

Current development in EU State Aid law and business taxation

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Abstract

The importance of EU State aid ban for Member States tax legislation is subject to extensive discussion. The Court of Justice of the European Union (CJEU) has long ago decided that the ban on State aid includes tax exemptions or reductions. The importance of the State aid ban has thus come to the attention of the public interest, particularly in connection with the European Commission's investigation in Apple, Amazon or McDonald's cases. Unlike EU rules on fundamental freedoms¹ whose impact on national tax legislation is already largely clarified, many open questions remain in regards to the application of the State aid ban on national tax advantages. The purpose of this article is to present the current development of EU state aid legislation. Particular attention will be paid to the criteria of providing benefits and material selectivity. At the same time, we will deal with a few critical remarks about the structure of corporate tax legislation in connection to State aid law.

Keywords

EU, European Commission, State Aid Law, CJEU, Selectivity, Taxation

1. Introduction

The importance of EU State aid ban for Member States tax legislation of the EU Member States has recently been the subject of intensive discussions. This topic is not new because by the state or through state resources „in any form“² granted state aid is prohibited under the EU legislation. The fact that this prohibition also includes tax exemptions or tax reductions has already been decided by the CJEU. The rules on prohibition and control of State aid laid down in Art. 107 and follows of the Treaty on the Functioning of the European Union (TFEU) are an essential element of European competition law since the foundation of the European Economic Community.

¹ In regards to fundamental rights and freedoms, see: KLIMEK, L. (2015): Trestnoprávne záruky Charty základných práv Európskej únie: krok vpred alebo „nový obal“ Dohovoru o ochrane ľudských práv a základných slobôd?, p. 339-349.

² FUNTA, R. - GOLOVKO, L. - JURÍŠ, F. (2016): Európa a európske právo, p. 425; GYARFÁŠ, J. (2017): Čo robiť, keď konkurent dostane štátnu pomoc – Súkromnoprávne vymáhanie štátnej pomoci na Slovensku, p. 12 and follows.

Prohibited is not only the distortion of competition, for example through cartels, but also distortion of competition by undertakings established in the Union. State aid of any kind is in principle prohibited. Permitted is only exceptionally and subject to authorization by the European Commission.

2. General prohibition of State aid and exemptions

According to Art. 107 and follows of the TFEU Member States are only allowed to grant „State aid“ in certain limited cases and in accordance with specific procedural rules. Art. 107 (1) TFEU provides a general prohibition of State aid. Art. 107 (2) TFEU regulates the so-called legal exceptions when the State aid is compatible with the internal market.³ Art. 107 (3) TFEU then refers to situations when State aid can be considered to be compatible with the internal market.⁴ The concept of State aid is a legal term which is defined in the TFEU. Art. 107 (1) TFEU prohibits „any aid granted in any form by the state or through state resources which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods ... in so far as it affects trade between Member States“.

In particular, the concept of state aid is means that it

- is provided by the state or through state resources (i.e. it constitute a burden to the state budget)⁵ and is imputable to the Member State;⁶
- brings an economic advantage to the undertaking to which it has been granted;
- may distort trade between Member States and
- prefers only a particular group of businesses, i.e. has a selective character.

The above criteria must be met cumulatively. In this

³ For example, aid to eliminate damage caused by natural disasters or extraordinary events.

⁴ For example, aid for small and medium-sized enterprises (SMEs) and aid for enterprises in less developed regions.

⁵ KLÁTIK, J. (2007): Zodpovednosť za spreneveru z rozpočtu EÚ, p. 424-433.

⁶ Both characteristics are separate assumptions that must be fulfilled. T-351/02, Deutsche Bahn AG v. Commission, ECLI:EU:T:2006:104, Point. 103.

context, there is a comprehensive case-law⁷ of the EU Courts, which is also followed by the European Commission in its practice. On 19 July 2016 the European Commission published a notice on the interpretation of the concept of State aid within the meaning of Art. 107 (1) TFEU which deals inter alia with tax measures.⁸ In a working document dated 3.6.2016 the European Commission's Directorate-General for Competition issued an opinion on the so-called „Tax Rulings“.⁹

3. State aid procedure

At the primary law level, State aid procedure is contained in Art. 108 and 109 TFEU.¹⁰ According to Art. 108 (1) TFEU the European Commission, „in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.“¹¹ Art. 109 TFEU authorizes the Council on a „proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Art. 107 and 108 and may in particular determine the conditions in which Art. 108 (3) shall apply and the categories of aid exempted from this procedure.“ In recent years the state aid procedure has been completely modernized.¹² The most important provisions can be found in the Council Regulation (EU) 2015/1589¹³ and in the implementing Regulation (EU) 2282/2015.¹⁴ In case of state aid procedure, there is a distinction between „new“ and „existing“ aid. Existing aid is aid granted by the Member State concerned before its accession to the EEC/EC as well as aid already approved by the European Commission or the Council. New aid is any aid not covered by any category of existing aid, including changes to existing aid.

