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RECOVERY OF UNLAWFUL STATE AID

MASTER THESIS

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ABREVIATIONS

TFEU, the Treaty - Consolidated version of the Treaty on the Functioning of the European Union

EU – European Union

CJEU – the Court of Justice of European Union

The Court – the Court of European Union, the European Union Court of Justice, the Court of First Instance of the European Union

The Commission – the Commission of European Union

The Procedural Regulation – Council Regulation (EC) No 659/1999 of 22 March 1999

An aid, a state aid – a state aid in the context of European Union

INTRODUCTION

The internal market is one of the cornerstones on which the main idea of European Union is based. Furthermore, the functioning of the union is highly depended on the effectiveness of the internal market. Therefore, an effective internal market requires the deployment of two instruments: first, regulation to create one integrated market without national borders and, second, competition policy including State aid control to ensure that the functioning of that internal market is not distorted by anticompetitive behaviour of companies or by Member States favouring some actors to the detriment of others.[1]

Even though the European Union does not put an absolute ban on state aid, its control is an essential component of competition policy and a necessary safeguard to preserve effective competition and free trade in the single market.[2] One of the instruments of state aid control is recovery of unlawful state aid. Pursuant to the fact that recovery of unlawful state aid is an *ex post facto* measure of state aid control, it is necessary only when there is already a breach of general obligation to provide state aid. In such event the competition and single market is already distorted and the main purpose of recovery measure is to restore the competition which was affected by unlawful state aid. Therefore, the effective system of performance of recovery of unlawful state aid is extremely important to preserve the functioning of the internal market by restoring fair environment for competition.

Under Article 3(1)(c) of TFEU, the European Union have an exclusive competence in establishing the competition rules necessary for the functioning of the internal market.[3] However, despite the European Union exclusive powers on control of state aid, the system of control of state aid, including recovery of unlawful state aid, in the context of European Union can be considered as dualistic in essence. The dualism reveals itself in the balance of powers between European Union institutions and Member States. Therefore, Member States and European Union institutions perform different and separate but complementary roles in the control of state aid. According to such a dualistic nature of state aid control, it is highly important for Member States and EU institutions to perform their obligations properly and cooperate for the same aim.

In the field of recovery of unlawful state aid the main actors are the Commission of EU and Member States. Pursuant to the fact that their roles are different, the Commission undertakes

[1] 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), 8.5.2012, COM(2012)
[2] The Common principles for an economic assessment of the compatibility of State aid under Article 87.3 EC-Treaty, http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf
[3] Consolidated version of the Treaty on the Functioning of the European Union // 2008. Official Journal of the European Union. C 115/47, Article 3

the supervisory control, while Member States take the main role in practical recovery actions. Thus, only in the existence of willing cooperation and communication between the Commission and Member States the recovery of unlawful state aid can be effectively performed. However, sometimes even in the best examples of cooperation between the Commission and Member States difficulties interfering the recovery procedures arise. One of the causes of such difficulties might be the legal regulation of EU state aid. The general restriction of providing state aid is established in the TFEU, but it does not give details of the recovery of unlawful state aid. For this reason the Regulation No. 659/1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union, known as Procedural Regulation, was adopted. However, even though the Procedural Regulation includes rules for recovery of unlawful state aid, these rules are addressed more to the performance of the Commission and not to the Member States. In addition, the Procedural Regulation provides that recovery has to be effected without delay and in accordance with the procedures under the national law of the Member States. Therefore, it can be stated that the dualism of recovery of unlawful state aid appears not only in the different powers and roles of the Commission and Member States, but also in the application of EU and national legislation rules.

Another powerful institution of EU which also plays an important role in recovery of unlawful state aid is the Court of Justice of European Union. Because of its exclusive competence to interpret the provisions of the Treaty, the Court is the main source of interpretation of state aid. Therefore, the national courts are obliged to follow the rules and interpretations which are formulated by the Court.

Pursuant to the fact that recovery has to be performed under the national law of Member States, another cause of difficulties of effective performance of recovery of unlawful aid can be defined. Currently, European Union consists of 28 countries and each of them has its own national law. Therefore, each national law of Member State can provide different procedures for recovery of unlawful state aid. According to the fact that based on cultural, historical economical and other differences between Member States, national law of each Member State differs from other Member States, it creates unequal position not only between Member States. Interests of individuals are also protected differently in each Member State and all individuals expect different protection and procedure of recovery according to their national law.

According to the last statistics published by European Commission on 30 June 2012, in the period between 2000 and 30 June 2012, the outstanding amount of recoverable, but not yet recovered state aid was 2276 million Euros.[4] The same statistics shows that for example 100 percent

[4] Trend in the number of recovery decisions and amounts to be recovered 2000 – 30 June 2012, http://ec.europa.eu/competition/state_aid/studies_reports/recovery.html

of aid known to be recovered in 2011 has not been recovered yet on the day of the statistics published. Such data shows that the system of state aid control and especially the recovery of unlawful state aid do not function properly and requires respective improvement. Therefore, **the problem of this research** is: What practical problems between EU institutions and Member States should be solved and/or legal regulation improved in order to increase the effectiveness of recovery of unlawful state aid?

The novelty and the relevance of this master thesis: recovery of unlawful state aid by the order of EU Commission has never been executed in Lithuania, thus based on lack of practical issues, the topic of recovery of unlawful state aid has never been deeply analysed by Lithuanian authors. However, the recovery of unlawful state aid is important for the future perspectives for Lithuanian institutions in order to implement effectively the obligation to recover unlawful state aid. The relevance of this master thesis appears from the aim of the European Union law and negative effect of unlawful state aid. While European Union law protects internal market and fair competition, the unlawful state aid distorts the competition and affects the internal market. Therefore, this master thesis is relevant for all Member States and European Union institutions in order to preserve the main aims of European Union. Despite the fact that Lithuanian authors did not deeply researched the features and problematic aspects of the recovery of unlawful state aid, some aspects of problematic issues regarding recovery of unlawful state aid were analysed by many foreign researchers such as C. Quigley, M. Schutte and other practitioners and scientist in the field of European Union state aid law.

The object of this master thesis: the object of master thesis research is analysis of the rules of law of European Union and the jurisrudence of European Union courts, which regulate and interprets the recovery of unlawful state aid in the European Union.

The subject matter of this master thesis: the subject matter of the research of the master thesis includes the state aid control system of the European Union and its interaction with national law systems of the Member States`.

The goal of this master thesis: to analyse the regulation and interpretation of unlawful state aid recovery in the context of EU law and identify the problematic aspects of regulation and interpretation of unlawful state aid recovery.

In order to achieve this goal, the following **objectives** are formulated:

- To analyse the concept and interpretation of unlawful state aid;
- To identify the supervisory control of state aid;
- To disclose the specific mechanism of recovery of unlawful state aid;

- To define and to evaluate the role of Member State national courts in the recovery of unlawful state aid.

Methods:

- Method of systematic analysis;
- Historical method;
- Comparative method;
- Linguistic method.

Hypothesis: Lack of legal regulation in European Union law in the field of recovery of unlawful state aid is the result of inefficient recovery of unlawful state aid.

The structure of this master thesis: Master theses consist of four parts:

- The concept of state aid;
- Supervisory control of state aid;
- Obligation to recover unlawful state aid;
- State aid and national courts.

1. THE CONCEPT OF STATE AID

As the basis of the free market is competition, its rules seek to promote effective and undistorted competition in the market.[5] The general approach in the field of state aid law is that a state aid distorts competition by making one undertaking to be in a more favourable position that other undertakings acting in the same level of competition. More importantly, State aid may distort the competitive process by crystalizing inefficient industry structures; it may crowd out private investment; it may reduce effective competition by increasing market power or by reducing the incentives to compete; it may distort production and location decisions across Member States;and it may foster overly risky or otherwise inefficient behaviour. [6]Whereas, in this work one aspect of the state aid control – recovery of unlawful state aid will be analysed, it is necessary to understand what is considered as state aid in the context of European Union. Thus, further in this section the definition, the main criteria for consideration and derogations of state aid established in EU law and case law will be analysed.

1.1. Criteria of the state aid defined in Article 107(1)

The Treaty on Functioning of the European Union gives restrictions to Member States on providing state aid. However, many authors state that the Treaty does not provide the exact definition of state aid.[7] Such a lack of certainty regarding definition of state aid in primary source of European Union law in many situations may create a vagueness of general restriction application. However, contradicting to such a situation, it should be stated that in the rapidly growing economy it would be impossible to establish the exact definition of state aid in the context of European Union law. In addition, it can be definitely stated that the roots of the notion of state aid are established in the Treaty of Functioning of the European Union. The general restriction for Member States to provide state aid lays down in Article 107(1) which states that "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the

[5] A. Jones and B. Sufrin, EC Competition Law:Text, Cases, and Materials,Third Edition, Oxford University Press, 2006, p. 2
[6] K. Bacon, European Union Law of State Aid, Second Edition, Oxford University Press, 2013, p. 14
[7] R. Funta, EC Law on State Aid Legal Framework, Case Law and the Story in the Alitalia State Loan Case, 3 Masaryk U. J.L. & Tech. 311 2009, HeinOnline (http://heinonline.org)

production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."[8].

Although the notion of aid is not further defined in the Treaty of Functioning of the European Union itself, it has to be regarded, through the case law of the European Union Court of Justice and the Court of First Instance, as entailing an intervention of the State or through State resources encompassing a financial burden borne by the State that results in an advantage for an undertaking by mitigating the charges which are normally included in its budget[9]. According to the opinion of some authors, the provision of a concrete definition of state aid in the legislation of European Union would allow too much scope for circumvention.[10] On the one hand, taking into account the quick enlargement process of the EU in recent decades this position is quite logical and safe. It gives the absolute power to the Commission and European Union Court of Justice to control and when it is necessary to change the concept of state aid and give whether a green light for a new aid or to create a new criterion of restrictions for certain aids. On the other hand, in respect to critics of exclusive rights of EU institutions, it may be considered whether it is a proportionate way to give such exclusive rights for EU institutions to give the definition of state aid and decide whether the aid can be provided.

Nevertheless, the European Union Court of Justice started its role as definer of state aid in the context of European Union law in early 1960`. In the famous judgment of the Case 30/59 *Steenkolenmijnen* v *High Authority* aid was defined for the first time. According to the future developments and changes that definition was and still is being modified, but in its essence remained the same:

"A subsidy is normally defined as a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces. An aid is very similar concept, which, however, places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help. The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect. Since these definitions are not contained in the Treaty, they are

[8] Consolidated version of the Treaty on the Functioning of the European Union // 2008. Official Journal of the European Union. C 115/47
[9] C. Quigley C, European State Aid Law and Policy. Second Edition, Hart Publishing,2009, p. 3
[10] M. Sanchez-Rydelski, The EC State Aid Regime-Distortive Effects of State Aid on Competition and Trade, Cameron May Ltd, 2006, p. 26

acceptable only if they are substantially borne out by the provisions of the Treaty or by the objects which it pursues."[11]

Despite the fact that it took more than a half of a century firstly to define aid in the European Union Court of Justice case law, the concept of state aid still remains vague and even misleading for Member States. While the wording of article 107(1) remained almost the same as it was firstly established in 1957, despite future developments and changes either in EU legislation or EU policy, the need for clearness of state aid definition still remains even today.

Nevertheless, though there is no clear definition of state aid in the early state aid case law practice more goals of state aid restriction and main criteria defining the state aid were formulated by the Court of Justice and the Commission. According to settled case-law, the classification of aid within the meaning of Article 107(1) of TFEU requires that all the conditions set out in that provision are fulfilled[12]:

- Firstly, there must be intervention by the State or through State resources;
- Secondly, the intervention must be liable to affect trade between Member States;
- Thirdly, it must confer an advantage on the recipient;
- Lastly, it must distort or threaten to distort competition.[13]

In author`s opinion, despite the absence of clear definition of state aid, leaving interpretation of four main criteria of definition of state aid for the CJEU competence, creates even more complicated environment of regulation of state aid control. Therefore, in the further work, each of the criteria will be analysed and discussed.

1.1.1. Intervention by the state or through state resources

One of the criteria that EU Commission and CJEU apply during the test of recognition of the state aid is that the aid should be granted by the Member State or through the state resources. In early case law the CJEU pointed out that for advantages to be capable of being categorised as aid within the meaning of Article 107(1) of the Treaty, they must firstly be granted directly or indirectly through State resources[14] and secondly be imputable to the State[15].

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[11] Case 30-59, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*

[12] Case C-142/87, *Belgium* v *Commission*, paragraph 25; Case C-280/00 , *Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 74; Joined Cases C-341/06 P and C-342/06 P, *Chronopost and La Poste* v *Ufex and Others*, paragraph 125

[13] Case C-142/87, *Belgium* v *Commission*, paragraph 25; Case C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 74; Joined Cases C-341/06 P and C-342/06, *Chronopost and La Poste* v *Ufex and Others*, paragraph 125; Case C-451/03, *Servizi Ausiliari Dottori Commercialisti*, paragraph 56; Case C-341/06 P and C-342/06 P, *Chronopost and La Poste* v *Ufex and Others*, paragraph 126

[14]Case C-482/99, France v. Commission; Joined Cases C-72/91 and C-73/91, *Sloman Neptun* v *Bodo Ziesemer*, paragraph 19; Case C-189/91, *Kirsammer-Hack* v *Sidal*, paragraph 16; Joined Cases C-52/97 to C-54/97, *Viscido and*

As well as the general definition of state aid comes from the decisions of EU Commission and CJEU, the guidelines to what may be considered as intervention by the state or through state resources are also created by the EU Commission and CJEU. The Court in its early decisions has held that *"<...> an aid need not necessarily be financed from State resources to be classified as a State aid. Article 107 covers all aid granted by States or through State resources and there is no necessity to draw any distinction according to whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid.*".[16] By such interpretation CJEU created a broad notion regarding what should be treated as the aid given by the State or through the State resources. Firstly, it created an uncertainty for Member States regarding the question what should be assigned to state, as well as such broad notion gave broad powers to the Commission and CJEU to decide what kind of test should be applied in order to justify that the aid was granted by the state. Secondly, as a result of broad interpretation of CJEU, it raised the question of what should be considered as state sources. Therefore, the Author points out, that it is impossible for CJEU to clear out all the uncertainties that are created by the broad notion of interpretation of definition of state and state sources. In the further work, the author separately distinguish issues regarding aid granted by the state and issues that are met by the member States regarding interpretation of aid granted through the state sources.

- **Aid granted by the state**

At first sight it seems easy to define what is considered as the Member State according to the Article 107(1) of TFEU. Still, the case law is full of explanations what should be treated as the state in the context of the state aid. It should be thought that no discussion could arise talking about public institutions and unanimously it should be clear that such institutions will be considered as State. However, some authors emphasise the idea that according to the CJEU case law all benefits granted by the public undertaking do not necessarily amount to State Aid.[17] Whether or not the public undertaking is to be considered as acting under the influence of the State, such as the

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Others v *Ente Poste Italiane*, paragraph 13; Case C-200/97, *Ecotrade* v *Altiformi e Ferriere di Servola*, paragraph 35; Case C-295/97, *Piaggio* v *International Factors Italia (Ifitalia), Dornier Luftfahrt, Ministero della Difesa*, paragraph 35; Case C-379/98, *PreussenElektra* v *Schleswag*, paragraph 58; see also to that effect K. C. O'Higgins, Overview of the Jurisprudence in State Aid Cases: Substance and Procedure - an Update, 2011 Eur. St. Aid L.Q. 601 2011, HeinOnline (http://heinonline.org)

[15] Case C-482/99, France v. Commission; Joined cases 67, 68 and 70/85,*Van der Kooy*, paragraph 35; Case C-303/88, *Italy* v *Commission*, paragraph 11; Case C-305/89, *Italy* v *Commission*, paragraph 13

[16] Case 57/86, Greece v. Commision; Case 290/83 Commission v French Republic and etc.

