 107.

The provisions of Article 108 TFEU, in general, outline the procedures that must be applied by the Commission in the process of assessment of State aid measures and the actions of Member States to be taken in response to Commission's decisions at each stage. Article 108 (3) fixes the standstill obligation of Member States to notify the Commission of any plan or intention to grant State aid for it to have time to review the proposal for such aid. Paragraph 3 of Article 108 is essential because it provides *inter alia* that the aid measures proposed shall not be implemented until the Commission adopts a decision about their approval. This article is also called 'Council referral provision' and it provides the Council with the authority to restrict the powers of the Commission regarding State aid assessment where overriding extraordinary circumstances exist⁴⁰.

2.5.2 Derogations in Article 107 (1) TFEU.

If any State aid measure can be considered as such under Article 107 (1), it can be approved by the Commission under the condition that it corresponds to the list of allowed measures set forth in Article 107 (2,3). However, as we can understand from the TFEU, the list of all allowed aid measures is separated into two article sections in the Treaty and there is a legal explanation. There is a major difference in the application and general perception of them by the Commission. The core of inequality of the listed measures lies just in two collocations: 'shall be considered' in Article 107 (2) and 'may be considered' in Article 107 (3). In the former case, the set exemptions are mandatory; the Commission must approve it and has no grounds for prohibition of aid measures which the exemptions in questions provide for. In the latter case, the Commission has much wider scope of actions and, therefore, more influence.

Thus, the Commission raised no objections in 2018 to a regional sectoral investment made by the Government of Latvia for the development of waste recycling facilities and reuse of waste practice across the territory of the country⁴¹ and for the development of separate waste collection systems.⁴² The decision was based on the assessment of the contribution of the project to the attraction of investments, creation of working places and its positive impact on environment protection by reducing the levels of pollution. All listed effects would benefit not Latvia only, but the EU in general.

⁴⁰ *ibid* 15

⁴¹ Commission's decision SA.46525 (2016/N) – Latvia Aid for promoting waste recycling [2018]

⁴² Commission's decision SA.46228 Development of separate waste collection systems [2018]

Having looked through the types of State aid provided in Article 107 (3), it becomes easy to determine their unifying feature. The support of undeveloped regions, the execution of projects of general European interest, the conservation of culture and heritage etc.⁴³ have a common character: all constitute the common interest for the European Union but not only to the Member States.

The objective of common interest is a valuable factor for the Commission. It is often guided by this factor when deciding whether the provision of Article 107 (3) shall apply and, therefore, the derogation be made⁴⁴. The range of such potential objectives is very wide and it gives quite a lot of freedom for Member States to support various sectors and fields. However, such space for application of aid measures granted by Art. 107 (3) for States is a double-ended sword because, at the same time, the Commission is given a broad discretion to interpret the article in question. Not all initiatives of States that, at first sight, fall within the scope of Art. 107 (3) receive approval of the Commission. In 2017, Spain notified the Commission of its intention to support the promotion on the media of the Basque language, spoken in parts of northern Spain and southwestern France.⁴⁵ The initiative comprised collaboration with news agencies, newspapers to popularize the language and, subsequently, encourage bilateral society for higher level of well-being. The Commission did not recognize such measure as an aid, establishing a direct relationship between promoting Basque language and the development of new projects in this language that will produce profit for private individuals.

Article 107(3) specifically provides for regional State aid in sections ‘a’ and ‘c’. These sections provide that aid measures aimed at promotion of economic developments in regions with low standard of living or with generally complicated economic or social situation may be considered as compatible with the internal market, unless they destroy competition or negatively affect the market in any other way. The promotion and facilitation of certain economic areas may also serve as a ground for application Article 107 (3). In European State aid rules the latter areas were given the term ‘c’ areas in correspondence with the relevant section in the Treaty.

‘C’ areas are usually designated as such by Member States and can be divided into two categories⁴⁶:

1. Predefined ‘c’ areas: areas that fulfil defined pre-established conditions and may be designated as such By Member States without any justification;

⁴³ Consolidated version of the Treaty on the Functioning of the European Union [2008] Article 107 (3)

⁴⁴ K Bacon, *European Community Law* (Oxford University Press, 2009) 15

⁴⁵ Commission’s decision SA.47448 Promotion of the Basque language in digital news media [2017]

⁴⁶ Guidelines on regional State aid for 2014-2020 [2013] para 155

2. Non-predefined 'c' areas: areas that can be designated as such by Member States under the condition that a Member State concerned proves that these areas satisfy required socioeconomic criteria, such as the size of the territory, unemployment rate, GDP per capita, number of inhabitants.

As can be concluded from the chapter, there is quite a wide space for derogations TFEU in State aid, specifically from its general prohibition.

3. ENFORCEMENT OF STATE AID POLICY IN THE EUROPEAN UNION.

3.1 The role of the Commission in the enforcement of European Union rules on State Aid.

The European Commission plays a fundamental role in the implementation of EU rules on State Aid. It is one of the main legislative bodies in the system of State aid control. The Commission possesses an exclusive authority to recognize by its decision State aid measures to be either compatible or incompatible with the internal market. It means that any aid measure, except those that fall under legal exceptions already mentioned in Chapter 2, such as the GBER or *de minimis* Regulation, cannot be granted without the Commission's approval. The Commission is empowered to develop independently legislation in the field of State aid on the application of the rules on State aid fixed in the constituent acts of the EU. This power includes the adoption of soft law legislation based on the Commission's decisions, such as notices, guidelines, and frameworks. It is also authorized to submit to Union's institutions proposals for adoption of legislative acts, such as Regulations, which are binding and subject to direct application. The latter function is of an extreme significance in this specific field because the articles of the TFEU on State aid set only the general framework and cannot regulate complex aid measures which Member States introduce in constantly developing market conditions. The clarification and specification of the provisions of TFEU on State aid requires Commissions legislative initiative and the development of case law by the Court of Justice of the European Union.

The Commission exercises overall assessment of aid measures on the level of their compatibility with internal market and with the Treaty, correspondence to established competition rules and general effect on the market.

The criteria for such assessment are clearly specified in the Guidelines for regional State aid 2014-2020⁴⁷:

1. The main aim of the proposed aid measure should be the achievement of a common interest for the EU as laid down in Article 107 (3) TFEU;
2. The aid measure must be indispensable. It means that the achievement of an objective of common interest would be impossible without State intervention or that it is impossible to improve the local market by own resources in any way;
3. Appropriateness: the aid measure must be appropriate for the achievement of the objective of common European interest;

⁴⁷ Guidelines on regional State aid for 2014-2020 [2013] OJ C 209, 23.7.2013 para 26

4. Proportionality: it is crucial that the aid measure is limited to the minimum possible extent required for the certain objective in the target area or sector;
5. Transparency: it must be ensured that all the relevant information about an aid scheme can be easily accessed by the Commission, Member States and the public.
6. Positive overall balance of the aid measure must be preserved by the prevention or limitation of possible negative effects.

Although Article 107 gives the Commission quite a wide discretion, Commission applies a big range of sources of law for carrying out its assessments. The main reason for that is to avoid political pressure from member States. Political and economic situations, as well as other internal obstacles, are very different in Member States and, therefore, each Member State has its own view of whether a certain type of State Aid is lawful and beneficial for common welfare. Subsequently, if the powers of the Commission would have been unlimited, Member States would try to use their opportunity and exert pressure to lobby their State Aid measures. Having foreseen such possibility, the Commission limited its discretion by using not only primary legislation, but also secondary legislation and soft law.

3.1.1 Examination Procedure.

Standstill obligation provides that Member States must notify their intention to provide any new aid and any additional aid measures to existing State aid to the Commission for it to assess the compatibility of such aid. As soon as the Commission receives such notification, it has to confirm the receipt of it as quickly as possible.