⁷ C-280/00, Altmark Trans GmbH, ECLI:EU:C:2003:415, Point. 75; or C-482/99, French republic v. Commission, ECLI:EU:C:2002:294, Point. 68.

⁸ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01).

⁹ http://ec.europa.eu/competition/state_aid/legislation/working_paper_tax_rulings.pdf

¹⁰ FUNTA, R. (2009): EC Law on State Aid: Legal Framework, Case Law and the Story in Alitalia State Loan Case, p. 312 and follows.

¹¹ LOPEZ, J. J. (2015): The Concept of State Aid Under EU Law: From Internal Market to Competition and Beyond, p. 35.

¹² TICHÝ, L. - PIPKOVÁ, P. (2016): Státní podpora a základní lidská práva: řízení o státní podpoře a právo na řádný proces, p. 15-23.

¹³ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.

¹⁴ Commission Regulation (EU) 2015/2282 of 27 November 2015 amending Regulation (EC) No 794/2004 as regards the notification forms and information sheets.

3.1. Preventive and repressive control of new aid

A new aid must be in accordance with Art. 107 (1) TFEU approved by the European Commission.¹⁵ This approval is proposed in two steps: Member States that intend to accept or modify the aid must notify the European Commission¹⁶ in sufficient time to enable it to submit its comments (Art. 108 (3) TFEU). After notification follows the „preliminary examination“, which must be in principle completed within two months after receipt of the notification. The interim review ends with a decision by the European Commission that either a notified measure does not constitute aid or meets the conditions for granting an authorization under Art. 107 (2) or (3) TFEU, or that the measure can be declared compatible with the internal market, followed by the „formal investigation procedure“ in accordance with Art. 108 (2) TFEU. The measure is approved if the European Commission does not take a decision by the end of this period. In the context of the formal investigation procedure under Art. 108 (2) TFEU, the European Commission has to examine the measure in detail. Firstly, in initiating the procedure the European Commission calls the Member State concerned, other Member States and other interested parties (in particular the beneficiaries and any competitors) to comment on the appropriate measures. This investigation should, in principle, be completed within 18 months in the form of a formal decision by the European Commission that the measure does not constitute unlawful aid and is approved (positive decision) in accordance with Art. 107 (2) or (3) TFEU or is incompatible with the internal market (negative decision). In the latter case, the Member State concerned can not grant the proposed aid. Existing aid is subject to an ongoing review by the European Commission, in cooperation with the Member States, in accordance with Art. 108 (1) TFEU (so-called repressive control). Its purpose is to determine whether there is any reason to initiate the formal investigation procedure. While the new aid can only be implemented after „approval“ (Art. 108 (3) TFEU), the existing aid may be provided until the European Commission decides on its incompatibility.¹⁷

3.2. Prohibition of unlawful assistance

If the European Commission does not consider a measure qualified as aid compatible with the internal market, its implementation is in accordance to Art. 108 (3) of the TFEU prohibited. This prohibition applies to any measure subject to notification (not only to measures actually notified) but also to measures not notified by the Member States. In the event that the European Commission takes a negative decision at the end of the formal investigation procedure, the national

¹⁵ KARAS, V. - KRÁLIK, A. (2012): Právo Európskej únie, p. 453.

¹⁶ SVOBODA, P. (2013): Úvod do evropského práva, p. 311.