[17] For example C.Quigley, European State Aid and Policy, p. 13

application of its resources may be considered as giving rise to the State aid, is to be determined by all the circumstances of the case and the context in which a given measure is taken.[18]

As the CJEU stated in the case France v Commission that even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed.[19] Because of the fact that a public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures, to be imputed to the State.[20] Thus the Court pointed out that it is necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures.[21]

According to what was stated above and to the other recent CJEU practice, it gives a clear position of CJEU that in each situation the test of imputability to the state should be applied. Firstly, it has to be precisely examined what is the value of the State control of certain public undertaking and what kind of influence the state has to such undertaking. For example in one of the Italian Republic v Commission case the CJEU pointed out that under the respective Italian law, an undertaking which granted the aid was a public corporation controlled by the Italian State and the members of its board of directors and management board were appointed by decree of the Prime Minister.[22] Furthermore, in the same case the CJEU held that *"although an undertaking is required to operate in accordance with economic criteria, it does not have full freedom of action, since it must take account of directives issued by the Comitato Interministeriale per la Programmazione Economica (Interministerial Committee for Economic Planning). Taken as a whole, those factors show that the undertaking operates under the control of the Italian State".*[23] Secondly, it should be examined whether the State was clearly involved in granting the certain aid.

As it was mentioned previously, the CJEU interpreted the definition of „State" in a broad way leaving no space for the difference what kind of form of undertaking provided aid by saying that "there is no necessity to draw any distinction according to whether the aid is granted directly by the State or by public or private bodies".[24] According to this interpretation a lot of various decisions were made regarding state aid in which different type of undertakings had connection to the state and were imputable by the State. One of the examples of such a situation is the judgment of

[18] C.Quigley, European State Aid and Policy, p. 13
[19] Case C-482/99, *French Republic v Commission of the European Communities*
[20] Ibid
[21] Ibid
[22] Case C-303/88, *Italian Republic v Commission*
[23] Ibid
[24] Case 57/86, Greece v. Commission; Case 290/83, Commission v French Republic and etc.

Kwekerij Gebroeders van der Kooy BV and others v Commission, where the private company in which the Netherlands State holds 50% of the shares argued that the lower tariff cannot be considered as state aid because the State of the Netherlands is not involved, the CJEU held that the fixing of the disputed tariff was the result of action by the Netherlands state.[25] *"First of all, the shares in the undertaking [Gasunie] are so distributed that the Netherlands State directly or indirectly holds 50% of the shares and appoints half the members of the supervisory board- a body whose powers include that of determining the tariffs to be applied. Secondly, the Minister for Economic Affairs is empowered to approve the tariffs applied by the undertaking, with the result that, regardless of how that power may be exercised, the Netherlands Government can block any tariff which does not suit it. <...> Considered as a whole, these factors demonstrate that the undertaking in no way enjoys full autonomy in the fixing of gas tariffs but acts under the control and on the instructions of the public authorities."*[26]

Therefore, there are no strict rules that would establish what is considered as aid granted by the State. In each case, there should be done a strict test by measuring whether a state has a connection to one or another entity which granted an aid. In Author`s opinion, the main difficulties arise when there is no distinction between private and public entities and each of them can be considered as having an impact of state. There is also no guideline what the limit of state aid impact is and whether even a minimum connection of entity with certain state institutions can predestine such entity status as a state. Therefore, there is always a question for Member States what will be the decision of the Commission or CJEU.

- **Aid granted through the state sources**

As it was mentioned before, one of the criteria to consider provided aid as incompatible with EU law is to recognize that it was given by the state or through the state resources. The first alternative "aid given by the state" was analysed above. While the TFEU provides the second alternative "the aid provided through the state resources". The CJEU case law related to this alternative will be analysed in the further work.

It might be said that CJEU has interpreted the notion of criteria that the aid has to be given either by the member state or through state resource by overlapping the wording of this criteria given in the TFEU. While TFEU provides that there is an alternative of provision of state aid either by a Member State or through resources of the state, the CJEU in one of its cases stated that "for advantages to be capable of being categorised as aid within the meaning of Article 107(1), they

[25] Joined cases 67, 68 and 70/85, Van der Kooy v. Commission
[26] Ibid

must, first, be granted directly or indirectly through State and second, be imputable to the State"[27]. By such an interpretation the CJEU narrowed the prohibition of state aid by aggravating one of the main criteria to consider given aid as contrary to the TFEU. Following such an interpretation the Commission should prove that both imputability of the state and state resources were involved in the provision of the aid, while the TFEU establishes the explicit alternative for the provision of the aid. Besides the criticism, the arguments against such an opinion can be found in the early CJEU case law, stating that *„<...> only advantages which are granted directly or indirectly through State resources are to be regarded as State aid within the meaning of Article 107(1) of the Treaty. The wording of this provision itself and the procedural rules laid down in Article 108 of the Treaty show that advantages granted from resources other than those of the State do not fall within the scope of the provisions in question. The distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State.".*[28]

Arguments for the advantage of the court decision can be found in the opinion of the same case of advocate general Jacobs who stated that in both situations when a Member State grant aid by using special funds transferred from the budget to the public undertakings before the aid is granted or those undertakings own resources, the State uses resources under its control and in both situations the economic burden of the measure is ultimately borne by the State.[29] In addition to Jacob`s opinion, it should be said that even though the court in its decision assimilated two alternative criteria given by the state, it could not be stated that in such a way the court increased the possibility to avoid recognition of the state aid prohibition. According to this, it can be stated that in both ways imputability of the state is involved either the aid is given by the state or through state resources. Therefore, explaining the wording of TFEU it can be stated that those two alternative options assimilate in any case.

1.1.2. The advantage is conferred on recipient

According to the article 107(1) of TFEU, the state aid should be *„favouring certain undertakings"*. Such a wording leads to the interpretation of the CJEU understanding that the aid

[27] Case C-482/99, *French Republic v Commission;* see to that effect K. C. O'Higgins, Overview of the Jurisprudence in State Aid Cases: Substance and Procedure - an Update, European State Aid Law Quarterly, 2011, HeinOnline (http://heinonline.org)

[28] Joined cases C-72/91 and C-73/91, *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG*

[29] Opinion of Advocate General Jacobs delivered on 13 December 2001, *Case C-482/99 French Republic v Commission of the European Communitie*

should provide to the beneficiary a certain advantage, otherwise it will not be considered as a state aid.[30] The CJEU has made it clear that the concept of aid covers not only positive benefits, such as subsidies, but also measures that mitigate the charges an undertaking would normally bear, such as the supply of goods or services at a preferential rate, a reduction in social security contributions or tax exemptions.[31] A measure will, nonetheless, be classified as aid even if it benefits the whole range of undertakings, as in general export aid, though by the way of contrast aid for general infrastructure will not normally constitute aid within Article 107 of TFEU.[32]

Aid may be selective in the light of that provision even where it concerns the whole economic sector.[33] The Court has consistently held that the definition of State aid does not include national measures introducing a differentiation between undertakings when it arises from the nature and structure of the system of charges of which they are a part. As a rule, where that is the case, the measure at issue cannot be considered to be selective even if it gives an advantage to the undertakings that are able to benefit from it.[34]

It follows, that the application of Article 107(1) of the Treaty only requires it to be determined whether under a particular statutory scheme a State measure is such as to favour certain undertakings or the production of certain goods' over others which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question. And if so, the measure satisfies the condition of selectivity which defines State aid as laid down by that provision.[35] The fact that the number of undertakings able to claim entitlement under the measure at issue is very large, the same as the fact that they belong to different sectors of activity, is not sufficient to call into question its selective nature and therefore, to rule out its classification as State aid.[36]

However, the court has established an exception for selectivity regarding public undertakings. As it was pointed out in Altmark judgement, a selective economic advantage is not considered and that compensation granted by the State or through State resources to undertakings in consideration to public service obligations imposed on them does not confer such an advantage on

[30] See also to that effect F. De Cecco, The Many Meanings of Competition in EC State Aid Law, 9 Cambridge Y.B. Eur. Legal Stud. 111 2006-2007, HeinOnline (http://heinonline.org)
[31] P.Craig and G. De Burca, EU LAW: Text, Cases, and Materials, Fifth edition, Oxford University Press,2011, p. 1088
[32] Ibid
[33] Case C-75/97, *Belgium* v *Commission*, paragraph 33; Case 248/84, *Federal Republic of Germany v Commission*; Case C-148/04, *Unicredito Italiano SpA v. Agenzia delle Entrate, Ufficio Genova 1*
[34] Case C-409/00, *Spain v Commission*; Joined Cases C-72/91 and C-73/91, *Sloman Neptun*, paragraph 21
[35] Case C-143/99, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 41; Case C-200/97, *Ecotrade*, paragraph 41; Case C-75/97, *Belgium* v *Commission*, paragraph 26; Case C-409/00, *Spain v. Commission*
[36] Case C-75/97, *Belgium* v *Commission*, paragraph 32; Case C-143/94, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 48

the undertakings concerned, and hence does not constitute State Aid within the meaning of Article 107(1) TFEU, provided four conditions are satisfied[37]:

– The first: the undertaking recipient must actually have public service clearly defined obligations to discharge. In the main proceedings the national court will therefore have to examine whether the public service obligations are clear according to the national legislation and/or the licences at issue in the main proceedings.

– The second: the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the undertaking recipient over competing undertakings.

– The third: the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the undertaking recipient is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking competitive position.

– The fourth: whether the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

Therefore, the selectivity test is strictly applied to all undertakings with some exceptions for undertakings providing public services. However, both Commission and CJEU are strictly imposing test of selectivity and interpreting it narrowly. Thus, the Author points out, that even for the undertakings providing public services it is not easy to comply with the requirements of the test and not complying with at least one of the criteria provided above, constitutes that a certain measure is considered as state aid under Article 107 TFEU. However, from the point of view that it is an exception for selectivity regarding public undertakings, it is a good position of the Court not to interpret such exception in a broad way and to leave it only for strictly exceptional situations.

[37] Case C-280/00 , *Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 87-88; Commission Decision of 30 May 2012 on Retroactive compensation of SIMET SpA for public transport services provided between 1987 and 2003, SA.33037 (C/2012) – Italy; Case 30/03, Judgement of the Constitutional Court of the Republic of Lithuania, 21.12.2006, Constitutionality of the Law on Lithuanian National Radio and Television

1.1.3. Effect on trade between the Member States

Since early decisions in the field of state aid, the CJEU pointed out that Article 107(1) TFEU does not distinguish between the measures of state intervention concerned by references to their causes or aims but defines them in relation to their effects.[38] Such CJEU interpretation emphasized the effect on trade between the Member States which can be caused by the state aid.

As it was mentioned above, Article 107(1) TFEU prohibits aid which affects trade between Member States and which distorts or threatens to distort competition. In the assessment of those two conditions the Commission is required. Its duty is not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted but only to examine whether that aid is liable to affect such trade and distort competition.[39] The result is that aid must be found to be incompatible with the internal market if it has or is liable to have an effect on intra-Community trade and to distort competition within such a trade. [40] Richard Plender QC explains, that plainly it is unnecessary to demonstrate an actual effect on intra-Community trade as the foundation of the Commission power to determine whether it is compatible with the common market.[41] It is required to have a propensity to affect trade between Member States and this denotes not a hypothetical conjecture but a foreseeable prospect.[42] As in one of the cases CJEU made a decision that it was thus reasonably foreseeable that Tubemeuse (the undertaking) would redirect its activities towards the internal Community market.[43] According to this, it can be concluded that the wording of Article 107(1) in regards of effect on trade should be interpreted in a broad way. By this the EU Commission and CJEU is not obliged only to constitute post factum effects, but only to decide whether the effect will definitely arise in the future. This interpretation not even gives a chance to stop the negative effect on trade before it is already done, but also provides a possibility for EU Commission to protect EU law more efficiently.

In Philip Morris Holland's B.V. case the court decided that *"<...> the aid which the Netherlands Government proposed to grant was for an undertaking organized for international trade and is proved by the high percentage of its production which it intends to export to other Member states. The aid in question was to help to enlarge its production capacity and consequently to increase its capacity to maintain the flow of trade including that between Member States.<...> the aid is said to have reduced the cost of converting the production facilities and has thereby given*

[38] Case 173/73, *Italy v. Commission*
[39] Case C-372/97, *Italy* v *Commission*, paragraph 44; Case C-148/04, *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1*
[40] Case C-148/04, *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1*
[41] Q.C. Richard Plender, The Law of State Aid in the European Union, Definition of Aid, Oxford University Press, 2004, p.32
[42] Ibid
[43] Case C-142/87, *Belgium v. Commission*

the applicant a competitive advantage over manufacturers who have completed or intend to complete at their own expense a similar increase in the production capacity of their plant. <...> aid would be likely to affect trade between Member States and would threaten to distort competition between undertakings established in different Member States."[44] In this case it was defined by the CJEU that when the aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid.[45]

Moreover, in the case Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova, the court pointed out that the tax reduction strengthens the position of the beneficiary undertakings in relation to other undertakings active in intra-Community trade and it is not necessary that the beneficiary undertaking itself be involved in intra-Community trade.[46] The aid granted by a Member State to an undertaking may help to maintain or increase domestic activity with the result that undertakings established in other Member States have less chance for penetrating the market of the Member State concerned.[47] In addition, the CJEU found that the strengthening of an undertaking which until then was not involved in the intra-Community trade may place that undertaking in a position which enables it to penetrate the market of another Member State[48].

Generally, the court in its decisions showed that the effect on the trade of the Member States can be made in a different ways. In case Italian Republic v Commission**,** where the partial reduction in social charges in textile industry was made, the CJEU made a decision that when the Italian textile industry is in competition with textile undertakings in other Member states, as is shown by the substantial and growing volume of Italian textile exports to other Member States of the common, the modification of production costs in the Italian textile industry by the reduction of the social charges in question necessarily affects trade between the members states.[49] Anotehr example can be given in case Kingdom of Belgium v Commission, where an undertaking to which the aid was granted exported 90% of its production to non-member countries. According to this fact, Belgium Government argued that the aid cannot be constituted as having an effect on the trade of the Member States because the undertaking mostly serves the Soviet market. Nevertheless, the court pointed out that regardless of whether the aid may be regarded as export aid does not exclude

[44] Case 730/79, *Philip Morris* v *Commission*
[45] Case 730/79, *Philip Morris* v *Commission*, paragraph 11; Case C-53/00, *Ferring*, paragraph 21; Case C-372/97, *Italy* v *Commission*
[46] Case C-148/04, *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1*
[47] Case C-310/99, *Italy* v *Commission*, paragraph 84
[48] Case C-148/04, *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1*
[49] Case C-179/73, *Italian Republic v Commission*

the application of Articles 107 TFEU.[50] The court held that even if an undertaking is exporting most of its production it still may affect the trade between the Member States.

The requirement of effect on trade may be regarded as entailing a jurisdictional criterion for the application of Article 107(1) TFEU.[51] According to C. Quigley, where aid benefits only products which are not subject to any competition or which not the subjects of inter-State trade are or where the trade of a product is affected only at a purely national level the measure will not fall within the scope of Article 107(1) TFEU.[52] However, other authors point out that the fact that a beneficiary operates only locally is not sufficient to exclude any effect on intra-Community trade.[53] In Altmark case the court held that it must be observed, first, that it is not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may none the less have an effect on trade between Member States and that the condition for the application of Article 107(1) of the Treaty that the aid must be such as to affect trade between Member States does not depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned.[54] On the other hand, if a measure effectively benefits only a local heritage centre trade between Member States is not affected and the measure is considered not to constitute aid as the Commission held in the Brighton Pier case.[55] In addition, the important position of the Court is that there is no threshold or percentage below which it may be considered that trade between Member States is not affected and even the relatively small amount of aid or the relatively small part of the undertaking which it receives does not exclude the possibility that trade between Member States might be affected[56]. In Author`s opinion such position of the Court leads to a conclusions that there are no guidelines what can be considered as effect on trade between Member State and in differs respectively to a certain situation.