The obligations and powers of the Commission are not determined only by treaties. A settled European case law serves as an additional source for detailed interpretation of the Commission's authority. It also often provides a deeper explanation of the required for the Commission scope of reasoning of its decisions. At the final stage of *Mediaset v Commission* case⁴⁸, where the Mediaset company made several complaints against the Commission's decision to presume aid, granted by several Member States to consumers for the hire or purchase of digital decoders to finish the process of digitisation of television signals throughout the European Union the ECJ Stated, that the Commission is not required to conduct any analysis of the situation on the markets of Member States.⁴⁹ In the assessment of compatibility of aid with internal market the Commission is not required to analyze the actual economic situation on the relevant markets, of the position of the parties concerned, of the market interest of the undertakings in the receipt of aid or in trade streams between Member States. However, as Stated in the case *Germany v the*

⁴⁸ Case C-403/10P *Mediaset SpA v Commission* [2011] ECLI:EU:C:2011:533

⁴⁹ *Ibid* para 26

*Commission*⁵⁰ the Commission still has an obligation to prove that the aid gives an ‘appreciable advantage’ to its recipients towards their competitors.⁵¹

In ordinary situation when the Member State duly performed its obligation to notify the Commission and the Commission confirms the receipt of a notification of the State’s intention to grant State aid, it proceeds to the preliminary evaluation. After the preliminary assessment of aid measure based on the initial analysis of all factual and legal matters is done, the Commission takes an opening decision and addressed it to the Member State. The latter may, within specified in the decision period, which is usually 1 month, submit its comments on the opening decision. If the Commission still has any doubts or concerns, it may opt for the next part of the examination procedure which is the formal investigation procedure. It is also called in-depth investigation procedure. In case of any doubts over lawfulness and compatibility of a measure, the Commission can initiate a formal investigation procedure based on the preliminary assessment finalized in the opening decision.⁵² If the Commission does not find the information provided by a Member State concerned relevant for taking decision, it may request extra information necessary for the investigation from a Member State concerned or any other Member State, undertaking etc. Basically, the Commission may request all the necessary market information from any Member State of any undertaking or their association but only from the parties concerned and only for the formal investigation procedure that proved to be ineffective before the request.⁵³

However, the powers of the Commission are not unlimited. In carrying out an appropriate investigation the Commission is limited in time: the time limit for a final decision must be reasonable. This ‘reasonability’ depends on the case individually, however, in the practice of ECJ there was a case, where the Commission failed to take decision on the incompatibility of aid measure within 26 weeks and the ECJ recognized aid to be legitimate because of this too long delay.⁵⁴

A recent Commission’s decision, issued on 10 August 2018, on Rostock Airport serves as a good example of the guidelines for the Commission to decide whether an aid is compatible with Article 107 TFEU. The case is the following: Germany notified the Commission of an aid to be granted to a regional passenger airport Rostock to secure its sustainable functioning and

⁵⁰ Case 248/84 Germany v the Commission [1987] ECR I-4013

⁵¹ *ibid* para 18

⁵² 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 [2015] OJ L 248 Article 8 (1)

⁵³ *Ibid* Article 7 paras 1-2

⁵⁴ Case 223/85 Rijn-Schelde-Verolme (RSV) Machinefabrieken en Scheepswerven NV v Commission of the European Communities [1987]

cover its operational losses.⁵⁵ German government considers the airport to be significant for the improvement of transport infrastructure of the region as there is no other airport within 1h from Rostock Airport offering regular flights. Furthermore, the aid to the airport is believed to contribute to the development of the region's tourism industry which already experiences a growth in the number of annual visitors. The Commission raised no objections to the measure in question on the basis of the following assessment: the aid to Rostock Airport contributes to the objective of common European interest by improving the connectivity of the regions and enhancing the mobility of EU citizens. A very important factor in this case was the absence of other airports in the area, so that this particular the aid does not in any way distort competition.

In 2018 the same two criteria served a basis for the Commission to make decisions in a number of other cases. For example, the permission for Croatia to grant aid for maritime companies ensuring regular maritime ferry connections on five routs between the mainland and the Croatian islands⁵⁶ ; State aid granted by Hungary to the project on improvement of the security and safety of Debreen Airport⁵⁷ etc.

However, case study proves that the purpose of the improvement of infrastructure and transport connection is not always sufficient for granting State aid. Thus, in 2010 the Commission launched an investigation on the lawfulness of €166 million loan granted by the Government of Slovakia to ZSSK Cargo Railway Company.⁵⁸ Although, Slovakia granted aid in order to ensure the continued operation of the enterprise necessary for effective interState connection, the Commission found that the measure gave the company unjustified advantage on the market. Another criteria, used by the Commission to assess the lawfulness of State aid in this case, was to determine whether it would be reasonable for a private investor to act in the same way as the Slovak Government.

3.1.3 Commission's tools in the assessment of compatibility of State Aid.

The private-investor test, mentioned in the paragraph above, was introduced in 1981⁵⁹ and is constantly used by the Commission in evaluation of the advisability of State Aid. This test served as a basis for the development of 'market economy investor principle' which was enshrined in Commission's bulletin of 1984.⁶⁰ The 'market economy investor principle' is similar

⁵⁵ Commission's decision SA.49709 Germany, Rostock Airport [2018] p. 5

⁵⁶ Commission's decision SA.48120 Croatia, SGEI – Compensation for scheduled costal maritime public transport on the route No 409: Preko – Ošljak – Zadar [2018]

⁵⁷ Commission's decision SA.46378 Modernisation of Debrecen International Airport [2017]

⁵⁸ Commission's decision C5/2010 Slovakia, Railway company Cargo Slovakia a.s. (ZSSK Cargo) [2018]

⁵⁹ Commission Decision 2320/81/ECSC [1981]OJ 1981 L 228

⁶⁰ Commission Communication Concerning the Application of Article [107] and [108] of the EEC Treaty to Public Authorities Holdings(Bulletin EC 9-1984) [1984]

to private-investor test in its essence. The idea of such test is to determine if a private investor would have acted in the same way as the Government in the matter of granting aid to a certain undertaking or sector. The logic behind this idea is, actually, the assessment of economic remuneration. Every subsidy or investment is aimed, first of all, at the maximization of profit. Therefore, it is logical that the State should apply the same criteria as the private investor: to achieve the objective of gaining profits. The Commission applies this test by creating a possible virtual situation in which State is put in the place of a private investor to see if the goal of gaining profit will be achieved.

The application of the private-investor test still has its nuances. In 2015 the General Court in its judgement in joined cases *France and Orange v Commission*⁶¹ Stated that the Commission must apply the private-investor test ('Market Economy Investor Principle' in the judgement) only regarding the moment at which the State aid is actually adopted. This test cannot be applied to any situations or facts that existed before the State aid was granted.⁶² In the case the Court did not agree with the application of such test to the Statement of the French Minister of the intention to grant aid to France Télécom, which he made during his interview earlier than France adopted decision on this aid. The conclusion from this case is that the 'private-investor test' can only be applied upon the fact of granting aid but not to an intention to grant State aid or other prior circumstances.

'Balancing test'

This test is another Commission's tool in taking decision on whether the State Aid is lawful or not.⁶³ The general 'balancing approach' was introduced for the first time in 2005 in the State Action Plan: a document adopted after the accession to the European Union of ten new Member States and constituting a major reform of European State aid control. The main aim of such approach is to ensure that State aid is targeted properly by identifying the relevant economic situations in certain areas, market failures, general public concerns, such as fair competition and equal access to market. Virtually, this balancing test consists of four definite steps⁶⁴:

1. Does a certain State aid corresponds to the objective of common European interest?
2. Does an aid measure has a stimulus effect on industry/sector?
3. Will the State aid result in a distortion of competition on the relevant market?