1.1.4. Distorts or threatens to distort competition

Another condition laid down in the Article 107(1) TFEU is that the aid has to distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. In CJEU decisions this condition is usually related to the condition of affections on trade between Member States which was analysed above. Despite the fact that often these two criteria are

[50] Case C-142/87, Belgium v. Commission
[51] C. Quigley, European State Aid Law and Policy, p. 55
[52] Ibid
[53] M. Sanchez-Rydelski, The EC State Aid Regime-Distortive Effects of State Aid on Competition and Trade , p. 49
[54] Case C-280/00 , *Altmark Trans and Regierungspräsidium Magdeburg*
[55] M. Sanchez-Rydelski, The EC State Aid Regime-Distortive Effects of State Aid on Competition and Trade , p. 49
[56] Joined Cases C-278/92 to C-280/92, Spain v. Commission; Case C-280/00 , *Altmark Trans and Regierungspräsidium Magdeburg*

interpreted together, in the further work some feature of distortion or threaten to distort competition in the context of restriction to provide aid will be analysed.

As it was discussed previously, it is not required to prove that the effect on trade between Member States has already happened, it is enough to prove that the effect is reasonably foreseeable and will affect the trade in the future. The court has the same opinion regarding the distortion of competition. As the court held in one of its decisions, the Commission is not required to demonstrate the real effect of illegal aid on competition and trade between Member States, therefore Article 107(1) of the Treaty declares not only aid which distorts competition to be incompatible with the common market but also aid which 'threatens' to do so.[57] However, in another decision the court pointed out that even if in certain cases the very circumstances in which the aid is granted are sufficient to show that the aid is capable of affecting trade between Member States and of distorting or threatening to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision.[58]. The latter decision shows that even though it is not necessary to prove that there is a distortion of competition, it still has to be proved that the real threaten to distort competition exists by providing facts why the aid may threaten to distort the competition.

As C. Quigley states, establishing a distortion of competition presupposes, where necessary, the correct identification of the relevant product market and the relevant geographic market. However, the relevant market must be identified, that does not necessarily impose on the Commission an obligation to define the market in detail or to analyse its structure and the ensuing competitive relationship.[59] As the examples of such arguments the author takes Philip Moris v Commission case, where the Commission refused to allow the grant of investment aid to the major tobacco manufacturer in the Netherlands. It was argued that the Commission should, by analogy with articles 101 and 102 TFEU, have identified the relevant market and the patterns of trade between competitors in order to determine how far the aid in question may affect relations between competitors.[60] The court in this case stated that when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade the latter must be regarded as affected by that aid.[61] This decision implicitly identified the market as being the cigarettes market in which Phillip Morris competed with other undertakings.[62] Other similar to Phillip Morris case examples can be found in the decisions of CJEU. Therefore, despite the above mentioned example and partially disagreeing with the above statement of C. Quigley, it should be

[57] Case T-35/99, *Keller SpA and Keller Meccanica SpA v. Commission*
[58] Joined Cases 296 and 318/82, *Kingdom of the Netherlands and Leeuwarder Papierwarenfabriek BV v. Commission*
[59] C. Quigley, European State Aid Law and Policy, p. 51-52
[60] Ibid
[61] Case 730/79, *Phillip Morris v. Commission*
[62] C. Quigley, European State Aid Law and Policy, p. 52

added that such a correct identification of the relevant product market and the relevant geographic market could only strengthen the position of the Commission and to supplement the totality of the facts. In the Author`s opinion, it should not become the regular instrument for approval of distortion of competition because it not necessarily would aggravate the Commission`s substantiation.

1.2. Derogations from general restriction to provide state aid

In Article 107(1) TFEU a general restriction to provide state aid is established. However, the general restriction is not an absolute. As it was mentioned above, the state aid must comply with four main conditions to be considered as unlawful state aid which is incompatible with the internal market. If the aid does not fulfil all the requirements it will be considered as lawful. As C. Quigley states that, although State aid is recognised as being incompatible with the common market because it constitutes an obstacle to its essential aim of rational distribution of production, the prohibition in Article 107(1) TFEU itself contains the provision that aid is incompatible as provided in the TFEU.[63] As the author continuous, it is incompatible to the extent that nothing is provided to the contrary.[64] For that reason, Article 107(1), despite the general restriction, consists of two more parts which state contrary to the first paragraph provided criteria when the aid shall be compatible with the internal market or when it may be considered to be compatible with the internal market. In the Author`s opinion, it is a proportional way to establish institution of state aid in a such kind of structure of Article 107 TFEU by giving not only general restriction, but at the same article providing general exceptions. Despite the fact that by analysing the criteria of unlawful state aid, usually various and different types of examples when the state aid makes a negative effect on common market are found, in a variety of situations the aid may have a positive effect. According to this it would be not efficient to restrict the aid absolutely. But, as the court stated in SIDE v Commission case according to established case-law, exceptions to the general rule that State aid is incompatible with the common market, laid down in Article 107 TFEU, must be interpreted strictly and such strict interpretation also requires that a derogation concerning State aid must be limited in its application to the period after it became effective, at the very least where the aid in question has already been disbursed.[65] Agreeing with such position of the Court, the Author points out that the exceptions laid down by the Article 107 TFEU must be left strictly as exceptions. However, application of the narrow interpretation of exceptions laid down in Article 107 TFEU will create

[63] C. Quigley, European State Aid Law and Policy, p. 124
[64] Ibid
[65] Joined Cases C-280/99 P to C-282/99 P, *Moccia Irme and Others v Commission*, paragraph 40; Case T-150/95, *UK Steel Association v Commission*, paragraph 114; Case T-384/04, *RB Square Holdings Spain, SL v Office for Harmonisation in the Internal Market*

obstacles for positive state aids. Thus, it is important for the Court and Commission to keep in mind that in some exceptional situations, an aid can make a positive effect for the whole internal market and that the strict interpretation should not limit aid which falls within exceptional situations and grants positive effect.

1.2.1. Provision of state aid under Article 107(2)

One of the possibilities when the aid can be granted lawfully is established in Article 107(2) TFEU. It states that the aid shall be compatible with the internal market when it is:

(a) the aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) the aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) the aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such an aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council acting on a proposal from the Commission may adopt a decision repealing this point.“[66]

As the word “shall“ is used in Article 107(2) these are sometimes referred to as the automatic exemptions, meaning that the Commission has no margin of discretion to decide whether or not to approve the aid. However, this is slightly misleading as the Commission still has to verify that the conditions laid down in the Treaty are met. Thus, for example, in the case concerning Article 107(2)(b), the Commission has to verify that the event concerned was indeed a natural disaster or an exceptional occurrence, that the event caused the damage and that the aid does not exceed what is necessary to make good the damage.[67]

According to Article 107(2)(a) TFEU, aid having a social character, granted to individual consumers, provided that this aid is grated without discrimination related to the origin of the products concerned, is compatible with internal market.[68] The aid, under this derogation, must have a social character, i.e. it must, in principle, only cover specific categories of passengers travelling on a route, such as children, handicapped persons or low income people, exceptionally, where the route concerned links an unprivileged region, mainly islands, the aid could cover the entire population of

[66] TFEU, Article 107(2)
[67] European Commission, State Aid Internal DG Competition working documents on procedures for the application of Articles 107 and 108 TFEU: Manual of Procedures, Luxembourg, Publications Office of the European Union, 2013
[68] TFEU, Article 107(2)(a)

the region.[69] It comes expressly from the wording of provision which also emphasises that such an aid should be granted without discrimination. It means that if an aid is granted e.g. for a certain food product, it should cover all the types of that product from all Member States without any exception to one or few producers. The notion of discrimination in this provision must be taken to refer to the origin or the supplier of the products concerned, not to measures distinguishing between that product and competing products.[70] This limits the use of this provision, since most state aid is directed exclusively to a particular firm within the Member State providing the aid.[71]

Another derogation from the general restriction to provide state aid is established in Article 107(2)(b) TFEU, which states that aid to make good the damage caused by natural disasters or exceptional occurrences shall be considered as compatible with internal market.[72] The Court has held that only the damage caused by natural disasters or exceptional occurrences may be compensated for under that provision.[73] The Court also emphasised that there must be a direct link between the damage caused by the exceptional occurrence and the State aid and that an as precise as possible assessment must be made of the damage suffered by the producers concerned.[74] In addition, the aid may cover both the cost of repairing damage as well as compensation for economic loss. However, the notion of exceptional occurrences does not extend to purely financial loss caused by commercial decisions of economic operators, whatever the motive is.[75]

Provision of Article 107(2) (c) TFEU is directly addressed to historical events in Germany. It states that aid shall be compatible with the internal market which is granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany; as such an aid is required in order to compensate for the economic disadvantages caused by that division.[76] This provision also includes a permition for the Council to adopt a decision repealing this provision under a proposal of the Commission after five years after the Lisbon Treaty will come into force.[77] Whereas the Treaty of Lisbon entered into force on 1 December 2009, the Commission may propose to repeal this provision after 1 December 2014.

[69] C. Quigley, European State Aid Law and Policy, p. 129
[70] C. Quigley, European State Aid Law and Policy, p. 128
[71] P.Craig and G. De Burca, EU LAW: Text, Cases, and Materials, p.1093
[72] TFEU, Article 107(2)(b)
[73] Joined cases C-346/03 and C-529/03, *Atzeni* and *Others* v *Regione autonoma della Sardegna*
[74] Case C-73/03, *Spain v Commission*;
[75] C. Quigley, European State Aid Law and Policy, p.130
[76] TFEU, Article 107(2)(c)
[77] Ibid

1.2.1. Provision of state aid under Article 107(3)

Pursuant to Article 107(3) TFEU, the following aid may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment and of the regions referred to in Article 349 TFEU in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such an aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) other categories of aid as may be specified by decision of the Council on a proposal from the Commission.[78]

The exemptions laid down in Article 107(3) TFEU are discretionary in nature. In contrast to the Courts strict control of Commission`s activities under Article 107(1) TFEU, there is a significant discretion the Commission enjoys in granting a derogation from Article 107(1) TFEU, particularly on the basis of Article 107(3) TFEU.[79] In exercising these wide discretionary powers the Commission balances the necessity and the proportionality of the aid measure in achieving a Community objective versus the distortion of competition brought about by it. [80] To publicise its approach and the actual criteria used in this assessment the Commission has issued a number of documents based on Article 107(3) TFEU in the form of regulations, communications, notices, frameworks, guidelines and letters to Member States with regard to various categories of aid based on its form, purpose, the size of the undertakings, their location or the sector of the economy.[81]

Pursuant to Article 107(3)(a) TFEU, an aid may be considered to be compatible with the internal market which is provided to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions

[78] TFEU, Article 107(3)
[79] J. Basedow, W. Wurmnest, Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid, Kluwer Law International, 2011, p. 220
[80] European Commission, State Aid Internal DG Competition working documents on procedures for the application of Articles 107 and 108 TFEU: Manual of Procedures, Luxembourg, Publications Office of the European Union, 2011, p. 11
[81] Ibid

referred to in Article 349 TFEU, in view of their structural, economic and social situation.[82] According to the case law, it can be stated that an aid under the Article 107(3)(a) TFEU may be given only for very damaged areas. As the court held in Philip Morris Holland BV v Commission case, "*<…> the Commission has with good reason assessed the standard of living and serious under-employment in the Bergen-Op-Zoom area, not with reference to the national average in the Netherlands but in relation to the Community level".*[83] With such interpretation the Court clearly stated that for the need of state aid under Article 107(3)(a) TFEU, the problem of the certain region must be valued in the context of the whole EU level.

Article 107(3)(b) TFEU establishes that aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State may be considered as compatible with internal market.[84] In a case the court stated that the Commission has based its policy with regard to aid in the view that a project may not be described as being of common European interest for the purposes of Article 107(3)(b) TFEU unless it forms part of a transnational European programme supported jointly by a number of Governments of the Member States, or arises from concerted action by a number of Member States to combat a common threat such as environmental pollution.[85]

The aid which is provided for the purpose to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest may be also considered as compatible with internal market under the Article 107(3)(c) TFEU.[86] In a case Germany v. Commission the court held that when a programme of regional aid falls under Article 107(1) of the Treaty it must be determined to what extent it may fall within one of the exceptions in Article 107(3)(a) and (c): *"In that respect the use of the words "abnormally" and "serious" in the exemption contained in Article 107(3)(a) shows that it concerns only areas where the economic situation is extremely unfavourable in relation to the community as a whole. The exemption in Article 107(3)(c), on the other hand, is wider in scope inasmuch as it permits the development of certain areas without being restricted by the economic conditions laid down in Article 107(3)(a), provided such aid "does bit adversely affect trading conditions to an extent contrary to the common interest". That provision gives the Commission*

[82] TFEU, Article 107(3)(a); Article 349 TFEU states that taking account of the structural social and economic situation of Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the Treaties to those regions, including common policies.

[83] Case 730/79, *Philip Morris Holland BV v Commission of the European Communities*

[84] TFEU, Article 107(3)(b)

[85] Joined cases 62/87 and 72/87, *Exécutif régional wallon and SA Glaverbel v Commission*

[86] TFEU, Article 107(3)(c)

power to authorize aid intended to further the economic development of areas of a Member State which are disadvantaged in relation to the national average".[87]

Under Article 107(3)(d) TFEU an aid may be considered as compatible with internal market if it is granted to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.[88] The cultural State aid derogation, by accommodating national or regional cultural precepts in State aid evaluation, attempts to strike a balance between the fundamentals of the common market and domestic cultural prerogatives and it serves precisely to allow Member States the space required to effectively pursue their cultural strategies.[89] Article 107(3)(e) states that other categories of aid as may be specified by decision of the Council on a proposal from the Commission.[90] In any event, Article 107(3)(e) TFEU does not give an automatic right to the Council to permit other categories of aid as it sees fit, thus, since the Council can only take such a decision by acting on proposal from the Commission, the latter retains the initiative in determining whether there is a need or desire for any further categories to be declared.[91]

[87] Case 248/84, Germany v. Commission
[88] TFEU, Article 107(3)(d)
[89] Evangelia Psychogiopoulou, EC State Aid Control and Cultural Justifications, Legal Issues of Economic Integration 33(1): 3-28, 2006, p. 4, HeinOnline (http://heinonline.org)
[90] TFEU, Article 107(3)(e)
[91] C. Quigley, European State Aid Law and Policy, p. 144

2. SUPERVISORY CONTROL OF STATE AID

Pursuant to Article 108 TFEU, the Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States, furthermore the Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid.[92] Thus, the Commission has power of supervisory control during the whole existence of aid: from the consideration whether the planned aid is compatible with internal market until it is used properly according to the notice approved by the Commission. Generally, the Commission's State aid control is based on the principle of compulsory prior notification of all new aid measures (schemes or individual aids) to the Commission.[93] This is the main rule which is compulsory for all the Member States. According to the rule, the Member State concerned may not put its aid measure into effect until the Commission has reached a decision.[94] Thus, as it was mentioned before, the Commission`s control does not stop after notification about new aid. The Commission has power to review the existing aid, to supervise alterations of existing aid or how the aid is being used. The main powers of Commission`s supervisory control are laid down in the Treaty, however detailed procedures are established in the Regulation 659/1999 (also known as Procedural Regulation) which after adoption in 1999 was few tines amended and which does not require further implementation, thus is directly applicable in all Member States. Therefore, further in this work, the main supervisory functions of the Commission related to the state aid will be analysed.