⁶¹ Joined cases T-425/04 RENV and T-444/04 RENV *France and Orange v Commission* [2015]

⁶² Official website of European Commission, Commission Staff Working Paper accompanying the Report on Competition Policy 2016 p.14 < http://ec.europa.eu/competition/publications/annual_report/2015/part2_en.pdf > accessed 15 March 2019

⁶³ Bacon K, *European Community Law* (Oxford University Press, 2009) 20

⁶⁴ Werner P Verouden V, *EU State Aid Control* (2016) 197

4. Evaluating all the positive and negative effects of the aid measure, is the overall balance remains positive?

In fact, this SAAP balancing test represents the Commission's economic approach in assessment of State aid measures. In contrast to the private-investor test, balancing test is applied to estimate the situation on market that will arise after granting State aid to an undertaking, not the expediency of granting State aid to an undertaking from private investor's point of view. In establishing whether the balancing test is positive, the Commission *inter alia* compares the potential market outcome with State aid and the same without such aid.

Although, 'balancing test is applied by the Commission in numerous cases, it is not an essential and obligatory part in assessment of every case. Generally, various types of State aid measures can frequently be referred to specific set of guidelines used by the Commission in the process of standard assessment. Only in cases where the aid is not subject to any of such guidelines, or in specific cases when the guidelines so provide, the balancing test shall apply.

Balancing test is the most comprehensive tool which is used in cases that require in-depth assessment under Article 107 (3). To be approved by the Commission, aid measure must pass all parts of the balancing test listed above. If the aid measure fails to satisfy any part of the test, it is declared by the Commission to be incompatible with internal market.

Altmark Trans criteria

Altmark Trans criteria is represented by a set of four different criteria used by the Commission in the process of assessment of State aid which was introduced in the decision of the ECJ in the eponymous case.⁶⁵ These criteria were established in the preliminary ruling of ECJ for the assessment the application of Article 107 TFEU in cases where State aid is aimed at provision of services of general economic interest. Altmark case was innovative in the field of State aid at some point. This case changed the perception of a service of general economic treatment in the field. Altmark Trans GmbH was a bus company to which the German Government had granted State aid. Its competitor filed a lawsuit claiming that such aid was incompatible with the common market and European law because, at the time when the company received a license, its financial operation was no longer possible without subsidies. Meaning, that Germany actually 'saved' the company with this subsidy.

⁶⁵ Case C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH [2003] ECR I-7747

The ECJ provided German court with very detailed legal opinion on this case giving various specifications. The substantive part of the relevant decision is a Statement given by ECJ that in carrying out an assessment on the compatibility of aid measure with the common market only the effects of this measure must be taken into consideration. It means that complicated financial or economic position of an undertaking on the market at the time of the receipt of State aid is not an incontestable ground for claims on the unlawfulness of such aid. In cases similar to Altmark Trans it is important to clarify, that performance by a State of its public obligations through funding relevant enterprises responsible for such services shall not in each case be regarded as ‘advantage’ within the sense of this term under Article 107 (1) TFEU. Altmark ruling for the first time raised the issue of the difference between subsidies and compensations when the case is about public services and SGEIs in general.

Altmark case represented innovative approach in application of State aid rules of the EU to the provision of services of general economic interest. ECJ embodied in its preliminary ruling on Altmark Trans four criteria to determine compensation for services of general economic interest, which should be strictly distinguished from unlawful State aid. These criteria are the following:⁶⁶

1. Undertaking receiving aid must actually exercise clearly defined public service obligations;
2. The grounds for potential aid as well as the principles of calculation of the amount of such aid must be determined in advance. This data must be transparent.
3. The amount of aid must be reasonable. It shouldn’t exceed the amount proved to be required for the performance of public service obligation.
4. In cases, when the public procurement procedure to choose a contractor, responsible for the provision of relevant public service, is not yet carried out, the amount of aid must be calculated on the basis of the analysis of the average market price for the same services exercised by typical undertakings competent in the field.

This judgement significantly contributed to State aid law enforcement. It excluded compensation for SGEIs from the scope of State aid and designed an extensive test for the Commission to determine if and when the governmental funding for SGEIs goes beyond the compensation and, therefore, must be considered a State aid and be in line with relevant State aid rules.

⁶⁶ Ibid para 95

3.1.3 Incompatible and unlawful State Aid: Commission's actions

In previous chapters of this thesis the procedure following Commission's decision of compatibility of State aid with the common market was described as laid down on the TFEU. It is quite clear: an aid measure approved by the positive decision of the Commission can be implemented directly after its adoption and granted to an undertaking as initially planned. Opposite decision stating incompatibility of State aid leads to different consequences. In cases that consider a new State aid, which was notified to the Commission, the decision on incompatibility will mean that aid in question cannot be provided. When it comes to already existing aid scheme, a Member State can be requested either to modify it or to abandon within fixed period of time. Otherwise, the Commission will stop the recognition such aid scheme as an existing one and may invoke Article 108(2) p.2 before ECJ as a new aid.

If the Commission decides that aid is granted by Member State unlawfully, it is required explain its views and reasoning arguments. The Commission should specify in its final decision what market competition is affected or is likely to be affected by such aid and in what way. However, the Commission is not required to evaluate in detail the actual effect of that aid measure on trade and competition. This was specified in the case *Le Levant 001 and others v Commission*.⁶⁷

If the Commission decides that a certain aid measure is unlawful, it shall oblige by its decision the Member State concerned to recover unlawful aid in full amount from an undertaking to which it was granted. In other words to take earlier granted State aid back. The negative consequences of such situation are not financial only because the reputation of the body that granted unlawful aid can be undermined. The Commission can exercise its powers to order the recovery of unlawful State aid during limited period of 10 years.⁶⁸ In the context of adopting decisions it is very important to understand the difference between unlawful aid and misused aid as the latter term is also used in Article 108 TFEU, however, the clear definition of the term is not provided. Unlawful aid is the aid that was granted with violation of a standstill obligation without Commission's positive decision. It is a Member State which granted unlawful aid to be responsible for the legal consequences and for the enforcement of the Commission's recovery decision. 'Misused aid' is a State aid that was approved by the Commission, however, was used by the beneficiary in violation of the conditions under which the decision was adopted.⁶⁹

⁶⁷ Case T-34/02 *Le Levant 001 and Others v Commission of the European Communities* [2006] ECLI:EU:T:2006:59

⁶⁸ 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 [2015] OJ L 248, 24.9.2015 art. 16-17

⁶⁹ Säcker F J Montag F, *European State aid law: a commentary* (2016) 1566

In addition, in cases of unlawful aid the Commission has a duty to ensure the restoration of the legal situation that preceded granting of such aid. This obligation is performed by the Commission via issuing a special order for a Member State providing for recovery of aid and interest for the period since that aid was granted to an undertaking. If a Member State fails to comply with the order, the Commission can use it as a ground for initiation of infringement procedure before the ECJ under Article 258 TFEU.⁷⁰

As already indicated, the Commission has powers to adopt secondary legislation in the field of State aid and a wide discretion to adopt decision on the compatibility of State aid. The final decision of the Commission is not limited to recognition of State aid to be either compatible or incompatible with the internal market. In some cases the Commission can make its decision on the compatibility of State aid subject to specific conditions and obligations.⁷¹ For instance, if an aid measure is planned to be provided for a long period of time, the Commission may establish special conditions to further changes in the circumstances over this period. Also, in the event if State aid was planned to be granted to an undertaking, to which Member State had granted unlawful aid in the past, the Commission may allow to grant such new aid only under the condition that the previous unlawful aid is completely recovered. Such powers of the Commission are not directly provided in European legislative acts but were established by case law.

⁷⁰ Ibid 1533

⁷¹ Ibid 1534

3.2 The role of national courts in the enforcement of European Union rules on State Aid.

The enforcement of State aid policy of the EU is impossible without the involvement of national courts of all Member States. The functions of the national courts of Member States include, as well as the functions of the Commission, supervision and control over the implementation of State aid policy and the enforcement of this policy at national levels of each State. The Commission is responsible for the development of competition policy and national courts protect individual rights of affected parties in respective countries dealing with legal actions brought by that parties against the Member States that granted State aid in violation of law. This particular function is one of the fundamental roles of national courts in the field of State Aid.⁷² There is a space for collaboration between the Commission and national courts of Member States in the matter in question, however, their enforcement powers have a different character: while the Commission exercises public enforcement of State aid policy oriented at States, national courts mainly exercise private enforcement oriented at individuals.