2.1. Review of existing aid

The definition of existing aid is established in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union Article 1(b).[95] As it was stated above, Procedural Regulation provides detailed procedures of implementation of Article 108 TFEU by establishing main definitions and defining in detail procedures which might or must be taken by the Commission or Member States. However, despite the fact that Procedural Regulation establishes the definition of existing aid, definitions and interpretation narrowing what should be considered as existing state aid

[92] TFEU, Article 108
[93] European Commission, State Aid Internal DG Competition working documents on procedures for the application of Articles 107 and 108 TFEU: Manual of Procedures, Luxembourg, Publications Office of the European Union, 2013
[94] Ibid
[95] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union

can be found in the case law. According to this, many examples of different types of existing aid are found either in Procedural Regulation or in the case law:

– Aid which existed before the entry into force of the Treaty;

– Aid which has been given the green light under Article 107(3). Individual disbursement of aid pursuant to a general aid scheme that has been approved by the Commission courts as existing aid, provided that it comes properly within the general scheme;

– Aid which has been notified to the Commission pursuant to Article 108(3), where the Commission has taken no action within the requisite time;

– Aid that is not recoverably because the limitation period has expired;

– Aid deemed to be existing aid because it did not initially constitute aid, and only became so due to the evolution of the internal market. Where certain measures become aid following the liberalization of an activity by EU law, such measures are considered existing aid after the date fixed for the liberalization.[96]

Pursuant to Articles 17 – 19 of Procedural Regulation, the Commission has a right to review the existing state aid and even if it is necessary to start certain procedures. Review of existing aid first of all includes requiring all necessary information from the Member State regarding certain state aid for the review.[97] Usually such necessity arises when the Commission gets information that some aid might be no longer compatible or that there are other derogations from general obligations. Where the Commission considers that an existing aid scheme is not, or is no longer, compatible with the common market, it shall inform the Member State concerned of its preliminary view and give the Member State concerned the opportunity to submit its comments within a period of one month.[98] It should be noted that the procedure of the Commission and Member State communication on this level is only bilateral and no other institutions are involved and the Commission at this stage can already ask the Member State for formal commitments to abandon/amend the scheme without waiting for formal appropriate measure.[99] In the Author`s opinion it is questionable whether the Member State acting alone in communication with the Commission is capable to provide necessary and appropriate information regarding compatibility of certain state aid. According to the fact that the provided information may be one of the main factors deciding whether the aid is still compatible or not, Member State being the only responsible entity

[96] P.Craig and G. De Burca, EU LAW: Text, Cases, and Materials, p. 1100

[97] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union; see also to that effect P. R. Maccanico, Commentary of State Aid Review of Multinational Tax Regimes: A Comprehensive Illustration of Main State Aid Cases, 2007 Eur. St. Aid L.Q. 25 2007, HeinOnline (http://heinonline.org), Tue Oct 1 13:49:25 2013

[98] Ibid

[99] European Commission, State Aid Internal DG Competition working documents on procedures for the application of Articles 107 and 108 TFEU: Manual of Procedures, Luxembourg, Publications Office of the European Union, 2013, p.26

to provide certain information is taking a risk that incorrect or incomplete information may be submitted. While, certain responsible authorities are operating on behalf of respective Member State, the beneficiary of state aid has to rely on the trust that such responsible authorities will take all necessary actions and do not have possibility to participate directly in such communication. It could be presumed that the responsible authorities of Member State are asking for special and detailed information the beneficiary and other related parties. However, there is no regulation providing legal rules of this procedure.

If the Commission examines the comments from the Member State and decides not to proceed with the case, the Member State is informed by a service letter that no further action will be taken since:

-the preliminary doubts regarding the compatibility of the scheme no longer exist;

-the Member State committed itself to phase out/amend the scheme within a certain time.[100]

If the Commission considers that an existing aid is incompatible with the common market it must first propose appropriate measures to the Member State concerned.[101] If the Member State does not accept the appropriate measures, the Commission must then open the procedure. Since the proposal for appropriate measures must in any case be approved by the Commission, the proposal could be accompanied by a request for an empowerment empowering the Commissioner either to accept the reply from the Member State, or, if no satisfactory reply is received, to initiate 108(2) proceedings.[102] Where the Commission, in the light of the information submitted by the Member State, concludes that the existing aid scheme is not, or is no longer, compatible with the common market, it shall issue a recommendation proposing appropriate measures to the Member State concerned.[103] The recommendation may propose, in particular:

(a) substantive amendment of the aid scheme, or

(b) introduction of procedural requirements, or

(c) abolition of the aid scheme.[104]

Where the Member State concerned accepts the proposed measures and informs the Commission thereof, the Commission shall record that finding and inform the Member State and then the Member State shall be bound by its acceptance to implement the appropriate measures.[105]

[100] Ibid
[101] European Commission, State Aid Internal DG Competition working documents on procedures for the application of Articles 107 and 108 TFEU: Manual of Procedures, Luxembourg, Publications Office of the European Union, 2013, p.26
[102] Ibid
[103] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union
[104] Ibid
[105] Ibid

If the Member State does not accept the proposals and the Commission, after having taken into account the arguments of the Member State, still finds that those measures proposed are necessary, it then initiates 108(2) proceedings. In case of conditional acceptance by the Member State, reservations or limitation of acceptance to a part of the appropriate measures, the Commission must initiate 108(2) proceedings on the measures not accepted by the Member State. This procedure does not have suspensive effect. Should the Commission find the scheme to be incompatible with the common market, it will require the Member state to either abolish it or to amend it within a stated period of time.[106]

According to what was state above, the effective communication between the Commission and Member States is highly important. While the system of examination procedures of existing aid is complex and each of the procedure has long term, not efficient acts of each of the parties may cause additional time. In addition, it should be noted that the negative answer to the question of compatibility of existing aid will cause the recovery of such state aid. Therefore, the Member States should properly communicate with the Commission and perform its obligations in order to protect the existing aid which is still compatible with internal market or to protect internal market from the aid which is no more compatible with internal market and may cause a negative effect.

2.2. Notification of new aid

Pursuant to Article 108 TFEU, the Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.[107] The Commission's State aid control is based on the principle of compulsory prior notification of all new aid measures (schemes or individual aids) to the Commission.[108] The definition of new aid can be found in Procedural Regulation, which states that new aid means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid.[109] According to such definition, different types of aid can be found:

– New aid schemes;

[106] European Commission, State Aid Internal DG Competition working documents on procedures for the application of Articles 107 and 108 TFEU: Manual of Procedures, Luxembourg, Publications Office of the European Union, 2013, p.27-28
[107] TFEU, Article 108 (3)
[108] European Commission, State Aid Internal DG Competition working documents on procedures for the application of Articles 107 and 108 TFEU: Manual of Procedures, Luxembourg, Publications Office of the European Union, 2013
[109] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union

– A new individual award of aid which does not come within previously notified aid scheme;

– An individual award of aid which does fall within previously notified scheme, but which is required by the Commission to be individually approved prior to being put into effect;

– Any alteration to existing aid or aid scheme.[110]

Despite the general requirement to notify about new state which is established in the Treaty, Article 2(1) of the Procedural Regulation states that any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned.[111] The discussable question is what should be considered as sufficient time to notify. In the Author`s opinion, it should be considered that any time before the aid is granted may be kept as sufficient. The most important fact should be that the notification should be made before the aid is granted, otherwise it would constitute that the aid was already granted unlawfully.

2.3. Misuse of aid

Commission`s supervisory control is also related to misused aid. Procedural Regulation Article 1(g) defines misuse of aid as aid used by the beneficiary in contravention of a decision of the Commission which states that aid is compatible with the internal market.[112] The definition of "misuse of aid" can be understood in a very broad way. Basically, "misuse" includes all the deviations from the aid which was considered by the Commission as compatible with the internal market. In decision 1999/580/ECSC the Commission concluded that "In cases where the Commission has expressly authorized aid for a special purpose that was initially notified, the Member State concerned is not entitled to use the amounts covered by the Decision for any other purpose by simply arguing that the Commission could have ascertained this intention from information provided previously."[113]. According to this, the Commission stated that the aid is considered as misused if it is used for not the same purpose as it was notified, but for different. For example, the Commission took a decision that the aid was used improperly and should be considered as misuse of aid because the aid was used to cover costs of production which led to sell production in more favourable prices than other producers of the same production and created a

[110] C. Quigley, European State Aid Law and Policy, p. 261
[111] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union
[112] Ibid
[113] 1999/580/ECSC: Commission Decision of 11 November 1998 concerning aid granted by Germany to ESF Elbestahlwerk Feralpi GmbH, Riesa, Saxony, *Official Journal L 220 , 20/08/1999 P. 0028 - 0032*

discriminatory situation.[114] It is also considered to be as a misuse of aid where the real beneficiary of aid is not the same as the recipient of aid.[115] Where the Commission decides that the aid was misused in its decision it also provides that Member State should recover the aid which was misused and is considered as unlawful.

2.4. Unlawful aid

Pursuant to Article 1(f) unlawful aid means a new aid which is put into effect in contravention of Article 108(3) of the Treaty.[116] Such definition also includes aid which is unnotified, aid which is notified to the Commission but is put into effect before the Commission or the Council has come to a decision on its compatibility with the Treaty, and aid which exceeds the provisions which have been authorized.[117]

The main differences between the treatment of notified and unlawful aid result from the fact that the aid has already been put into effect.[118] Since unlawfulness refers to procedural issues only (non-notification), it is still possible that the measure may be assessed as compatible and the aid therefore be approved.[119] However, if it is decided that the aid is unlawful, the recovery procedure, which will be analysed in the further work, will begin.

In addition, it should be borne in mind that, under Article 20(2) of Procedural Regulation, any interested party may inform the Commission of any alleged unlawful aid and of any alleged misuse of aid.[120] With regard to the possible definitive and actionable nature of measures taken by the Commission in the procedure for reviewing State aid, it should be noted, first, that the Commission must, under Article 10(1) of Procedural Regulation, carry out an examination where it has in its possession information from whatever source regarding allegedly unlawful aid. The examination of a complaint, on the basis of that provision, gives rise to the initiation of the preliminary examination stage under Article 108(3) TFEU and obliges the Commission to examine, immediately, the possible existence of aid and its compatibility with the common

[114] Commission decision of 29 July 1998 on aid granted by Germany to the companies Sophia Jacoba GmbH and Preussag Anthrazit GmbH for 1996 and 1997, *Official Journal L 060 , 09/03/1999 P. 0074 - 0082*
[115] Commission Decision of 21 June 2000 on State aid granted by Germany to CDA Compact Disc Albrechts GmbH, *Official Journal L 318 , 16/12/2000 P. 0062 - 0078*
[116] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union
[117] C. Quigley, European State Aid Law and Policy, p. 391-392
[118] European Commission, State Aid Internal DG Competition working documents on procedures for the application of Articles 107 and 108 TFEU: Manual of Procedures, Luxembourg, Publications Office of the European Union, 2013, p. 31
[119] European Commission, State Aid Internal DG Competition working documents on procedures for the application of Articles 107 and 108 TFEU: Manual of Procedures, Luxembourg, Publications Office of the European Union, 2013, p. 31
[120] Case C-322/09 P, *NDSHT* v *Commission*, paragraph 48

market.[121]Pursuant to what was stated, the Author points out, that there is liberal regulation from a point of view that the Commission should react to any information from any source. At the one hand it creates freely available notification for everybody about a certain state aid which might be unlawful and provides high possibility to protect and even avoid the internal market from distortion. At the other hand, taking for example a hypothetical situation when the competitors of a certain beneficiary may inform with misleading information about a state aid, it could be concluded that the beneficiaries and other related parties are being in a much more unfavourable position because of the Commission`s powers to carry out an examination where it has in its possession information from whatever source regarding allegedly unlawful aid.

2.5. Exceptions

As most of the obligatory rules have exceptions, some of them can be found in application on obligation under Article 108(3) TFEU. Council Regulation No 994/98 of 7 May 1998 established that the Commission should be enabled to declare by means of regulations, in areas where the Commission has sufficient experience to define general compatibility criteria, that certain categories of aid are compatible with the common market pursuant to one or more of the provisions of Article 107(2) and (3) of the Treaty and are exempted from the procedure provided for in Article 108(3).[122] Thus, by such provisions the Council provided the power to the Commission to create certain exceptions in the field of state aid law. The reason to create such exceptions was to streamline the procedures of granting the state aid in some areas.[123] Under the Council Regulation No 994/98 of 7 May 1998, the Commission is able to adopt special regulations and define areas or specific categories of aid which are exceptions from general obligation and notification requirements. Under such Commission regulations, the member states can grant the state aid without prior notification if it fulfils special requirements under certain regulation.

One of the exceptional regulations is Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 107 and 108 of the Treaty (General block exemption Regulation).[124] It defines categories of aids which if fulfil all the relevant conditions are exempted from the notification of obligation. Thus, if the particular aid falls within the scope of General block exemption Regulation it is

[121] Case C-322/09 P, *NDSHT* v *Commission*, paragraph 49; Case C-521/06 P, *Athinaïki Techniki* v *Commission*, paragraph 37

[122] Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid

[123] Ibid

[124] Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), Official Journal L 214 , 09/08/2008 P. 0003 - 0047

considered as compatible with the common market. Another well-known exceptional regulation is Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 107 and 108 of the Treaty to de minimis aid (De minimis Regulation).[125] The purpose of De minimis Regulation is to exempt from notification obligation aids of small amount which presumably cannot distort competition and is compatible with the common market. Thus De minimis Regulation sets out that for the reason to be considered as de minimis and to fall within the exception of notification the aid has to fall condition below:

- The total de minimis aid granted to any one undertaking should not exceed EUR 200,000 over any period of three fiscal years.
- The total de minimis aid granted to any one undertaking active in the road transport sector shall not exceed EUR 100,000 over any period of three fiscal years.[126]

Such possibilities of the Commission to adopt regulations that establish a possibility for the member states to grant the state aid without prior notification if certain conditions have been fulfilled, in the Author`s opinion, should be valued as a positive way in to more simplified aid granting procedures. However, regarding different economic situation of Member States, most of the regulations still establish not equal possibilities for all Member States to grant state aid in a simplified way. In addition, the regulations put too many requirements for the entities of the Member States which would like to use a possibility and advantage of state aid. Therefore, in the Author`s opinion simplifying the requirements of such regulations would also affect positively the number of recoverable unlawful state aid, because more potential beneficiaries of state aid would not have to avoid the notification procedure because of long lasting procedures or other procedural issues that do not have any relation with distortion of competition and internal market.

[125] Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid Official Journal L 379 , 28/12/2006 P. 0005 - 0010

[126] With some exceptions. Please see Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid Official Journal L 379 , 28/12/2006 P. 0005 – 0010.

3. OBLIGATION TO RECOVERL UNLAWFUL STATE AID

The history of the recovery of unlawful state aid has started in the early 1970` with the Court decision in the case Commission v Germany. In this case the court held that the Commission is competent, when it has found that aid is incompatible with the common market, to decide that the state concerned must abolish or alter it, to be of practical effect, this abolition or modification may include an obligation to require repayment of aid granted in breach of the Treaty, so that in the absence of measures for recovery, the Commission may bring the matter before the court.[127] This logical approach of the Court started a new era in the policy of provision of aids. With such decision the Court first time assigned the competence for the Commission to decide to recover aid if it is considered as unlawful. At that time neither primary EU legislation nor secondary defined what is considered as unlawful state aid and how it should be recovered. Therefore, there emerged the necessity to establish the regulation of recovery of unlawful aid in the legislation. According to this fact, in 1999 the Regulation No 659/1999 was adopted which regulates procedural issues of recovery of unlawful aid. After that, some more implementation provisions of recovery of unlawful state aid were established in the Regulation No 794/2004.

As the main purpose of the general restriction to provide state aid is to protect the internal market from negative effect which can be done by aid, the same purpose is lied down in the case law regarding recovery of unlawful state aid. As the court held, by repaying the aid, the recipient forfeits the advantage which had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored.[128] Consequently, one of the main goals of recovery institution is to restore the situation that was before the aid and to protect the internal market. As in the Case C-75/97, Belgium v Commission, the Court held that the Commission will not exceed the bounds of its discretion, recognized by the case-law of the Court[129], if it asks the Member State to recover the sums granted by way of unlawful aid since it is only restoring the previous situation.[130] At the same decision the Court explained that the recovery cannot be considered as a fine or other punishment measures by stating that "since repayment of the aid is meant only to restore the prior legal situation, it cannot in principle be regarded as a sanction"[131]. However, the fact that the Commission was not notified about the new stated, automatically does not mean that the aid should be recovered.