If to compare the competence of national courts and those of the Commission in detail, the optimal way to reveal the difference is to divide the process of granting aid by State into stages and examine the level of involvement of the Commission and national authorities at each stage. In the case *Van Calster and Cleeren*⁷³ the ECJ Stated that the Commission and national courts fulfil “complementary and separate roles.”⁷⁴

The main role of the Commission is to conduct assessment of an aid measure that was notified to it of the compatibility of State aid with the internal market. Such assessment falls within the exclusive competence of the Commission and must be based on the criteria set in Article 107 TFEU which were explained in detail in Chapter 2 above. The role of national courts is to prevent the application of unlawful aid by national authorities: aid, which was either not notified to the Commission or not approved by it and, in cases where unlawful aid was granted, protect the interests of private parties that suffered from such aid. Where an authority of a Member State failed to perform a ‘standstill obligation’ under Article 108 (3) and granted State aid without the Commission’s positive decision, the parties concerned, the competitors, for example, are entitled to refer to the national court to protect their rights.⁷⁵

The primary role of national courts in the enforcement of State aid, apart from other functions, is to enforce Commission’s decisions on misused or unlawful aid and order recovery

⁷² Commission notice on the enforcement of State aid law by national courts [2009] para 24

⁷³ Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren* [2003] ECR I-12249

⁷⁴ *Ibid* para 74

⁷⁵ Commission notice on the enforcement of State aid law by national courts [2009] para 21 (a)

to be granted by respective Member State to the third parties affected by it. National courts can order recovery either after the Commission adopted a negative decision or upon a lawsuit of third party on unlawful aid pending the Commission's decision or, where a standstill obligation is violated, pending the assessment procedure. Where the Commission takes positive decision on the compatibility of State aid, national courts can no longer order recovery of such aid, unless appealed in the CJEU in future.

Where a claim of illegally granted State aid is submitted to the court and in absence of positive decision of the Commission, national court opens proceedings. At first, national courts get familiar with a measure proposed by the government and carry out an initial analysis of it within the scope of Article 107(1) TFEU. This analysis is required to ensure the performance of standstill obligation to notify the Commission. To this end, national courts bring their opinion of whether a measure can be regarded as State aid and define whether it is the new aid or the existing aid. If any doubts arise before the court regarding the interpretation of the notion of aid in specific case, the court can either refer to the Commission for the opinion or refer to the ECJ for a preliminary ruling.⁷⁶

Exceptions exist regarding these competencies of national courts. Firstly, if an aid measure is already an existing aid, Member State is not required to notify it to the Commission. Secondly, when a measure falls under the Block Exemption Regulation it should be considered as compatible with the common market that is not required to be notified under Article 108 TFEU.⁷⁷

The second obligation of national courts is to ensure effective enforcement of the Commission's decisions for recovery of State aid by granting Member State after the assessment that resulted in negative decision on incompatibility of such aid.⁷⁸

The authority to interpret the notion of State aid belongs to both the Commission and the national courts, however, the Commission carries out more complex economic and social assessment to determine whether a measure is compatible with the internal market of the EU. It is also the Commission that is the institution which adopts decision on the compatibility of aid. National courts are not empowered to declare a State aid compatible or incompatible with the TFEU.⁷⁹ When the Commission raises no objections against a measure, definitely fosters its implementation, however, the Commission may decide to initiate a formal investigation procedures if it has any concerns. It is important to mention, that the Commission possesses the

⁷⁶ Ibid para 13

⁷⁷ Ibid para 15

⁷⁸ Ibid para 21 (b)

⁷⁹ Ibid para 20

authority to take decision on the compatibility of aid even if it is contrary to the suspending decision of national court at the first stage. Subsequently, it becomes clear that in the field of State aid national courts have less powers than the Commission.⁸⁰

In the process of my research I identified several weighty advantages of enforcement of State aid rules in national courts.

The first advantage emerges from the private enforcement itself. In contrast to the Commission initiating public proceedings, national courts can award damages that incurred as a result of illegal aid. The Commission itself recognizes significant benefits of private enforcement for State aid policy as it provides the third parties with an opportunity to settle a number of State aid related disputed directly at national level.⁸¹

In certain cases, another advantage of private enforcement in comparison with public enforcement exercised by the Commission is visible. Private enforcement of State aid policy may be more effective in some cases because the party initiating proceedings for the breach of its rights by illegal State aid obviously possesses vital information and proofs of such violation. For example, the information about national market and better knowledge of a certain sector of economy, in which the recipient of State aid conducts its activities, are more known to its competitors rather than to the Commission.

The second advantage is ensuring effective compliance with European State aid rules in general. If aid is proved to be illegal by the national court and suspended by it, there is a large possibility that the undertaking which suffered from such aid, a competitor, for example, will be entitled to receive a compensation of losses caused by such aid. Last year, this was the reason for three formal complaints, submitted to the Commission against “Alitalia” by competing airlines after the former had been alleged State aid from the Government of Italy.⁸² Such outcomes are not beneficial to Member States and it is their interest to guarantee strict compliance with the EU State aid policy to avoid the above mentioned cases.

Strict and efficient State aid control goes side by side with the efficient implementation of the rules of the EU internal market and, therefore, is vital to ensure a proper functioning of EU single market. Such control is especially relevant in newly opened markets where the areas dependent on State aid, such as transport, postal services, energy, play a fundamental role.⁸³

⁸⁰ De Cecco F, *State Aid and the European Economic Constitution* (Oxford, United Kingdom: Hart Publishing, 2013) < <http://search-ebsohost-com.uaccess.univie.ac.at/login.aspx?> > accessed 9 November 2018

⁸¹ Commission notice on the enforcement of State aid law by national courts [2009] para 5

⁸² Commission’s decision SA.48171 Italy, Complaints against alleged State aid to Alitalia [2017]

⁸³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM) [2012] COM/2012/0209 final para 15

Subsequently, national courts of Member States provide great service for well-functioning single market as they ensure a better level of State aid compliance on national level.

Proceedings regarding State aid may arise in national courts of Member States in several contexts.⁸⁴ As mentioned above, the receipt of State aid by an undertaking shall be strictly notified to the Commission. The first reason for initiating proceedings before national court by a recipient of State aid is to seek official declaration that the measure does not constitute State aid and, therefore, does not need to be notified to the Commission. The beneficiaries of aid often submit to the national courts their claims demanding recovery of the financial support following a negative decision of the Commission after notification. Besides, a competitor or any other third interested party may seek a judicial recognition that aid is unlawful. Such forms of national court proceedings represent a private enforcement.⁸⁵ Proceedings may also arise against the recipients of State aid by the initiative of Member States.

Together with the Commission, national courts also possess substantial authority to interpret the notion of State aid. In the case *Steinke & Weinlig vs. The Federal Republic of Germany* the ECJ Stated, in particular that national courts have power to interpret and apply the concept of aid in order to determine whether State aid introduced in the case is subject to the relevant procedure.⁸⁶ As Article 107 TFEU does not have direct effect, national courts often have to apply Article 107(1) TFEU for the purpose of definition of whether a measure can be regarded as State aid. This case is essential because it affirmed that national courts are endowed with the power to interpret the notion of State aid.

In general, the jurisdiction of national courts of Member States to apply State aid rules extends to three cases.⁸⁷

The first case is the enforcement of the ‘standstill obligation’ set forth in Article 108 p. 3 TFEU.⁸⁸ The standstill obligation applies to State Aid in the following context: any aid granted to Member State shall be considered as illegal if implemented contrary to Article 108(3) TFEU. The same article prohibits the implementation of aid by Member States until it has been notified to and approved by the Commission. The responsibility of national courts is to grant effective remedies for the implementation of aid that is not in line with Article 108 TFEU. In the case *Lorenz v Germany* the ECJ recognized that the prohibition laid down in Article 108 TFEU serves

⁸⁴ Quigley C, *European State Aid Law and Policy* (2nd Edition, Oxford 2009) 448

⁸⁵ *Ibid* 449

⁸⁶ Case 78/76 *Steinke & Weinlig* [1977] ECR 595 para 14

⁸⁷ Szyzszak E, ‘National Judges and Training in EU State aid Law’ (*European State Aid Law Quarterly* 3, 2017) 471

⁸⁸ Commission notice on the enforcement of State aid law by national courts [2009] OJ C 85 para 28

as a ground for directly effective rights that shall be preserved by national courts.⁸⁹ Subsequently, if State aid is implemented contrary to the relevant article, national courts must grant all effective remedies for the consequences of such implementation.

The second case is the enforcement by national courts of decisions, adopted by the Commission under Article 108 (2), providing, in general, that a State aid scheme regarded by the Commission as ‘misused’ or as incompatible with the common market has to be annulled or modified by the Member State. If the Commission takes decision that State aid, which had already been granted, is incompatible with internal market, the responsibility to recover all damages caused by such aid falls on the authorities of the Member State concerned. Such recovery must be ensured by national courts by all means available in their national system.

If the Commission, after prior notice of proposed aid measure, finds such measure to be compatible with the internal market, the competitors, if considering the aid measure to undermine their position on the market by distorting competition, still have the right to challenge such Commission’s decision and bring proceedings before national courts.

The third case of application by national courts of the rules on State aid lies in their power to directly apply any block exemption regulation adopted under Article 109 TFEU. Like any Community Regulation, block exemption regulations have direct effect in all Member States and, therefore, shall be directly applied in the courts of Member States. If national court faces any doubts regarding the interpretation of such regulation, it can always refer to the ECJ for a legal opinion.

National courts of Member States are also entitled to enforce decisions of the Commission adopted under Article 108 (2) TFEU, and to apply the provisions of any Block Exemption Regulation having direct effect.

The role of national courts in the enforcement of European State aid policy, as already mentioned, is closely related to the Commission’s activity and to the direct effect of standstill obligation⁹⁰, because on its basis national courts exercise the protection of individual rights against the enforcement of State aid measures conducted without Commission’s approval. If the Commission doubts about the compatibility of prematurely enforced State aid with the internal market and decides to start formal investigation, national court has to decide on appropriate remedies. In cases when there is no decision of the Commission on aid measure, national court must decide on the character of measure and evaluate its potential effects.

⁸⁹ Bacon K, European community Law on State Aid (Oxford University Press) 540

⁹⁰ Commission notice on the enforcement of State aid law by national courts [2009] OJ C 85, 9.4.2009 para 28

There is a case *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH* that was put before the German national court of first instance in November 2006.⁹¹ I would like to carry out a brief analysis of the role of national courts in enforcing regional State aid policy of the EU basing on the case in question, because, from my point of view, it provides a good specification on powers and restrictions given to national courts in enforcing aid measures and State aid policy in general. German Court (Second Chamber) provided in its judgement a clear explanation on coordination between the Commission and national courts and the powers of national courts in considering cases on State aid. Furthermore, the Court also provided its point of view on how national court should act to prevent damages from illegal State aid depending on the decisions of the Commission.

Firstly, it is important to lay out the essence of the dispute. Frankfurt-Hahn airport originally had three owners: Fragport AG, having 65% of shares, and German federal States of Rhineland-Palatinate and Hessen. The airport was totally unprofitable. Until 2009 Fragport covered its losses but the situation was getting worse and forced Fragport to sell its shares to German federal State of Rhineland-Palatinate, making Frankfurt-Hahn GmbH a State owned company.

In 2011, the losses of Frankfurt-Hahn GmbH reached the amount of nearly EUR 200 million. The main reason for that was the impossibility to impose any taxes on Ryanair, an airline carrying out more than 95% of passenger traffic through the airport, because Ryanair threatened to leave the airport in the event of any taxes imposed on it. Therefore, under very soft conditions, Ryanair was exempted from all passenger taxes, as well as from all landing, take-off, air navigation service, and ground handling assistance fees. In such circumstances it was impossible to limit any losses.

To this end, in 2006, Lufthansa brought an action before a regional court against Frankfurt-Hahn Airport GmbH, claiming, that:

1. The practice of exempting one airlines from all taxes by the Airport constituted illegal State aid, granted in breach of Article 108(3) TFEU as it had not been preliminarily notified to the Commission;
2. The Airport should grant no aid for the benefit of Ryanair in the future.⁹²

⁹¹ Case C-284/12 *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH* [2013] ECLI:EU:C:2013:755

⁹² *Ibid* para 14

This case was considered in three instances: Regional Court, Higher Regional Court and in the Federal Court of Justice. The Federal Court of Justice, considering the case, did not satisfy the appeal, but referred the case back to the Higher Regional Court to establish whether there had been the violation of Article 108 (3) TFEU.

In 2008, the Commission initiated an investigation procedure and, in its decision of 17 June 2008, preliminarily considered all aid measures for Ryanair to be selective and to constitute State aid under Article 107(1) TFEU.⁹³ In the decision the Commission also Stated, that the Higher Regional Court was not required to make an assessment of whether the measures could or could not be recognized as State aid and that the Court could use the Commission's decision as a ground for establishment whether the breach of Article 108(3) TFEU took place or not.⁹⁴

Now the contradiction arises: on the one hand, the Commission refers the Regional Court to its own opinion on the assessment of the measures of the case, saying that the court does not need to make any evaluation of whether the measures in question can be regarded as State aid; on the other hand, the Federal Court of Justice bounds the Regional Court to take decision of whether there had been a breach of Article 108(3) ruling nothing about the obligation of the Regional Court to refer to the Commission's opinion. Basically, such action is giving the Regional Court freedom to make own assessment of whether the exempting Ryanair from taxes can be regarded as State aid within Article 107(1)TFEU.

Article 108(3) TFEU provides that the Commission must be notified of any intention to grant State aid and that the Member State concerned should not implement the proposed measures until the Commission takes final decision on the lawfulness of such aid.⁹⁵ It should be obvious that in order to examine the implementation of Article 108(3), foremost it is necessary to decide whether a certain measure in case was actually a State aid within the meaning of Article 107(1).

For the reason mentioned in the paragraph above, German Regional Court had conducted its own assessment whether measures applied could be regarded as State aid and, still having doubts, decided to terminate proceedings and refer to the Federal Court of Justice for the ruling on the following question:

⁹³ Ibid para 16

⁹⁴ Ibid para 39

⁹⁵ Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C326/2012 Article 108 (3)

Does an undisputed decision of the Commission to start a formal investigation within Article 108(3) TFEU have an effect that a national court becomes bound by such a Commission's decision in assessment on whether a measure constitutes State aid?

German Higher Regional Court in its preliminary ruling in the case *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH* provided a detailed answer to the question and a reasoned opinion on national court's authority to define, in cooperation with the Commission, whether a certain measure can be regarded as State aid. The main conclusions from the case in question can be singled out as follows:

- Although the assessment of the compatibility of aid measures with the European internal market falls within the exclusive competence of the Commission under TFEU, it can be subject to the revision by the Courts of the European Union.
- National courts of Member States are obliged to safeguard the rights of individuals even in the process of the consideration of the case by the Commission pending the adoption of a final decision on the compatibility of notified aid measures. It is essential because third parties can potentially suffer from a possible breach by State authorities of their duty not to put any proposed measures into effect until the final decision of the Commission on such measures is taken.
- The decision of the Commission to initiate an investigation procedure under Article 108(2) shall not in any way affect the obligation of Member States to safeguard the rights of the individuals faced with a possible breach of Article 108 (3.2) TFEU.