[127]Case 70/72, *Germany v Commission*; see also to that effect L. Hancher EU State Aids, 4th edition, Sweet & Maxwell, 2012, p. 1007-1009
[128] Case C-350/93, *Commission v Italy*, paragraph 22
[129] Case 310/85, *Deufil v Commission*, paragraph 24
[130] Case C-75/97, *Belgium v Commission*, paragraph 66
[131] Case C-75/97, *Belgium v Commission*, paragraph 65

The Commission has no powers to recover the state aid which is absolutely compatible with common market.[132]

3.1. Obligation to recover

Article 14(1) of the Regulation 659/1999 establishes an obligation for Member States to recover unlawful state aid: "Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a 'recovery decision`)"[133]. At the first glance, the Regulation establishes a proportional regulation of the unlawful state aid mechanism – the Commission controls and evaluates whether the State aid is compatible with internal market and Member States have freedom to decide how to recover such state aid and what kind of measures to use. However, the CJEU case law provides some limits to absolute freedom of Member States. Recovery has to be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision.[134] To this effect and in the event of a procedure before national courts, the Member States concerned has to take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to EU law.[135] EU law does not prescribe which procedure the Member State should apply to execute a recovery decision, however, Member States should be aware that the choice and application of a national procedure is subject to the condition that such procedure allows for the immediate and effective execution of the Commission's decision.[136] Unfortunately, neither Regulation, nor other legislation do not define what is considered as immediate and effective, leaving this exclusive right for CJEU. According to such position, the Member States are not only obligated to recover the state aid under their own discretion, but they also are obligated to choose the appropriate measures under the national law which would fulfil the Commission`s decision immediately and effectively.

As the Court held, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less

[132] C. Quigley, European State Aid Law and Policy, p. 417
[133] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, Article 14(1)
[134] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, Article 14(3)
[135] Ibid
[136] Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, *Official Journal C 272 , 15/11/2007 P. 0004 - 0017*

favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)[137]. Moreover, while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection[138].

Such statements of Commission on the Commission`s Notice on the Recovery of Unlawful State Aid put a lot of responsibility and risk on Member States. The Commission gives a lot freedom to apply national law for fulfilling obligation of recovery of unlawful state aid, but at the same time it limits such freedom in quite harsh way by imposing limits expressly established in the Regulation in the broad way.

More generally, Member States should not be able to place any obstacles in the way of carrying out a Commission recovery decision[139]. Consequently, Member State authorities are under an obligation to set aside any provisions of national law, which might impede the immediate execution of the Commission decision[140].

3.2. Undertakings from whom the aid must be recovered

Article 107(1) of TFEU establishes that any aid which is favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States is incompatible with the internal market. According to this TFEU explicitly states to who state aid should be provided in order to be considered as breach of article 107(1) of TFEU. The state aid rules are applicable only if the beneficiary is an "undertaking". As C. Quigley emphasis, state aid must to be granted directly or indirectly to an undertaking for state aid to fall within competition law.[141] EU legal acts do not define what should be considered as an undertaking. Such lack of definition might create some difficulties, because according to different regulations and provisions of legal acts of Member States, the definition of undertaking may differ from state to state. However, in many cases CJEU has defined the concept of undertaking in the context of EU law by giving the main criteria for recognition of an undertaking. The Court has consistently held that, in the context of competition law, the concept of an undertaking covers any entity engaged in an

[137] Case 33/76, *Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, paragraph 5; Case C-453/99, *Courage and Crehan*, paragraph 29; Case C-13/01, *Safalero Srl v Prefetto di Genova*, paragraph 49-50
[138] Joined Cases C-87/90 to C-89/90, *Verholen and Others*, paragraph 24; Case C-13/01, *Safalero Srl v Prefetto di Genova*, paragraph 49-50
[139] Case C-48/71, *Commission v Italy*
[140] Case C-232/05, *Commission v France*
[141] C. Quigley, European State Aid Law and Policy, p. 33

economic activity, regardless of the legal status of the entity or the way in which it is financed.[142] Such definition of an undertaking includes private and public undertakings[143], holding companies[144] and even in some cases non-profit making undertakings[145] as long as they are engaged in an economic activity and comply with the main criteria for consideration as an undertaking established by the case law. Entities that are purely non-profit makings are excluded from the definition of undertakings.[146]In joined cases C-159/91 and C-160/91 the Court held that the sickness funds, and the organizations involved in the management of the public social security system, fulfil an exclusively social function, so their activity is based on the principle of national solidarity and is entirely non-profit-making, therefore the benefits paid are statutory benefits bearing no relation to the amount of the contributions and such activity is not an economic activity. However the limit between exclusion from consideration and recognition as an undertaking should be considered as very narrow and such exclusionary position of the Court should mostly apply to non-profit entities performing strictly just social functions. [147]

Although position of the CJEU in the context of the definition of undertaking creates a broad concept of undertakings, it gives some clarity what could be considered as a beneficiary of state aid. Still the main criteria mentioned above leave a lot of space and freedom for the Court to interpret what can be recognized as an undertaking and the definition of undertaking can be widened according to the certain facts of the particular case.

After solving the issue of recognition what entities can be considered as an undertakings in the context of competition law, the next issue for Member States that arises is to determine the real recipient of the State Aid from which the State Aid should be recovered. As the Court explicitly stated, in order to determine the recipient of State aid, it is necessary to identify the undertakings

[142] Case C-41/90, *Hoefner v Elser*, paragraph 21

[143] Case C-387/92, *Banco Exterior de España v Ayuntamiento de* Valencia, paragraph 11, Case 173/73, *Italy v Commission*, paragraph 26

[144] Case C-222/04, Ministero dell'Economia e delle Finanze. v. Cassa di Risparmio di Firenze SpA and Others, paragraph 113, however in this case the Court held that *"<...> the mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset. On the other hand, an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking."*

[145] Joined Cases C-115/97, C-116/97 and C-117/97, *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen*, the Court held that "<…> the fact that the fund is non-profit-making and the manifestations of solidarity referred to by it and the intervening governments are not sufficient to deprive the sectoral pension fund of its status as an undertaking within the meaning of the competition rules of the Treaty"

[146] Joined Cases C-159/91 and C-160/91, *Christian Poucet v. Assurances Générales de France (AGF) and Caisse Mutuelle Régionale du Languedoc-Roussillon*

[147] Ibid

which have actually benefited from it.[148] The State Aid may not be recovered from the hypothetical beneficiary[149] or from the undertaking which not actually benefited from the State Aid. In a lot of cases it may happened that the official recipient of the State Aid is not the real beneficiary of the State Aid. In such cases it is important to examine which undertakings really benefited from the granted State Aid. According to this, the state aid can be recovered from the beneficiary who was direct or indirect recipient of the state aid.[150]

Usually the obligation to determine the real recipient is left for the Member States. In any way, Member States do not have other options, because the main obligation to recover the State Aid is addressed for the Member States, thus in order to recover the State Aid, firstly Member States have to know the object or in other words the undertaking from which to recover the State Aid. In addition, Member States cannot excuse that they do not have a possibility to recover properly the State Aid because of some difficulties recognising the real beneficiary of State Aid.[151] However, there is no restriction for the Commission to recognise the exact recipient as well. In case C-303/88 the Court rejected arguments of Italy that the uncertain identity of the addressees of the order for recovery is sufficient in itself to make that order unlawful, because the Commission clearly stated in order of recovery that the aid had to be recovered from the undertakings which actually benefited from it and stating clearly that those undertakings were four certain subsidiaries.[152]

3.3. Effective and immediate recovery

Article 14(3) of the Procedural Regulations states that "<...> recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision."[153].

According to this provision Member States should guarantee not only that the recovery of unlawful state aid will be performed without delay, but also points out two very important conditions for Member States: the recovery has to be executed effectively and immediately. Such requirement established in the Procedural Regulation raises a lot of questions for Member States regarding principle of effectiveness and what should be considered as effective and immediate execution.

[148] Case C-457/00, *Belgium v. Commission*, paragraph 55
[149] Case T-196/02, *MTU Friedrichshafen v Commission*
[150] Case T-55/99, *CETM v Commission*
[151] Case C-303/88, *Italy v. Commission*
[152] Ibid
[153] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, Article 14(3)

In case C-232/05 the Commission pointed out that a national procedure which provides for the automatic suspensory effect of actions brought against demands for payment issued in order to recover aid granted does not fulfil criteria of effective and immediate recovery.[154] In the same case the French Government argued that the 'immediate and effective' execution of the Commission's decision does not necessarily mean that the aid must be recovered immediately and that execution signifies that the Member State is to initiate immediately the national procedure which must lead to the recovery of the aid granted.[155] However the Court disagreed with such position of French Government by stating that the 13th recital in the preamble to the Procedural Regulation states that, in cases of unlawful aid which is not compatible with the common market, effective competition should be restored and for this purpose it is necessary that the aid be recovered without delay, therefore the application of national procedures should not therefore impede the restoration of effective competition by preventing the immediate and effective execution of the Commission's decision.[156] To achieve this result, Member States should take all necessary measures ensuring the effectiveness of that decision.[157]

However, the Court did not interpret the principle of effectiveness and just relied on the same arguments that recovery should be performed effectively and immediately. Such court position is understandable, because in the previous case law the Court has already tried to interpret what is considered as effective and immediate, thus in case C-232/05 the Court avoid the broader interpretation by stating that the principle of effectiveness has been already interpreted. In the previous case law, the Court stated that the recovery of aid must take place in accordance with the relevant procedural provisions of national law, subject however to the provision that those provisions are to be applied in such a way that the recovery required by Community law is not rendered practically impossible[158] Still, The interests of the Community must be taken fully into consideration in the application of a provision which requires the various interests involved to be weighed up before a defective administrative measure is withdrawn.[159] In the same case the Court limited Member State`s national legislation by stating that the suspensory effect of actions brought before national courts cannot be considered essential for ensuring effective judicial protection in the light of EU law, such protection is already fully ensured by the means provided by the Treaty, in this case, in particular, the action for annulment under Article 263 TFEU.

[154] Case C-232/05, *Commission v. French Republic*
[155] Ibid
[156] Ibid
[157] Ibid
[158] Case C-142/87, *Belgium v Commission*, paragraph 61; Case C-5/89, *Commission v Germany*, paragraph 12
[159] Case 94/87, *Commission v Germany*, paragraph 12

3.4. Amount of the recoverable aid

The general rule of unlawful state aid recovery is that the state aid must be recovered in a full amount. As it was mentioned before, the Member State to which a decision requiring recovery of illegal aid is addressed is obliged under Article 288 TFEU to take all measures necessary to ensure implementation of that decision.[160] This must result in the actual recovery of the sums owed[161]. Furthermore, it is settled case-law that the obligation on a Member State to abolish aid found by the Commission to be incompatible with the common market is to restore the previous situation on the European Union market[162]. As long as the aid is not recovered, the beneficiary of the aid is able to keep funds deriving from the aid declared incompatible and to benefit from the resulting unfair competitive advantage[163]. According to this, for the purpose to recover the situation that was before the aid was granted, the aid has to be recovered back fully. However, as it was mentioned before, the aids can be granted in a various forms, and because of that sometimes it can create some difficulties in recognising the exact amount of recoverably aid.

In case Spain v Commission the Court exactly stated that, it should be observed that no provision of EU law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the recipient to work out himself, without overmuch difficulty, that amount. [164] At the same case the Court continued that, the Commission may, therefore, legitimately confine itself to declaring that there is an obligation to repay the aid in question and leave it to the national authorities to calculate the exact amount of aid to be repaid where, as in the present case, that calculation requires tax and social security systems, the detailed rules of which are laid down in the applicable national legislative provisions, to be taken into account. [165] By stating that the Commission is not obliged to define the exact amount of an aid which has to be recovered, the Court again opened a black hole in its case law. According to such position all the responsibilities are left for national institutions to exam what kind of amount should be recovered. However, the Court gets rid off the responsibility of the Commission by not only saying that there are no rules in EU law that states the responsibility of the Commission to define the exact amount of recoverable aid, but also by saying that it is also apparent from the case

[160] Case C-209/00, *Commission* v *Germany*, paragraph 31; Case C-404/00, *Commission* v *Spain*, paragraph 21; Case C-232/05,*Commission* v *France*, paragraph 42;
[161] Case C-331/09, *Commission v Poland*; Case C-415/03, *Commission* v *Greece*, paragraph 44; Case C-232/05, *Commission* v *France*, paragraph 42
[162] Case C-350/93, *Commission* v *Italy*, paragraph 21; Case C-75/97, *Belgium* v *Commission*, paragraph 64; Case C-331/09, *Commission v. Poland*, paragraph 55-56
[163] Case C-232/05, *Commission* v *France*, paragraph 47
[164] Case C-480/98, *Spain* v *Commission*, paragraph 25-26;
[165] Ibid

law of the Court that a Member State which, in giving effect to a Commission decision on State aid, encounters unforeseen and unforeseeable difficulties, whether of a political, legal or practical kind, or becomes aware of consequences overlooked by the Commission, must submit those problems to the Commission for consideration, together with proposals for suitable amendments to the decision in question.[166] In such cases, the Commission and the Member State concerned must work together in good faith with a view to overcoming the difficulties whilst fully observing the provisions of the EC Treaty and in particular those on aid.[167] The Court relies on the provision of the Treaty to work together which means that the national authorities should inform the Commission about difficulties defining the exact amount of the recoverable aid and according to the Court`s statement, the Commission should help to solve this problem. It should be doubtly presumed that the Commission could somehow help to define the exact amount, but it could be thought that more time could be given to the national institutions to define such an amount without taking any other measures. In the same case, the Court held that in the Commission`s decision it was stated that the recoverable amount must be between EUR 798 million and EUR 1,140 million in capital, according to this, the amount of EUR 798 million must be considered to be the minimum aid amount to be recovered, therefore, the fact that the exact amount of aid to be recovered had not been laid down definitively did not prevent the authorities from implementing the recovery procedure for the minimum amount of aid or from cooperating effectively in determining the final amount of the aid to be recovered.[168] It follows, that if the French institutions had recovered at least the minimum amount stated in the Commission`s decision, it would be considered as the effective implementation of its decision. Such a statement of the Court leaves interesting thoughts it would be really considered as an effective implementation to recover only a minimum amount approximately stated by the Commission. It leaves some doubts according to the previous statements of the Court where it says that the purpose of recovery of unlawful state aid is to restore the situation which was before the aid and take away all the advantages from the beneficiary that it has from unlawful aid.

The principle of loyal cooperation which was one of the Courts arguments in Commission v Belgium decision is established in the Treaty. This principle is also emphasised by the Commission in its notice by saying that if a Member State encounters unforeseen or unforeseeable difficulties in executing the recovery decision within the required time-limit or perceives consequences overlooked by the Commission, it should submit those problems for consideration to the Commission, together with proposals for suitable amendments.[169] In such a case, the

[166] Case C-378/98, *Commission* v *Belgium*, paragraph 31-34
[167] Case C-378/98, *Commission* v *Belgium*, paragraph 31; Case C-441/06, *Commission v France*, paragraph 28
[168] Case C-378/98, *Commission* v *Belgium*, paragraph 33-34.
[169] Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, *Official Journal C 272 , 15/11/2007 P. 0004 - 001*

Commission and the Member State concerned must work together in good faith to overcome the difficulties whilst fully observing the Treaty provisions. Likewise the principle of loyal cooperation requires that the Member States provide the Commission with all the information enabling it to establish that the means chosen constitutes an adapted implementation of the decision.“[170] . However, at the same notice the Commission continues by saying that informing the Commission of the technical and legal difficulties involved in implementing a recovery decision does however not relieve Member States from the duty to take all necessary steps possible to recover the aid from the undertaking in question and to propose to the Commission any suitable arrangements for implementing the decision.[171] So it brings the Commission again into the same safe position, where all the obligations to recover an unlawful aid is directed to the Member State and the Commission is not attached to any of the responsibilities if the Member State faces difficulties in implementing such a decision.

According to what was stated above, the question still remains if the minimum recovery would restore the situation completely which was before the aid and in not a hypothetical situation the Court would held that this is really an effective recovery made by the French authority. In the Author`s opinion the minimum recovery of unlawful state aid cannot be equated to the proper recovery and would contradict the main aim of the recovery procedures – to recover the competitive environment which was distorted by unlawful state aid.