National Courts, as well as the Commission, have discretion to interpret the notion of State aid and to define independently a measure as State aid when it is necessary to preserve the rights of third parties affected or that can be potentially affected by such aid. National courts enforce Commission's decisions at national level but also have the right to suspend granting of State aid that has an effect of distorting competition even in absence of the Commission's decision recognizing such aid as unlawful. In carrying out the assessment of aid measures courts can act either independently or, in case of any doubts, refer for the opinion of the Commission or for a preliminary ruling of the ECJ on respective matter.

3.3 Enforcement actions of State Aid rules in the Court of justice of the European Union.

The enforcement of State aid policy of the EU is not only on national courts of Member States but is secured at the EU level by the system of judicial protection. The CJEU is composed of three courts, two of which, the General Court and the European Court of Justice consider State aid cases. There are three types of proceedings available in the CJEU in cases on State aid.⁹⁶

1. Main proceedings. The main proceedings in the CJEU in State aid cases are represented either by the direct actions referred to the CJEU, or the proceedings for preliminary rulings before the ECJ. The General Court is the court of first instance that deals with the initial reviews of the decisions adopted by the Commission.⁹⁷ The competences of the General Court are laid down in Article 256 TFEU⁹⁸ and include consideration in State aid cases of legal actions taken against acts or failure to act⁹⁹ of the Commission by natural and legal persons and Member States. These actions include actions for annulment of Commission's decisions, actions claiming for a compensation for damages, actions for failure to act.¹⁰⁰ The main proceedings in the CJEU also comprise references for preliminary rulings, which shall be addressed directly to the ECJ. In addition, if a Member State fails to comply with the legislation on State aid and with the decisions of the Commission on incompatibility of State aid, the Commission is entitled to initiate proceedings against such State before the CJEU.
2. Appeals. As the rulings of all institutions of the EU, the decisions of the Commission on State aid are subject to appeal in the Court of Justice of the EU.¹⁰¹ Within the CJEU the competences in consideration of State aid cases are distributed between the General Court and the ECJ, where the General Court acts as the court of the first instance and the ECJ acts as the court of second instance, which is the final one and can review the decisions of the GC. The reference for appeal before the Court of Justice, however, has no suspensory effect and is limited only to points of law.¹⁰²
3. Expedited procedure. Article 23 of the Statute of the ECJ provides for expedited procedure for cases that require urgent settlement. This procedure can also be applied

⁹⁶ Säcker F J Montag F, European State aid law: a commentary (2016) 1677

⁹⁷ Ibid 1669

⁹⁸ TFEU Article 256

⁹⁹ Ibid Article 263

¹⁰⁰ Säcker F J Montag F, European State aid law: a commentary (2016) 1669

¹⁰¹ Säcker F J Montag F, European State aid law: a commentary (2016) 1667

¹⁰² Statute of the Court of Justice of the European Union (Consolidated version) Articles 58, 60

for preliminary rulings. However, this practice is not very popular specifically in State aid cases because of the large amount of the case materials to examine.

Under Article 263 TFEU Member States, the Commission, the European Parliament and the Council are recognized as privileged applicants within the CJEU. Not only Member States can contest the decisions of the Commission on State aid in the CJEU, but also, in specific cases, natural and legal persons, including public bodies, State aid recipients, competitors and other parties whose interests are directly affected. According to Article 263(4) TFEU all natural and legal persons are regarded as non-privileged applicants for annulment actions who are allowed to initiate proceedings in the CJEU only when the decision they want to appeal was issued to them directly or when their individual interests were directly affected by the original decision.¹⁰³ In the latter case the criterion of direct and individual concern must be satisfied. The main category of cases on State aid

The enforcement of State aid policy by the CJEU is mainly exercised by the final recovery decisions. The vast majority of cases are references for preliminary rulings, cases brought before the CJEU both by the Commission and the individual parties are initiated on the ground of failure by Member States to comply with State aid decisions and actions challenging the validity of the Commission's decisions. The procedure for such actions is more complex than it seems to be. Cases regarding the validity of the Commission's decisions fall within the competence of the General Court under Article 256 TFEU and proceedings against non-compliance of Member States are brought before the ECJ under article 259 TFEU. The only reasonable justification for a Member State of its failure to comply with the Commission's decision is unlawfulness of such decision, which should be recognized by the General Court. In cases where Member State is sued for non-compliance and the reason for such non-compliance is the consideration by that State that the Commission's decision it failed to perform was illegal, it is impossible to continue proceedings in different courts simultaneously because actions before the CJEU have no suspensory effect according to Article 278 TFEU. These conditions created a serious collusion in the consideration of State aid cases by the CJEU, which did not exist before the establishment of the General Court in 1989 when both proceedings were considered by one court. After that the CJEU stopped to accept such justification. The only basis to challenge the lawfulness of the Commission's decisions became either serious mistakes or manifestly bad drafting of the decision or absolute impossibility of a Member State to implement the decision. However, in practice, this situations never happen as the Commission is a very competent authority and its decisions are proportionate and fully justified in their procedural form containing reasonable

¹⁰³ Consolidated version of the Treaty on the Functioning of the European Union [2010] OJ C 83/47 Article 263

arguments developed in the process of comprehensive assessment of aid measures. This is the main procedural issue with the enforcement of State aid in the CJEU, as it is very complicated, even almost impossible for Member States to seek the recognition of invalidity of the Commission's decisions.

But what happens if a Member State take no national measures and fails to enforce the judgement of the CJEU? To this end Article 260 TFEU provides that in such cases the Commission can sue Member State for non-compliance and set the amount of penalty payment that it considers reasonable and proportionate to such violation. The CJEU can impose this penalty to a Member State in the amount within the limit established by the Commission.

The concept of State aid is still not clearly defined, although applied for decades. This situation leads to numerous disputes and controversies in the field of State aid where the interpretation of the Court is required. The judgements of the ECJ constitute a valuable source of law in the field of State aid.

As mentioned in the Chapter 2, the criteria which now serve as instruments for the Commission's assessment of the compatibility of State aid, such as private investor test, *Altmark Trans* test were initially developed by the CJEU. In 1980s, long before the TFEU was adopted, a number of fundamental rules and principles of State aid had been established by the CJEU¹⁰⁴, such as:

- The concept of State aid extends not only to States but also to institutions established by State.¹⁰⁵
- Provision of capital to private undertakings could be considered as State aid.¹⁰⁶
- Where State authorities grant benefits to an undertaking operating in a competitive area on the market, it distorts or threatens to distort competition. If the benefit is limited, it distorts competition to a lesser extent, however the distortion still takes place.¹⁰⁷

The number of landmark cases of the CJEU formed a fundamental basis for modern developed State aid system. Before 1990's and the Boussac case¹⁰⁸ Commission considered unnotified aid unlawful per se without any evaluation. This case changed the Commission's approach to such aid as the Court held that the lawfulness of aid can only be determined after the assessment procedure of its compatibility (currently provided in Article 108 (2) TFEU), providing, however, that the payments of unnotified aid must be suspended before the

¹⁰⁴ Stuart E Roginska-Green I, *Sixty Years of EU State Aid Law and Policy: Analysis and Assessment* [2018] 179

¹⁰⁵ Ibid

¹⁰⁶ Ibid

¹⁰⁷ Case T-214/95 *Vlaamse Gewest v. Commission* [1998] ECR II-717 paras 46–50

¹⁰⁸ Case C-310/87 *French Republic v Commission of the European Communities* [1990] ECLI:EU:C:1990:67

Commission adopts final decision leaving an opportunity for a Member State to submit its comments.¹⁰⁹

The CJEU adopted very important decision regarding *de minimis* aid in the Tubemeuse case.¹¹⁰ In this case it recognized by affirming Commission's consideration that, although *de minimis* aid is granted in relatively small amounts, it still can distort competition on the market.¹¹¹

One of the significant cases of that period is the *SFEI case*¹¹², where the Court interpreted the notion of State aid and stressed that the requirement for advantage is basic criteria for determination of aid regardless of the form in which it is granted. In the case the Court ruled that when any logistical or commercial assistance is granted by public undertakings to their subsidiary companies regulated by private law, these measures can be regarded as State aid under Article 107(1) TFEU, unless the subsidiary provided relevant remuneration for such services which would be equal to the average market cost for the same services.¹¹³

3.3.1 Recent practice of the CJEU: new developments in the field.

Defining the powers of the Commission.

On 14 February 2019, the General Court adopted decision on the annulment of decision of the European Commission regarding Belgium's aid scheme that provided for tax exemptions for international corporations.¹¹⁴ In Belgium, since 2005, undertakings that form multinational corporations are subject to advantageous taxation system. Belgian governmental tax institutions did not impose a corporate tax on excess profits (profits gained from such sources, as creation of new working places, attracting investments in Belgium etc.) of such undertakings. After in-depth examination procedure, the Commission that such measure represents an aid scheme that is not compatible with the common European market. It ordered a recovery decision that obliged Belgium to compensate the full amount of expenditures on State aid granted to 55 enterprises.¹¹⁵

This case, in my opinion, will have a great impact on future case law in practice of granting State aid to enterprises through taxation privileges. The case *Belgium v the Commission*

¹⁰⁹ Ibid para 19-22

¹¹⁰ Case C-142/87 Kingdom of Belgium v Commission of the European Communities [1990] ECLI:EU:C:1990:125

¹¹¹ Ibid para 40

¹¹² Case C-39/94 Syndicat Français de l'Express international (SFEI) and others v. La Poste and others [1996] ECLI:EU:C:1996:285

¹¹³ Ibid paras 57-59

¹¹⁴ Official website of the Court of Justice of the European Union Press Release No 178/18 (Luxembourg, 15 November 2018) < <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-11/cp180178en.pdf> > accessed 27 February 2019

¹¹⁵ Joined cases T-131/16, T-263/16 Belgium v Commission [2019] ECLI:EU:T:2019:91

put before the GC two questions regarding the competence of the Commission and the notion of State aid scheme¹¹⁶:

1. Is the Commission endowed with the authority to interfere into the issues of direct taxation falling under exclusive domestic competence of Member States?

To this end the ECJ notes that, despite the fact that Member States have exclusive domestic competence on matters related to direct taxation, this is the area which is not harmonized in the EU law and, accordingly, cannot be excluded from the scope of State aid.¹¹⁷ Member States shall still guarantee that any tax regulations and regimes they provide, whether granted through State resources or not, are in line with European rules on State aid and does not distort competition on the market.¹¹⁸ Subsequently, as tax treatment is a measure that can put certain undertakings into much more favorable market position over the competitors and it is the duty of the Commission is to take preventive actions against such situations by ensuring the compliance of State aid policy¹¹⁹, the Commission did not exceed its powers while examining this case.¹²⁰

2. Does the measure in the case represent an aid scheme?

The ECJ Stated that in order to be regarded as an aid scheme a measure must provide for further measures on implementation. It is an essential condition for a measure to be considered as an aid scheme and in the relevant case the Commission wrongly defined the measures adopted by Belgium as an aid scheme.¹²¹

The rulings of ECJ also improve and explain the classification of State aid for better general understanding of this issue. Thus, in the preliminary ruling in the case *Congregación de Escuelas Pías* the ECJ held that in cases where exemption from taxation is regarded as State aid, this exemption should be classified as new aid, not the existing aid.¹²²

State aid for renewable energy sector.

Recently, on March 28, 2019 the ECJ adopted a landmark decision on feed-in tariffs applied in the renewable energy sector.¹²³ In 2012, Germany introduced law on renewable energy

¹¹⁶ Ibid

¹¹⁷ Ibid para 63

¹¹⁸ Ibid para 65

¹¹⁹ Ibid para 66

¹²⁰ Ibid para 67

¹²¹ Ibid paras 90-91

¹²² Official website of European Commission, Commission Staff Working Paper accompanying the Report on Competition Policy [2017] p.38 < http://ec.europa.eu/competition/publications/annual_report/2017/part2_en.pdf > accessed 10 April 2019

¹²³ Official website of the Court of Justice of the European Union Press Release No 44/19, Luxembourg [2019] < <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-03/cp190044en.pdf> > accessed 30 March 2019

aimed at supporting the producers of electricity from renewable energy sources by establishing the price for produced electricity higher than the market price. The Government required the source of funding to compensate the price difference and decided to impose the feed-in tariff which was imposed on the suppliers of 'green' electricity to the costumers, however, in practice fell on the final costumers. This tariffs were then payable to major very-high-voltage transmission systems and regional traders that sold the electricity produced from renewable energy sources.¹²⁴ In November 2014, the Commission adopted decision that, although the measures to promote renewable energy constitute State aid compatible with the common market, such feed-in tariffs compensated to electricity-intensive enterprises should be regarded as State aid and ordered a partial recovery regarding these tariffs.¹²⁵

Germany filed an appeal to the General Court and, after the Court approved the Commission's decision, to the ECJ.

The ECJ in its judgement provided that the feed-in tariffs provided by German law on renewable energy cannot be regarded as State aid.¹²⁶ Moreover, the adoption of this legislation created a boom in renewable energy sector by decreasing the cost of renewable energy making it cost-competitive on the market and resulted in 50 States in the world following the example of Germany by imposing similar tariffs.¹²⁷

Earlier, in November 2018, the General Court adopted another landmark decision suspending the UK's Capacity Market. The government of the UK provided regular payments to energy firms that own coal, gas and other power stations under £1bn capacity market scheme to ensure the availability of electricity in the peak months of heating season. Temptus Energy, clean energy provider, challenged the Commission's negative decision on the compatibility of this aid measure claiming that such measure is discriminatory against renewable energy producers as it stipulates coal, diesel and gas domination on the market.¹²⁸

¹²⁴ Ibid

¹²⁵ Ibid

¹²⁶ Ibid

¹²⁷ World Wind Energy Association. *Landmark decision: European Court of Justice rules feed-in tariffs do not constitute State aid* (2019, March 29) [Press release] <<https://wwindea.org/blog/2019/03/29/landmark-decision-european-court-of-justice-rules-feed-in-tariffs-do-not-constitute-State-aid/>> accessed 02 April

¹²⁸ A Vaughan, 'UK's backup power subsidies are illegal, European court rules' *The Guardian* (15 November 2018), <<https://www.theguardian.com/environment/2018/nov/15/uk-backup-power-subsidies-illegal-european-court-capacity-market>> accessed 05 April 2019

Definition of State aid.

In its reasoning in the case *Commission v FIH Holding and FIH Erhvervsbank*¹²⁹ the General Court provided an additional specification for the notion of State aid that can be derived from Article 107(1) TFEU. It Stated that as follows from the meaning Article 107(1), State aid does not cover measures granted to beneficiaries through State resources in circumstances where these beneficiaries could have received the same benefits under ordinary market conditions.

This chapter described the functions of the CJEU in the enforcement of State aid policy of the European Union in order to show that its enforcement at the Union level is of the same importance as at the national level in Member States. Firstly, in enforcing Commission's decisions that are directly addressed to Member States. In ordinary situations it is exercised through national procedure, however there were situations in the case law when Member States failed or refused to implement recovery decisions for different reasons and national courts would follow the position of the State. In such situation the enforcement is only possible through the Union level when the Commission refers to the CJEU to seek to bring the Member State to justice for the violation of law and granting illegal aid. Secondly, when either the national court or the Commission faces doubts in the interpretation of aid in the case or their competencies to consider it, they can refer to the ECJ for the preliminary ruling containing detailed legal opinion on the controversial matter. And, thirdly, the CJEU is the court of the first instance for a Member State in cases where the State objects to the Commission's decision on State aid and seeks to annul it. It has been analyzed in the chapter that there are procedural complexities of proving the unlawfulness of the Commission's decision on incompatibility of State aid, however, States in any way can only exercise this right by reference to the CJEU. In addition, the CJEU serves as a court of final instance for third parties initially seeking to appeal Commission's within the national judicial system.