3.5. Interests

Article 14(2) of the Regulation 659/1999 indicates that the aid to be recovered pursuant to a recovery decision has to include interest at an appropriate rate fixed by the Commission.[172] Interest has to be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.[173] In Spain v Commission case the Court emphasized that, according to the relevant case-law, the objective of re-establishing the previously existing situation is attained once the aid in question, increased where appropriate by default interest, has been repaid by the recipient, which thereby forfeits the advantage which it enjoyed over its competitors, on that point, it should be noted that the absence of any claim to interest on the unlawfully granted sums at the time of their recovery amounted to maintaining incidental financial advantages, consisting of the

[170] Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, *Official Journal C 272 , 15/11/2007 P. 0004 - 0017*
[171] Ibid
[172] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union
[173] Ibid

grant of an interest-free loan, for the undertaking concerned.[174] As it was mentioned before, the main aim of recovery is to restore the situation as it was prior to the payment of illegal aid, thus all of the financial advantages resulting from the aid which adversely affect competition in the common market have to be eliminated.[175] Thus, interest is a part for complete elimination of advantages. However, interest may only be recovered in order to offset the financial advantages actually arising from the allocation of the aid to the recipient, and must be in proportion to the aid.[176] For such purpose, the methods of calculating the applicable recovery interest rates are established in the Regulation No 271/2008. Articles 9 – 11 of the Regulation provides detailed description how the interests should be calculated.

3.6. Exception from obligation to recover

The general obligation to recover unlawful state aid is not an absolute one. Three major exceptions form the general obligation to recover unlawful state aid can be found:

- Absolute impossibility of complying with decision to recover state aid;
- Recovery of the aid is contrary to a general principle of EU law;
- A limitation period of ten years is exceeded.

As these exceptions are the ones on which Member States can rely in order to avoid the recovery of unlawful state aid, in the further work those exceptions will be analysed separately.

3.6.1. Absolute impossibility of complying with decision

Absolute impossibility of complying with decision is one of the exceptions to recover unlawful state aid. However, this exception is strictly and narrowly interpreted by the Court in its case law and it is not easy to rely on this exception. As in the case the Court held that according to consistent case-law, the only defence available to a Member State in opposing an application by the Commission under Article 108(2) of the Treaty for a declaration that it has failed to fulfil its Treaty obligations is to plead that it was absolutely impossible for it to implement the decision properly.[177] The Court emphasises that it has to be "absolutely impossible" to implement the decision if the Member State want to be released from the obligation. In other decisions the Court interprets what cannot be considered as absolutely impossible and finds out some gaps of the Member States in implementation the decisions. In the same case the court held that *"However, that condition*

[174]Case C-480/98, *Spain v Commission*, paragraph 35
[175]Case C-480/98, *Spain v Commission*
[176]Ibid
[177]Case C-280/95, *Commission v Italy*, paragraph 13

[absolutely impossible] is not satisfied where the defendant government merely informs the Commission of the legal and practical difficulties involved in implementing the decision, without taking any step whatsoever to recover the aid from the undertakings in question, and without proposing to the Commission any alternative arrangements for implementing the decision which would have enabled the alleged difficulties to be overcome. It should, moreover, be emphasised that, although insuperable difficulties may prevent a Member State from complying with its obligations under EU, mere apprehension of such difficulties cannot justify a failure by a Member State to apply EU law correctly"[178]. According to such interpretation of the Court, the Member State has to put all its efforts to implement the decision of recovery and only if all the measures were used as it supposed to and the Member State really tried to implement the decision, it can be considered as absolutely impossible. However, it is rare in a case law of the Court, where it was held that it was really absolutely impossible to implement the decision and the Member State was released from the obligation to recover unlawful state aid.

3.6.2. General principle of law: legitimate expectations and legal certainty

The exception of general principles of law is merely established in the EU legal acts. Article 14(1) of Regulation 659/1999 establishes that where negative decisions are taken in cases of unlawful aid, the Commission has to decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.[179] At the same Article there is an exception from general rule: "The Commission shall not require recovery of the aid if this would be contrary to a general principle of EU law."[180]. This is one of the exceptions which can be found in the Regulation. The general principles of law most often invoked in this context are the principles of the protection of legitimate expectation and of legal certainty.[181] The right to rely on the principle of the protection of legitimate expectations, which constitutes one of the fundamental principles of the EU law, extends to any individual who is in a situation in which it is clear that the EU authorities have, by giving him precise assurances, led him to entertain legitimate expectations.[182] Therefore, the notion of application of general principles of law in recovery of unlawful state aid is established by the case law of CJEU. However, the Court has strictly interpreted this principle in its case law.

[178]Case C-280/95, *Commission v Italy*, paragraph 14
[179]Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, Article 14(1)
[180]Ibid
[181]Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, *Official Journal C 272 , 15/11/2007 P. 0004 - 0017*
[182]C. Quigley, European State Aid Law and Policy, p. 419-420

In one of its cases, the Court held that a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund that aid and if such a case is brought before a national court, it is for that court to assess the material circumstances, if necessary after obtaining a preliminary ruling on interpretation from the CJEU.[183] However, a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 108 TFEU may not rely on the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid, because if it could do so, Articles 107 and 108 of the Treaty would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive decisions taken by the Commission under provisions of the Treaty of their effectiveness.[184]. At the same case the Court stated that, since the principle of the protection of legitimate expectations is part of the legal order of the EU, the fact that national legislation provides for the principles of the protection of legitimate expectations and assurance of legal certainty to be observed in a matter such as the recovery of unduly paid EU aids cannot be considered contrary to that same legal order.[185]

In another case, the aid was paid without prior notification to the Commission, so as the Court held it was unlawful under Article 108(3) of the Treaty. According to that, the Court stated that in accordance with the principle of [protection of legal expectations], the recipient of aid could not, therefore, have had at that time a legitimate expectation that its grant was lawful.[186] The Court held that although the EU legal order cannot preclude national legislation which provides that the principles of the protection of legitimate expectations and legal certainty are to be observed with regard to recovery, it must be noted that, in view of the mandatory nature of the supervision of State aid by the Commission under Article 108 of the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article, in addition, a diligent businessman should normally be able to determine whether that procedure has been followed.[187]

In case RSV v. Commission, where the applicant was waiting 26 months for Commission making the contested decision, it was stated that the Commission disregarded the requirements of legal certainty and failed to comply with the rules of good administration. According to the decision of the case, that delay caused RSV, its shareholders and creditors believed that the sums allocated

[183] Case C-5/89, *BUG-Alutechnik*, paragraphs 16-17
[184] Ibid
[185] Case C-5/89, *BUG-Alutechnik*, paragraph 13; Joined Cases 205 to 215/82, *Deutsche Milchkontor GmbH and Others v Federal Republic of Germany*, paragraph 30
[186] Case C-24/95, *Alcan*
[187] Case C-24/95, *Alcan*, paragraph 25; Case C-5/89, *Commission v Germany*, paragraphs 13-14; Case C-169/95, *Spain v Commission*, paragraph 51

by way of the aid in question lawfully belonged to that company; however the Commission argued that the delay in adopting the decision was due to its understanding attitude towards the difficulties of RSV. In this case the Court held that the Commission's delay in giving the contested decision could in the case in point establish a legitimate expectation on the applicant's part so as to prevent the Commission from requiring the Netherlands authorities to order the refund of the aid.[188]

Lack of legal regulation in EU legal acts and lack of clarity of the general principles doctrine creates difficulties to apply for protection on legitimate expectations and legal certainty. As A. Giraud pointed out, such lack of clarity provides the Commission and CJEU with an opportunity to implicitly ground a decision not to recover a particular aid on one or several of these factors.[189] Agreeing partially with such position it could be stated that more clarity in the context of general principles in the field of recovery of unlawful state aid would give more chances for parties who protect their legal interest to rely on protection of such general principles. However, strict and clear legal regulation of general principles would lead to more limitation of application. Therefore, it is proportional decision to leave interpretation of application of general principles of law for CJEU. In addition, it should be noted that general principles of law should be treated only as an exception from general obligation to recover state aid. Thus, it should be applied only in the exceptional situations.

3.6.3. 10 years limitation

Article 15 of Regulation 659/1999 establishes limitation period which is the second ground stated in the Regulation that release Member States from obligation to recover unlawful state aid. According to Article 15(1) the powers of the Commission to recover aid shall be subject to a limitation period of ten years.[190] The second paragraph of the same article states that the limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme.[191] According to such provisions, the Commission has one limitation in recovering of aid – time limitation of 10 years. Whereas, the time period is calculated from the day when the aid was granted it is very important to define on which exact date the aid was grated. In case France Telecom v Commission the Court held that the decisive factor in determining the starting point of the limitation period referred to in Article 15 is when the aid was

[188] Case C-223/85, *RSV v Commission*
[189] A. Giraud, A study of the notion of legitimate expectations in state aid recovery proceedings: Abandon all hope, ye who enter here?, *Common Market Law Review* 45: 1399-1431, 2008, HeinOnline (http://heinonline.org)
[190] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, Article 15(1)
[191] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, Article 15(2)

in fact granted.[192] At the same case the Court stated that *"It is apparent from Article 15(2) of Regulation No 659/1999 that, for the purpose of determining the date on which the limitation period starts to run, that provision refers to the grant of aid to a beneficiary, not the date on which an aid scheme was adopted. The determination of the date on which aid was granted may vary depending on the nature of the aid in question. Thus, in the case of a multi-annual scheme, entailing payments or advantages granted on a periodic basis, the date on which an act forming the legal basis of the aid is adopted and the date on which the undertakings concerned will actually be granted the aid may be a considerable period of time apart. In such a case, for the purpose of calculating the limitation period, the aid must be regarded as not having been awarded to the beneficiary until the date on which it was in fact received by the beneficiary.*"[193]

Under Article 15(2) any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh.[194] The Court pointed out that while that provision indeed contains a reference to both actions taken by the Commission and requests of the Commission, that cannot mean, however, that a request for information addressed by that institution to the Member State concerned constitutes action taken by the Commission only provided it has been notified to the beneficiary of the aid, therefore alternatively, there may be situations in which a request of the Commission does not automatically and simultaneously constitute action taken by the Commission.[195] Accordingly, the wording of Article 15 of Regulation No 659/1999 does not give any guidance as to whether there is any requirement to notify the action to the beneficiary of the aid if the limitation period is to be interrupted. [196] According to such position it could be stated if the beneficiary was not informed about some action which interrupts the limitation period, such limitation should not be considered as interrupted. However, in the same case the Court pointed out that the procedure provided for in Article 108(2) of the Treaty takes place primarily between the Commission and the Member State concerned, and it is initiated against that State and not against the beneficiaries[197].

Thus, the fact that the beneficiary did not know about the certain action which interrupted 10 years limitation can be an argument to deny the interruption period. Pursuant to what was stated, from the side of beneficiary it may be considered as breach of legitimate expectation or legal certainty principle.

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[192] Case C-81/10 P, *France Telecom v Commission*, paragraph 80
[193] Case C-81/10 P, *France Telecom v Commission*
[194] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, Article 15(2)
[195] Case C-276/03 P, *Scott SA v Commission*
[196] Ibid
[197] Ibid; see also to that effect A. Bartosch, The Procedural Regulation in State Aid Matters: A Case for Profound Reform, European State Aid Law Quarter, 2007, p. 479, HeinOnline (http://heinonline.org)

4. STATE AID AND NATIONAL COURTS

National courts of the Member States usually play also a very important part in the recovery of unlawful state aid. As the Commission emphasised in its notice, although there are very significant differences in the judicial traditions and systems of Member States, two main categories of recovery-related litigation can be distinguished: actions brought by the recovering authority seeking a court order to force an unwilling recipient to refund the unlawful and incompatible aid and actions brought by beneficiaries contesting the recovery order.[198] In addition to these two categories, other categories of disputes which may be held in the National Courts can be defined: disputes between different branches of the Administration as to the permissibility of State aid measures (institutional disputes); actions by a competitor against the Member State for damages, recovery and/or injunctive measures; and actions by a competitor against the beneficiary for damages, recovery and/or injunctive measures.[199]

The role of the national courts is to safeguard rights which individuals enjoy due to the direct effect of the prohibition in the last sentence of Article 108 (3) of TFEU, this means that the national courts should use all appropriate means and remedies and apply all relevant provisions of national law to implement the direct effect of this obligation.[200] Nevertheless, as is clear from the recital 2 in the preamble to Regulation No 659/1999 and its provisions, that regulation codifies and reinforces the Commission's practice in reviewing State aid and does not contain any provision relating to the powers and obligations of the national courts, which continue to be governed by the provisions of the Treaty as interpreted by the Court.[201] In that regard, firstly, it should be noted that implementation of the system for supervision of State aid, resulting from Article 108 of Treaty and the case-law of the Court on the subject, is a matter, on the one hand, for the Commission and, on the other, for national courts.[202]Therefore, the main roles of the national courts regarding state aid can be divided into several groups:

- Interpretation of state aid;
- Preventing the payment of unlawful aid and standstill obligation;
- Recovery of unlawful aid;

[198] Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, *Official Journal C 272 , 15/11/2007 P. 0004 - 0017*
[199] T. Jestaedt, J. Derenne, T. Ottervanger and others, Study on the enforcement of State aid law at national level, Brussels and Amsterdam, 2006, p.38
[200] T. Jestaedt, J. Derenne, T. Ottervanger and others, Study on the enforcement of State aid law at national level, Brussels and Amsterdam, 2006, p.39
[201] Case C-368/04, *Transalpine Ölleitung and Others*, paragraph 35
[202] Ibid

- Recovery of illegally interest;
- Damages for competitors and other third parties; and
- Interim measures against unlawful aid.[203]

In further clauses of this section, the main roles of national court will be discussed more detailed. As the recovery of unlawful state aid is already discussed in previous section, it will not take an additional clause in this section.

4.1. Interpretation of Article 107(1) TFEU

According to the EU case law, the Court established a generous position in respect of national courts by stating that a national court may have cause to interpret the concept of aid contained in Article 107(1) of the Treaty in order to determine whether a State measure has been introduced contrary to that provision.[204] By such position the Court gives on the one hand a wide discretion to the national courts to decide whether the benefit can be considered as the aid under the TFEU. However, on the other hand national courts are forced to have competence in interpreting not only EU case law but also EU legislation regarding the concept of state aid.

In its notice on the enforcement of State aid law by national courts the Commission has stated that the first issue facing national courts and potential claimants when applying Articles 107 and 108 of the Treaty is whether the measure concerned actually constitutes State aid within the meaning of the Treaty.[205] Considering the fact that the concept of aid, as it was also previously discussed in this work, covers not only general subsidies, but may appear in different forms, sometimes it might be difficult for national courts to analyse whether the same sort of benefit can be considered as aid. At this point the Commission states that in addition to this, it has issued detailed guidance on a series of complex issues, such as the application of the private investor principle and of the private creditor test, the circumstances under which State guarantees must be regarded as State aid, the treatment of public land sales, privatisation and assimilated State actions, aid below the *de minimis* thresholds, export credit insurance, direct business taxation, risk capital investments, and State aid for research, development and innovation.[206] According to this, case law, Commission guidance and decision making practice can provide valuable assistance to national

[203] Commission Notice on the Enforcement of State aid law by national courts, Official Journal of the European Union, 2009/C 85/01
[204] Case C-345/02, *Pearle and Others*, paragraph 31; Case 78/76, *Steinike & Weinlig*, paragraph 14; Case C-189/91 *Kirsammer-Hack*, paragraph 14
[205] Commission Notice on the Enforcement of State aid law by national courts, Official Journal of the European Union, 2009/C 85/01
[206] Ibid

courts and potential claimants concerning State aid.[207] Where doubts exist as to the qualification of State aid, national courts may ask for a Commission opinion under section 3 of this Notice. This is without prejudice to the possibility or the obligation for a national court to refer the matter to the CJEU for a preliminary ruling under Article 267 of the Treaty.[208]

Proceedings concerning State aid may be commenced before national courts requiring those courts to interpret and apply the concept of aid contained in Article 107(1) TFEU, in particular in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article 108(3) TFEU ought to have been subject to this procedure.[209]

On the other hand, national courts do not have jurisdiction to give a decision on whether State aid is compatible with the common market.[210] It is settled case-law that the assessment of the compatibility of aid measures or of an aid scheme with the common market falls within the exclusive competence of the Commission, subject to review by the EU courts.[211]

Similarly, the Court has held that a transitional system maintaining the effects of a State aid scheme not notified to the Commission and declared incompatible with EU law by a Commission decision – without, however, the Commission demanding repayment of the aid concerned – had to be interpreted as far as possible in such a way as to ensure its compatibility with that decision, namely in such a way that it does not authorise the granting of new State aid after the abrogation of the aid scheme censured by that Commission decision.[212]

4.2. Preventing the payment of unlawful aid and a standstill obligation

The national courts` obligation to prevent the payment of unlawful aid can arise in a variety of procedural settings, depending on different types of actions available under national law.[213] This obligation for national courts arises from the general to protect individuals` rights. It means that whilst assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the Court, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give

[207] Ibid
[208] Ibid
[209] Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA*, paragraph 50; Case 78/76, *Steinike & Weinlig*, paragraph 14; Case C-354/90, *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon*, paragraph 10
[210] Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA*
[211] Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA*, paragraph 52; Case 78/76, *Steinike & Weinlig*, paragraph 9; Case C-39/94, *SFEI and Others*, paragraph 42
[212] Case C-110/02, *Commission v Council of the European Union*; Case C-297/01, *Sicilcassa*, paragraph 44
[213] Commission Notice on the Enforcement of State aid law by national courts, Official Journal of the European Union, 2009/C 85/01

prior notification of State aids to the Commission pursuant to Article 108(3) of Treaty is infringed.[214]

Article 108(3) of the Treaty of the Functioning of the European Union establishes that Member States may not implement new State aid measures before they have been approved by the Commission.[215] Therefore, the aid will be considered as unlawful if there will be a breach of notification under Article 108 of the Treaty. Article 108(3) TFEU establishes a prior control of plans to grant new aid.[216] The aim of that system of prior control is therefore that only compatible aid may be implemented and in order to achieve that aim, the implementation of planned aid is to be deferred until the doubt as to its compatibility is resolved by the Commission's final decision.[217] The implementation of that system of control is a matter for both the Commission and the national courts, their respective roles being complementary but separate.[218] The competences of Commission and national court can overlap to some degree.[219] However, generally, the Commission has an exclusive competence to decide whether a particular state can be granted or altered and the national courts has a general obligation, so called standstill obligation which has a direct effect.

Two general purposes of Article 108(3) can be found. The first purpose of Article 108(3) of the Treaty is to provide the Commission with the opportunity to review, in sufficient time and in the general interest of the Communities, any plan to grant or alter aid.[220]The second purpose of prohibition laid down in Article 108(3) is regarding rise to rights in favour of individuals, which national courts are bound to safeguard.[221] Therefore, the main aim is that the prohibition laid down in Article 108 on putting any proposed measures into effect is designed to ensure that a system of aid cannot become operational before the Commission has had a reasonable period in which to study the proposed measures in detail and, if necessary, to initiate the procedure provided for in Article 108(2).[222] According to this it can be stated, that main role of the Commission is to exam whether there is not in breach with the Treaty and is compatible with the common market. Thus, the main role of the national courts is to secure rights of any individuals which might be infringed by unlawfully granted aid while the Commission will exam the aid.

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[214] Case 295/97, *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v. International Factors Italia SpA*, paragraph 31
[215] TFEU
[216] Case 120/73, *Lorenz*, paragraph 2; Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, paragraph 37
[217] Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, paragraph 41
[218] Case C-39/94, *SFEI and Others*, paragraph 41; Joined Cases C-261/01 and C-262/01, *van Calster and Others*, paragraph 74; Case C-368/04, *Transalpine Ölleitung in Österreich*, paragraphs 36 and 37; see also to that effect B.Brandtner, T.Beranger and C.Lessenic, Private State Aid Enforcement, European State Aid Law Quarter, 2010, HeinOnline (http://heinonline.org)
[219] See to that effect B. Cheynel and A. Giraud, New Paradigm for Recovery of Unlawful Aid in the EU - National Judges and the Exception of Compatibility, 31 World Competition 557 2008, HeinOnline (http://heinonline.org)
[220] Case C-301/87, *France v Commission*
[221] Case 6/64, *Costa v E.N.E.L..;* Case 120/73, *Lorenz v Germany and Rheinland Pfalz*
[222] Case C-301/87, *France v Commission*

The Commission has the same power in cases where it has been notified of aid but the Member State in question, instead of awaiting the outcome of the procedure provided for under Article 108(2) and (3) of the Treaty, has instead proceeded to put the aid into effect, contrary to the prohibition contained in Article 108(3).[223] As well as the initiation by the Commission of a preliminary examination procedure under Article 108(3) or the consultative examination procedure under Article 108(2) cannot release national courts from their duty to safeguard the rights of individuals in the event of a breach of the requirement to give prior notification.[224] It means that a Commission decision finding aid that was not notified compatible with the common market does not have the effect of regularising ex post facto implementing measures which were invalid because they were taken in disregard of the prohibition laid down by the last sentence of Article 108(3) of the Treaty, since otherwise the direct effect of that provision would be impaired and the interests of individuals, which are to be protected by national courts, would be disregarded and any other interpretation would have the effect of according a favourable outcome to the non-observance of that provision by the Member State concerned and would deprive it of its effectiveness.[225] Therefore, as Advocate General Jacob stated in his opinion in the Case C-368/04, for any particular aid plan, whether compatible with the common market or not, failure to comply with Article 108(3) of the Treaty carried no greater risk or penalty than compliance, the incentive for Member States to notify and await a decision on compatibility would be greatly diminished – as would, consequently, the scope of the Commission's control.[226] According to such conclusion, in the same opinion Advocate General Jacob raised a question what is the purpose of the requirement on the Commission to reach a decision on the compatibility of not notified aid, if that decision cannot cure the initial unlawfulness entailed by the failure to notify and gave three answers to this question:

- First, if the aid is of a continuing nature the decision, whatever its content, will produce full effects for the future;
- Second, an assessment by the Commission of a particular type of aid, even if that aid is no longer current, will assist Member States in determining whether future planned aid of the same type is permissible;
- Third, the procedural consequences could still change as a result of the Commission's decision, even with regard to the period before it was adopted. Where aid has been put into effect in

[223] Case C-301/87, *France v Commission*
[224] Case C-39/94, *SFEI and Others*, paragraph 44
[225] Case 368/04, *Transalpine Ölleitung in Österreich GmbH and Others v. Finanzlandesdirektion für Tirol and Others*, paragraph 41
[226] Advocate General Jacob Opinion in Case C-368/04, *Transalpine Ölleitung in Österreich GmbH and Others v. Finanzlandesdirektion für Tirol and Others*

breach of Article 108(3) TFEU, national courts must draw the appropriate conclusions from that illegality.[227]

Agreeing with General Advocate Jacob`s distinguished purposes of Commission`s examination it should be added that general principles of legal certainty and legal expectations applies as well. The formal statement that state aid is unlawful and in relevant cases should be recovered without any examination of compatibility would infringe the general principles and would confront with the main purpose of general restriction to provide state aid.

4.3. Recovery of illegally interest

As it was stated above, when there is a breach of notification under Article 108 of the Treaty, after examination the Commission may take two different decisions: to examine that state is not compatible with the common market and that state aid is compatible with the common market. Depending on what decision will be taken by the Commission, further action of the Member States, including national courts will be taken. In the first scenario, the decision to recover the unlawful state aid ant to restore the situation which was before the aid was granted would be ordered. In the second scenario, the even if the state aid was considered as compatible with the common market, this decision will come into effect only in future. Thus, the positive decision of the Commission does not relieve from the fact that during the period before the Commission took a decision, the state aid was unlawful. Because the aid is lawful only as to the future, EU law requires the national court to order the measures appropriate effectively to remedy the consequences of the unlawfulness that were before the positive decision. Pursuant to EU law, the national court must order the aid recipient to pay interest in respect of the period of unlawfulness and within the framework of its domestic law, it may, if appropriate, also order the recovery of the unlawful aid, without prejudice to the Member State's right to re-implement it, subsequently. [228]

Therefore, in a situation where the unlawful putting into effect of aid is followed by a positive Commission decision, EU law does not appear to preclude the recipient from, on the one hand, demanding the disbursement of aid payable for the future and, on the other hand, keeping aid received that was granted prior to the positive decision, subject always to the consequences arising from unlawfulness of aid disbursed prematurely.[229] Thus, the interests during the period when the

[227] Advocate General Jacob Opinion in Case C-368/04, *Transalpine Ölleitung in Österreich GmbH and Others v. Finanzlandesdirektion für Tirol and Others*
[228] Case 199/06, *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v. Société internationale de diffusion et d'édition (SIDE)*, paragraph 50-55
[229] Ibid

aid was granted until the date of Commission`s decision was taken should be paid, as well as other advantages that state aid provided before the Commission`s decision.

4.4. Damages for competitors and other third parties

Where the state aid is considered as unlawful, as it was stated above, national courts has a general obligation to take all the measures for the main aim to restore a common market and a competitive environment which was distort by unlawful state aid. This general obligation includes not only the recovery of unlawful state aid and illegal interests that were discussed previously, but also includes the legal interest of competitors or other third parties that were affected by such aid. Therefore, national courts may also be required to uphold claims for compensation for damage caused by reason of the unlawful nature of the aid.[230]

Such damage actions are usually directed at the State aid granting authority and can be particularly important for the claimant, since, contrary to actions aimed at mere recovery, a successful damages action provides the claimant with direct financial compensation for suffered loss.[231] According to the case law, because a national court may be required to rule on an application for compensation for the damage caused by reason of the unlawful nature of the aid, the national rules shall apply for such kind of claims[232]Therefore, differences may arise between different national law systems. As the EU law and CJEU case law gives a freedom to national courts to fulfil damages compensation obligation under national laws, at the one hand it might be considered as not equal solution from claimant's perspective. Because of the differences of national legal rules within Member States it might be stated, that claimants` possibilities to claim for damages depends on in which Member State the claim will be submitted. However, the CJEU case law provides the general principles and requirements for national courts that the national courts must strive to preserve the interests of individuals and take all the necessary measure for such protection.[233] Therefore, it could be expected that interests of individuals under national legal rules should be protected properly. But taking into account the examples of recovery procedures by national courts in different Member States and how the differences in national legal rules may affect the recovery, it is questionable whether the interest of individuals will be always protected and damages will be compensated properly.

[230] Case 199/06, *CELF v. SIDE*, paragraph 52-53; see to that effect H.C.H. Hofmann and A. Morini, Judicial review of Commission Decisions in State aid, edited by E. Szyszczak, Research Handbook on European State Aid Law,Edward Elgar Publishing Limited, 2011, p.361-364

[231] Commission Notice on the Enforcement of State aid law by national courts, Official Journal of the European Union, 2009/C 85/01

[232] Case C-368/04, *Transalpine Ölleitung in Österreich GmbH and Others v. Finanzlandesdirektion für Tirol and Others*

[233] Ibid

Irrespective of the possibility to claim damages under national law, breaches of standstill obligation have direct and binding consequences under EU law.[234]As it was discussed previously in this work, Article 108(3) of the Treaty has direct effect and it is directly applicable to Member State, thus national courts must offer to individuals a position to rely on such a breach the certain prospect that all the necessary inferences will be drawn, in accordance with their national law.[235] As the Commission explains in its notice on the enforcement of State aid law by national courts, breaches of the standstill obligation can therefore, in principle, give rise to damages claims based on the "Francovich" and "Brasserie du Pecheur" jurisprudence of the CJEU, thus this jurisprudence confirms that Member States are required to compensate for loss and damage caused to individuals as a result of breaches of EU law for which the State is responsible.[236] Such a position of the Commission gives another opportunity for individuals to protect their legal interests regarding unlawful state aid. However, in such an event, the individual has to be sure that the claim commits the criteria provided in the CJEU jurisprudence. As to the conditions to be satisfied for a Member State is required to make a reparation for the loss and damage caused to individuals as a result of breaches of EU law for which the State is responsible, these are threefold:

- the rule of law infringed must be intended to confer rights on individuals;
- the breach must be sufficiently serious;
- and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties[237]

Those three conditions are necessary and sufficient to found a right in favour of individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions pursuant to national law.[238]

4.5. Interim measures

Depending on the legal remedies provided for under domestic law, a national court may thus be seized of an application for interim relief such as the suspension of the measures at issue, in order to safeguard the interests of individuals and, in particular, to protect parties affected by the

[234] Commission Notice on the Enforcement of State aid law by national courts, Official Journal of the European Union, 2009/C 85/01
[235] Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic*
[236] Commission Notice on the Enforcement of State aid law by national courts, Official Journal of the European Union, 2009/C 85/01
[237] Case C-224/01, *Gerhard Köbler v. Republik Österreich*
[238] Case C-173/03, *Traghetti del Mediterraneo SpA, in liquidation. v. Repubblica italiana*

distortion of competition caused by the grant of the unlawful aid.[239] Therefore, where it is necessary to protect the rights of individuals, the national courts may take interim measures. This position of the Commission and CJEU jurisprudence shows how broad the notion of protection of individuals' rights is in case such rights are or could be violated because of unlawful state aid.

The necessity of application of interim measures might be seen in all situations regarding unlawful state aid. It is one of the safeguards for interested parties to be sure that the recovery of already granted unlawful aid will be performed or that the not yet granted unlawful aid will not be granted. In spite of general obligation for national courts to recover unlawful state aid, there may nevertheless be circumstance in which the final judgement for the national courts is delayed, thus in such cases, the obligation to protect the individual rights under Article 108(3) of the Treaty requires the national court to use all interim measures available to it under the applicable national procedural framework to at least terminate the anticompetitive effects of the aid on a provisional basis.[240] The most practical way to achieve such an interim recovery will, be to order the unlawful aid to be placed in a blocked account for the duration of the national court proceedings, then depending on the outcome of the case, the national court can then order the funds either to be returned to the State or to be released to the beneficiary.[241]

However, it should be stated that interim measures are applied only under national legal rules. This leads to a conclusion that the effectiveness of interim measures to protect from the anticompetitive effect of the unlawful aid depends completely on the national law system and national procedural rules. Differences between procedural national rules and national law systems as a whole that seems properly effective to Member States may not be considered as properly effective in the level of European Union. Therefore, there is not also a question for interested parties whether their rights will be safeguarded properly with interim measures under the national legal rules, but there is always a risk for national courts that the national procedural rules will be considered as not effective enough.

Another situation where the interim measures can also be a very effective instrument is in cases where national court proceedings run parallel to a Commission investigation.[242] As the Commission states in its notice on the enforcement of State aid law by national courts, an on-going Commission investigation does not release the national court from its obligation to protect individual rights under Article 108(3) of the Treaty, therefore the national court may not simply

[239] Case C-368/04, *Transalpine Ölleitung in Österreich GmbH and Others v. Finanzlandesdirektion für Tirol and Others*

[240] Commission Notice on the Enforcement of State aid law by national courts, Official Journal of the European Union, 2009/C 85/01

[241] Christof Lessenich and Thierry Beranger, The Commission notice on the enforcement of State aid law by national Courts, Competition Policy Newsletter, Number 2 — 2009

[242] Commission Notice on the Enforcement of State aid law by national courts, Official Journal of the European Union, 2009/C 85/01

suspend its own proceedings until the Commission decided, but it should therefore adopt appropriate interim measures.[243]

4.6. Lufthansa case: imposing new obligations for national courts

German company Lufthansa brought a claim before the German Court on 2006 seeking an order for the recovery of the payments made to Ryanair by way of 'marketing support' considering that it is a state aid and that Article 108(3) was breached by not notifying the Commission about such aid and making damages for competitors such as Lufthansa.[244] On 2008 the Commission decided to initiate a formal investigation procedure under Article 108(2) of the Treaty regarding possible State aid granted by the Federal Republic of Germany to FFH and Ryanair.[245]

Considering, that German court had to assess whether the measures at issue constituted State aid and, in particular, having doubts as to the selective nature of those measures, the German court has asked a question for the Court, whether or not an uncontested decision of the Commission to initiate a formal investigation procedure under the second sentence of Article 108(3) TFEU have the result that, in appeal proceedings concerning the recovery of payments made and an order to refrain from making future payments, a national court is bound by the Commission's legal opinion in that decision as to whether a measure constitutes State aid.[246]

On 21 November 2013 the Court in its judgement relied on the previous CJEU case law by stating that Article 108(3) TFEU establishes a prior control of plans to grant new aid[247] and that whilst assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union, it is for the national courts to ensure the safeguarding, until the final decision of the Commission, of the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by Article 108(3) TFEU[248]. Thus, the Court in its judgement again emphasised the obligation of the national court to ensure the protection of any interested parties related to state aid where there is a breach of Article 108(3).