¹²⁹ Case T-386/14 *FIH Holding A/S and FIH Erhvervsbank A/S v European Commission* [2016] EU:T:2016:474

CONCLUSION.

State aid policy is the integral part of the competition policy of the European Union. Although State aid is, in general, prohibited by European legislation, the overall benefits of it and the existence of the common European interest in the implementation of State aid form an exception to the general rule. State aid became a very effective instrument for supporting areas with low economic performance and cost and resource intensive sectors, including innovation, maintaining at the same time fair competitive conditions and trade balance on the internal market.

State aid policy is implemented by Member States of the EU through governmental authorities that draft proposals of aid measures or aid schemes for further submission to the European Commission. State aid can be granted in various ways, such as the provision of State funds, exemption from taxation, debt coverage by State resources, the provision of State services at a low price etc. Member States are responsible for implementing State aid policy strictly in conformity with European legislation on State aid as its infringement will result for a State in the abolishment of incompatible aid and the obligation to recover all related expenditures to the parties that suffered from such aid.

The Commission, national courts of Member States and the Court of Justice of the European Union conduct the enforcement of State aid policy at different levels. The main function of the Commission is to conduct initial assessment of the compatibility of State aid with the common market and its conformity to the criteria laid down in Article 107 TFEU. The Commission adopts decision for approval or disapproval of State aid, which is subject to further implementation and enforcement by national courts of Member States.

National courts of Member States have as their main obligation in State aid practice the protection of individuals against the violation of a standstill obligation and the prevention of payment of unlawfully granted aid. Apart from implementing Commission's decisions, national courts exercise their preventive duties independently of the Commission. The courts, both independently or with reference for the Commission's opinion or for ECJ's preliminary ruling, conduct assessment of a measure to define whether it can be regarded as State aid and, if it can, monitor the due performance of a standstill obligation. National courts order recovery of unlawful aid and compensation for damages caused by unlawful aid in cases where State aid was paid without notification to the Commission and its approval. It is a frequent situation when the proceedings in national courts take place simultaneously with the Commission's investigation as the courts are obliged to suspend the provision of unlawful aid even before the Commission adopts the decision that determines Said measure as such, however, it is important to distinguish

that the national courts do not have jurisdiction to adopt decisions on the compatibility of State aid like the Commission does.

The Court of Justice of the European Union ensures the enforcement of State aid policy at the EU level including, but not limited to the situations when the coordination of the Commission and national courts failed to preserve the rights of all parties affected by State aid granted by Member States. The parties concerned possess the right to challenge the Commission's decision on the compatibility of State aid or the suspension of State aid by national courts by reference to the General Court and, if the parties find the decision unsatisfying, to the ECJ for appeal. The cooperation between national courts of Member States and the CJEU is carried out through the right of national courts to refer to the ECJ for preliminary ruling in cases where courts have doubts with the interpretation of the notion of State aid. The practice of the CJEU became an especially valuable source of law in the field of State aid. Various issues, such as the interpretation of the notion of aid, definition and comprehensive specification of the powers of the Commission in the assessment of the compatibility of aid and adopting decisions thereof, examination and determination of the authority of national courts, the extensive interpretation of the fundamental Articles 107-109 TFEU, were initially raised before and resolved by the CJEU in numerous cases leading to the case law becoming one of the main sources of law on State aid. This is demonstrated in this Master Thesis by reference to both landmark decisions of the CJEU and recent cases to observe the tendencies of the development of European rules of State aid.

Annex

The EU being a highly integrated economic union with the large internal market and free trade between Member States is required to maintain fair competition on the market and ensure equal rights and national treatment for all its participants. Distortion of competition can strongly undermine the established trade relations within the European Union and, therefore, it is very important that Member States do not put any undertakings under more favorable conditions than their competitors.

One of the most effective instruments to achieve this goal is State aid policy. European rules on State aid establish specific conditions and criteria which determine the lawfulness of various supporting aid measures provided by Member States. The effective enforcement of State aid rules of the EU prevents unequal national treatment of undertakings by granting them unfair support from Member States through State resources in any form. The enforcement of State aid policy is achieved by the cooperation of the European Commission, national courts of Member States and the Court of Justice of the European Union, providing, at the same time, that each institution performs separate core functions. The main function of the Commission is, upon notification of Member States, carry out an assessment on the compatibility of State aid with the internal market and adopt respective decisions; national courts protect rights of the third parties and prevent granting of unlawful State aid; the CJEU serves as the final instance in the settlement of disputes in State aid cases and provides interpretation of legal provisions and the notion of State aid where national courts refer for preliminary rulings. The broad case law in the field of State aid serves as a valuable source of law as number of issues the resolution of which cannot be derived from legislation, such as the notion of State aid, the determination of competencies of the Commission and national courts in specific cases and the accuracy of implementation of legislation on State aid, have been resolved and further interpreted by the CJEU. This mechanism proved to be very effective in the field.

Die EU ist als stark integrierte Wirtschaftsunion, mit großem Binnenmarkt und freiem Handel zwischen den Mitgliedstaaten, verpflichtet, einen fairen Wettbewerb zu gewährleisten sowie die Gleichberechtigung und Inländerbehandlung aller Teilnehmer des Binnenmarktes sicherzustellen. Wettbewerbsverzerrungen können die bestehenden Handelsbeziehungen innerhalb der Europäischen Union jedoch stark beeinträchtigen. Aus diesem Grund ist es sehr wichtig, dass die Mitgliedstaaten bestimmten Unternehmen keine günstigeren Konditionen anbieten und alle Unternehmen den gleichen Bedingungen ausgesetzt sind.

Eines der wirksamsten Instrumente zur Erreichung dieses Ziels ist die Beihilfepolitik. Die europäischen Vorschriften über staatliche Beihilfen legen spezifische Bedingungen und Kriterien fest, die die Rechtmäßigkeit verschiedener von den Mitgliedstaaten gewährter unterstützender Beihilfemaßnahmen bestimmen. Die wirkungsvolle Umsetzung der EU-Beihilfenvorschriften verhindert die Ungleichbehandlung von Unternehmen, bei jeglicher mitgliedsstaatlichen Unterstützung. Die Durchsetzung der Beihilfepolitik erfolgt durch die Zusammenarbeit der Europäischen Kommission, der nationalen Gerichte der Mitgliedstaaten und des Europäischen Gerichtshofs, wobei gleichzeitig vorgesehen ist, dass jedes Organ eigene Kernfunktionen wahrnimmt. Die Hauptaufgabe der Kommission besteht darin, nach Anfrage der Mitgliedstaaten, eine Bewertung der Vereinbarkeit staatlicher Beihilfen mit dem Binnenmarkt durchzuführen und entsprechende Entscheidungen zu treffen. Die nationalen Gerichte schützen die Rechte Dritter und verhindern die Gewährung rechtswidriger staatlicher Beihilfen. Der EuGH dient als letzte Instanz bei der Einigung von Streitigkeiten in Fällen staatlicher Beihilfen und bietet die Auslegung der Rechtsvorschriften und des Begriffs der staatlichen Beihilfen an, wenn die nationalen Gerichte Vorabentscheidungen treffen. Die umfassende Rechtsprechung im Bereich der staatlichen Beihilfen dient als wertvolle Rechtsquelle, da eine Reihe von Fragen, deren Lösung sich nicht aus Rechtsvorschriften ableiten lässt, wie z.B. der Begriff der staatlichen Beihilfen, die Bestimmung der Zuständigkeiten der Kommission und der nationalen Gerichte in Einzelfällen sowie die Genauigkeit der Umsetzung der Rechtsvorschriften über staatliche Beihilfen, vom EuGH gelöst und weiter ausgelegt wurden. Dieser Mechanismus hat sich in der Praxis als sehr effektiv erwiesen.

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