The Court continuously stated that the objective of the national courts' tasks is therefore to pronounce measures appropriate to remedy the unlawfulness of the implementation of the aid, in order that the aid does not remain at the free disposal of the recipient during the period remaining

[243] Commission Notice on the Enforcement of State aid law by national courts, Official Journal of the European Union, 2009/C 85/01
[244] Case C-284/12, *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH.*
[245] Ibid
[246] Ibid
[247] Case 120/73, *Lorenz* , paragraph 2; Case C-199/06, *CELF*, paragraph 37
[248] Cases C-261/01 and C-262/01, *Van Calster and Others*, paragraph 75; *Case C-368/04, Transalpine Ölleitung in Österreich GmbH and Others v. Finanzlandesdirektion für Tirol and Others*, paragraph 38

until the Commission makes its decision.[249] Therefore, as it was discussed previously in this work, the initiation by the Commission of the formal examination procedure under Article 108(2) TFEU do not release national courts from their duty to safeguard the rights of individuals faced with a possible breach of Article 108(3) TFEU.[250] Therefore, the Court did not change its position regarding national courts obligations and relied on its judgement on previous rules of CJEU case law. However, answering directly to the question of the German court, the Court formulated a new approach by stating that:

"However, the scope of that obligation may vary, depending on whether or not the Commission has initiated the formal examination procedure with regard to the measure at issue in the proceedings before the national court. In a situation where the Commission has already initiated the formal examination procedure under Article 108(2) TFEU, it is necessary to consider which measures have to be taken by the national courts. While the assessments carried out in the decision to initiate the formal examination procedure are indeed preliminary in nature, that does not mean that the decision lacks legal effects. "[251]

With such a new approach the Court has formulated a new rule that if the Commission initiates formal investigation on the grounds that the particular aid might be considered as granted unlawfully, the national courts should take this into account and presume that the aid is granted unlawfully even the final decision was not made by the Commission. According to procedural regulation, where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it initiates proceedings pursuant to Article 108(2) of the Treaty.[252] The decision to initiate the formal investigation procedure summarizes the relevant issues of fact and law, includes a preliminary assessment of the Commission as to the aid character of the proposed measure and sets out the doubts as to its compatibility with the common market.[253] Thus, after the formal investigation the Commission should decide whether the aid is considered as state aid and if it is, is it compatible with EU law. However, after formal investigation, the Commission can take a decision that:

- a measure does not constitutes an aid;
- the aid is compatible with the common market;

[249] Case C-1/09, *CELF v. SIDE*, paragraph 30
[250] Case C-39/94, *SFEI and Others*, paragraph 44
[251] Case C-284/12, *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH*.
[252] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, Article 4(4)
[253] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union

- the aid is not compatible with the common market.[254]

According to what was stated above, even if the Commission has initiated a formal investigation, there is still no legal ground or presumption that a particular measure will be considered as an aid and as not compatible with the common market. However, CJEU pointed out differently in Lufthansa case:

"It must be pointed out in that regard that, if national courts were able to hold that a measure does not constitute aid within the meaning of Article 107(1) TFEU and, therefore, not to suspend its implementation, even though the Commission had just stated in its decision to initiate the formal examination procedure that that measure was capable of presenting aid elements, the effectiveness of Article 108(3) TFEU would be frustrated."[255]

In Author`s opinion, by this statement the Court completely cleared out any discussions or doubts regarding national courts obligation to consider a measure as a state aid when the Commission has started formal investigation. Thus, in the future it will be a huge challenge for national courts to deny that the measure cannot be considered as a state aid when the Commission opens a formal investigation. Such position of the Court may lead to a discussion whether or not national courts` freedom is limited by CJEU jurisprudence. Even though the legal regulations of EU state aid give a broad freedom and competence to act in the field of state aid law, the Court by its decisions formulates rules by which national courts are bound. Lufthansa case is one of the examples when it might be concluded that the Court restricts actions of national courts and imposes a new obligations for national courts.

4.7. Challenging the validity of Commissions decisions

Article 263 of the Treaty establishes that the CJEU may review the legality of acts of the Commission and other institutions and actions brought by a Member State, the Commission and other EU institutions on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. [256] Thus, for example, a Member State may challenge a Commission decision refusing to permit it to grant State aid or imposing conditions on the grant of aid, or it may challenge a decision allowing another Member State to grant aid. [257]While national courts may, in principle, have occasion to consider whether EU act is valid, they nonetheless have no jurisdiction

[254] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, Article 7
[255] Case C-284/12, *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH.*
[256] TFEU, Article 263
[257] C. Quigley, European State Aid Law and Policy, p.497

themselves to declare acts of EU institutions invalid[258]. The CJEU alone therefore has jurisdiction to determine that EU act is invalid[259]. Moreover, it is settled case-law that a decision adopted by EU institution which has not been challenged by its addressee within the time-limit of two months laid down by Article 263 of the Treaty becomes definitive as against that person.[260] The Court has also held that it is not possible for a recipient of State aid forming the subject matter of a Commission decision addressed directly solely to the Member State of that beneficiary, who could undoubtedly have challenged that decision and who allowed the mandatory time-limit of two months laid down in this regard by Article 263 of the Treaty to pass, effectively to call in question the lawfulness of that decision before the national courts in an action brought against the measures taken by the national authorities in an implementation of that decision[261].

Article 263 of the Treaty as well establishes a rule, that any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.[262] However, not every person can apply under Article 263 of the Treaty. Therefore, two separate and cumulative conditions should be separated under Article 263 of the Treaty: direct concern and individual concern.[263]

- Direct concern

The Court's case-law shows that, for a person to be directly concerned by a measure, the latter must firstly directly affect the legal situation of the individual and secondly leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such an implementation is being purely automatic and resulting from EU rules without the application of other intermediate rules.[264] Thus, the Court clearly divides two conditions when the person can be directly concerned. The same applies where the possibility for addressees not to give effect to the measure is purely theoretical and their intention to act in conformity with it is not in doubt. It is settled case-law that for a contested EU measure to be of direct concern to a private applicant for the purposes of the above provision it must directly affect the applicant's legal situation and its implementation must be purely automatic and the result from EU rules without the application of

[258] Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA* ; Case 314/85, *Foto-Frost*, paragraph 20
[259] Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, paragraph 17; Case C-344/04, *IATE and ELFAA*, paragraph 27
[260] Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA* ; Case C-188/92, *TWD Textilwerke Deggendorf*, paragraph 13; Case C-241/01, *National Farmers' Union*, paragraph 34
[261] Case C-188/92,*TWD Textilwerke Deggendorf*, paragraphs 17 and 20, and *National Farmers' Union*, paragraph 35
[262] TFEU, Article 263
[263] C. Quigley, European State Aid Law and Policy, p.503
[264] Ibid; see also to that effect M.Honore and N. E. Jensen, Damages in State Aid Cases, European State Aid Law Quarterly, 2011, HeinOnline (http://heinonline.org)

other intermediate rules. Therefore, a person cannot rely on Article 263 of the Treaty if there is no direct concern for invalidation of the decision.

In general, the contested decision obliges to take the measures necessary to recover the aid, the recipient of aid must be held to be directly concerned by that decision.[265] The same applies to the competitors of recipients, since the contested decision declares that certain payments do not constitute State aid, since the contested decision declares that certain measure do not constitute State aid, it is of direct concern to the competitors.[266]

- Individual concern

According to settled case-law followed by the decision in case *Plaumann v Commission*, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed by such a decision.[267] The same as regarding direct concern, person cannot rely on Article 263 of the Treaty if there is no individual concern for invalidation of the decision. Irrespective of whether the aid measure in question is an individual or general in nature, an applicant must, when bringing into question the soundness of the decision assessing the aid as such, demonstrate that he has a 'special status' within the meaning of *Plaumann* v *Commission*, which will be the case, inter alia, where the position of the applicant on the market in question is substantially affected by the aid which is the subject of the decision in question.[268]

According to what was stated above, challenging the validity of Commission`s decisions is limited to the entities which can prove direct and individual concern. Pursuant to the analysis of case law of CJEU it can be concluded that approval of direct and individual concern is not easily reached and proved. However, such limitation protects Commission`s decision from irrelevant entities to challenge the validity of Commission`s decision, as well as it creates the real possibility for interested and related entities to protect their rights. The question, whether the position of the Court should be liberalised and direct and individual concern should be interpreted in a broader way, still remains. Therefore, in the Author`s opinion, each situation may defer and the Court should always take it into account, but the limitation on a certain level should be kept and the interpretation should not be extended in to the level where it would allow for seriously related parties try to challenge the validity of Commission`s decision.

[265] Case T-445/05, *Associazione italiana del risparmio gestito and Fineco Asset Management v Commission*, paragraph 45
[266] Case T-358/02, *Deutsche Post and DHL v Commission*, paragraph 32
[267] Case 25/62, *Plaumann v Commission*; Case C-198/91, *Cook v Commission*, paragraph 20; Case C-225/91, *Matra v Commission*, paragraph 14; Case C-78/03 P, *Commission v Aktionsgemeinschaft Recht und Eigentum*, paragraph 33
[268] Case C-487/06P, *British Aggregates v Commission* , paragraph 56

CONCLUSIONS AND RECOMMENDATIONS

1. The Treaty on Functioning of the European Union does not provide the exact definition of state aid. Despite the fact that there is no clear definition of state aid provided in TFEU, the main criteria for defining the state aid are formulated by the jurisprudence of the Court of Justice of European Union. Such lack of legal definition and complexity of constantly changing jurisprudence of CJEU creates difficulties for Member States to define the state aid and to consider whether it has to be notified for the Commission or not. Such uncertainty often is one of the factors why Member States breaches the general obligation to notify regarding provision of new aid.

2. National courts should not avoid the possibility of communication with Commission when there is a doubt regarding recognition of state aid. Respectively, the procedure of communication between the commission and national courts should be lightened by creating more effective and less time taking system of consultation. In addition, national institutions responsible for state aid control should have a possibility of consultation as well. Such changes would allow making the system of state aid control more effective and would prevent from obligation to recover unlawful state aid.

3. Different roles of Commission and Member States in the field of state aid control may lead to ineffective state aid control. Member States often are confused what are their real competence and obligations regarding control of state aid. Thus, state aid control, including procedures of recovery of unlawful state aid, does not function properly because of unclear regulation of roles between the Commission and national courts.

4. It should be clarified what are the roles of national courts and other institutions of Member States in each case. In addition Member States should communicate with the Commission regarding questionable actions in order to avoid breach of obligations that Member States were expected to perform. More effective communication between Member States and Commission would improve the effectiveness of state aid control.

5. Because of the complicated procedures of recovery of unlawful state aid and state aid control as a whole in EU level, the recovery is not performed effectively. The procedures

regarding state aid control, including recovery of unlawful state aid, for every action by Member State and/or the Commission take a long time. Therefore, the procedures regarding state aid control, including recovery of unlawful state aid, should be simplified by shortening the time terms for all of the procedures performed by the Commission and abolishing unnecessary and time taking procedures.

6. The hypothesis of this master thesis was approved - Lack of legal regulation in European Union law in the field of recovery of unlawful state aid is the result of inefficient recovery of unlawful state aid. In most cases the recovery of unlawful state aid procedures are not executed because of special provisions established in the national law. Accordingly, lack of legal regulations on the level of EU law in the field of recovery of unlawful state aid is one of the factors of inefficient recovery of state aid. In addition, CJEU case law do not fill completely all the gaps that are left because of the absence of legal regulation on the EU level and creates uncertain regulation of recovery procedures.

7. The legal regulation of recovery of unlawful state aid completely under EU law would be one of the options for more clarified regulation of recovery of unlawful state aid. Another option would be adoption of EU legal regulations in order to establish detail application of recovery procedures in national courts. Therefore, EU Commission should consider the adoption of new regulation or modernisation of Procedural regulation which would establish more rules for Member States` national courts in recovery of unlawful state aid.

8. The analysis of CJEU case law leads to a conclusion that often national courts are still not familiarised with EU case law and regulations. The importance of CJEU jurisprudence in the field of recovery of unlawful state aid, lead to a conclusion that national courts and national institutions should improve their competence in the field of state aid interpretation.

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SUMMARY

Recovery of Unlawful State Aid

Master thesis analysis the regulation and procedures of recovery of unlawful state aid in the context of European Union law. Relevance of the topic is a subject to the fact that the recovery procedures of unlawful state aid have never been executed in Lithuania. However, according to the practice of other Member States and statistics provided by the European Commission, it could be stated that the recovery of unlawful state aid is one of the problematic aspects of European competition law which Member States are dealing with.

In the procedures of recovery of unlawful state aid, the European Union institutions and Member States play different but complimentary roles. Even though the European Union has an exclusive competence in the regulation of state aid, Member States are obligated to perform the recovery of unlawful state aid procedures under their national law. Thus, the efficiency of recovery of unlawful state aid is often affected by the differences of national law of Member States. Other cause which affects the effective recovery of unlawful state aid might be the lack of the regulation on European Union level in the field of recovery of unlawful state aid.

The author in this master thesis analysis the jurisprudence of Court of Justice of European Union and legal regulation of recovery of unlawful state aid in the context of European Union law. In this master thesis also is analysed the notion of state aid, its compatibility with internal market, state aid control performed by the Commission of European Union and the role of national courts in the field of recovery of unlawful state aid.

At the end, the thesis offers options regarding improvement of effective recovery of unlawful state aid and gives advice how to avoid the breach of effective recovery procedure which might be useful for Lithuania in the future as well.

SANTRAUKA

Neteisėtos valstybės pagalbos susigrąžinimas

Magistro baigiamajame darbe nagrinėjamas neteisėtos valstybės pagalbos susigrąžinimo reguliavimas ir procedūros Europos Sąjungos teisėje. Šios temos aktualumą lėmė, tai, kad Lietuvoje dar niekuomet nėra vykdytos neteisėtos valstybės pagalbos susigrąžinimo procedūros. Tačiau atsižvelgiant į kitų Europos Sąjungos valstybių narių praktiką bei Europos Sąjungos Komisijos pateikiamus statistinius duomenis, neteisėtos valstybės pagalbos susigrąžinimas yra viena iš Europos Sąjungos konkurencijos teisės problematinių sričių, su kuriomis susiduria Europos Sąjungos valstybės narės.

Pabrėžtina, kad neteisėtos valstybės pagalbos susigrąžinimo procese Europos Sąjungos ir valstybių narių institucijos atlieka skirtingus, tačiau vienas su kitu susijusius vaidmenis. Nors Europos Sąjunga turi išimtinę kompetenciją valstybės pagalbos reguliavime, valstybės narės yra įpareigotos neteisėtos valstybės pagalbos susigrąžinimo procedūras vykdyti pagal valstybių narių nacionalinę teisę. Atsižvelgiant į tai, neteisėtos valstybės pagalbos susigrąžinimo neefektyvumą dažnai lemia valstybių narių nacionalinės teisės skirtumai. Kitas tinkamai neįvyktos valstybės pagalbos susigrąžinimo faktorius yra teisinio reguliavimo valstybės pagalbos suigrąžinimo srityje trūkumas, kurį užpildo Europos Sąjungos Teisingumo Teismo praktika.

Atsižvelgiant į tai, autorė darbe atlieka Europos Sąjungos Teisingumo Teismo praktikos bei Europos Sąjungos teisės aktų analizę neteisėtos valstybės pagalbos susigrąžinimo srityje. Darbe analizuojama valstybės pagalbos samprata, jos susiderinamumas su vidaus rinka, Europos Sąjungos Komisijos vykdoma valstybės pagalbos kontrolė bei nacionalinių teismų vaidmuo neteisėtos valstybės pagalbos susigrąžinimo procese.

Darbo pabaigoje pateikiami pasiūlymai dėl neteisėtos valstybės pagalbos susigrąžinimo efektyvumo padidinimo bei neteisėtos pagalbos susigrąžinimo pažeidimo išvengimo, kurie galėtų būti pritaikomi ir Lietuvoje.