¹⁷ C-6/12, P Oy, ECLI:EU:C:2013:525, Point. 36.

measure is declared illegal and the prohibition on its granting becomes definitive. The European Commission then provides the Member State concerned with the period for revocation or redrafting of the measure in question and, if the Member State concerned fails to comply with the decision within the prescribed period, it may refer the issue directly to the CJEU (Art. 108 (2) TFEU). In particular in case of tax benefits the character of the aid measure is not timely recognized and such an advantage is granted without control of such aid by the European Commission. The European Commission, on its own initiative, will investigate the allegedly unlawful aid regardless of the source of the information (for example, on the basis of a complaint lodged by the competitor). The examination may lead to the initiation of a formal investigation procedure. The European Commission may, after having given the Member State concerned the opportunity to submit its observations, adopt a decision to suspend the measure until it has decided on its compatibility; in urgent cases, may even order interim recovery of such benefit.¹⁸

3.3 Recover of unlawfully granted aid

If the European Commission, after completing the formal investigation procedure, concludes that the aid is incompatible with the single market, order the recovery of the aid from the beneficiary by the respective Member State. Recover of unlawfully granted aid shall be performed in accordance with the relevant national procedural rules of the Member State concerned. However, the power of the European Commission to recover the aid must be in line with the limitation period of 10 years from the date on which the aid was granted.¹⁹ National procedural law (for example, limitation periods)²⁰ and the protection of legitimate expectations generally do not prevent it from being recovered. The recovery may be avoided only if it would be contrary to the general principles of non-discrimination,²¹ for example in cases where the protection of legitimate expectations is justified by acts of the Union institutions (but not by Member States or national courts). Due to these tight conditions, aid recipients can in most cases rely on the protection of legitimate expectations. The above described procedures may lead to insolvency of the aid beneficiary. The reason for the inexorable resolution of the European Commission's procedures is the settled case-law of the Union's courts. The primary objective is to ensure that „*an incompatible aid will never be implemented. That purpose is achieved first,*

¹⁸ If a Member State fails to fulfill its obligation, the European Commission may, in the context of an infringement procedure under Art. 108 (2) TFEU to bring an action against a Member State and, if necessary, to initiate proceedings for the imposition of a periodic penalty payment under Art. 260 (2) TFEU.

¹⁹ Art. 17 of the Council Regulation (EU) 2015/1589.

²⁰ ŠTEVČEK, M. - FICOVÁ, S. a kol. (2009): *Občiansky súdny poriadok. Komentár.*

²¹ SVÁK, J. (2006): *Ochrana ľudských práv; HUFELD, U. - EPINEY, A. (2008): Europäisches Verfassungsrecht.*

*provisionally, by means of the prohibition which it lays down, and, later, definitively, by means of the Commission's final decision, which, if negative, precludes for the future the implementation of the notified aid plan.*²²

3.4. Legal protection

The decision of the European Commission is in principle implemented only against the Member State which has granted or intends to grant aid. Against a decision of the European Commission an action for annulment may be brought before the General Court of the European Union (GCEU) in accordance with Art. 263 TFEU.²³ While all Member States act as so-called privileged applicants under Art. 263 (2) TFEU, the power to initiate proceedings by the beneficiaries of the aid presupposes that they are directly or individually concerned (Art. 263 (4) TFEU). Appeal against the decision of the GCEU shall be filed with the CJEU. If an undertaking considers that a competitor has benefited from unlawfully granted aid, it can take action against the Member State which has granted such aid (but not against the competitor). The assumption is that the Member State is directly or individually concerned.

3.5. Role of national courts

Although State aid law does not fall within the primary jurisdiction of national courts, they are increasingly dealing with it. The reference to the national courts is contained in Art. 108 (3) TFEU. The national court may deal with the question of State aid when an undertaking claims to benefit from a tax advantage. It is the role of the CJEU to clarify whether there is in fact an inadmissible aid, by requesting a preliminary ruling (Art. 267 TFEU).²⁴ E.g. the Finnish Supreme Administrative Court²⁵ and the Austrian Administrative Court²⁶ addressed the relevant questions to the CJEU.

4. Tax measures as aid

In addition to cover the financial needs of public finances²⁷ (fiscal target), Member States regularly monitor the objectives of economic, environmental and research policies as well as several other non-

²² C-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)*, ECLI:EU:C:2008, Point. 47.

²³ MAZÁK, J. (2010): *Súdy Európskej únie po Lisabonskej zmluve*, p. 90-102.

²⁴ STEHLÍK, V. (2011): *The obligatory preliminary ruling procedure and its enforcement in the Czech and Slovak legal order*, p. 6-25; STEHLÍK, V. (2005): *Účinky rozhodnutí Evropského soudního dvora v řízení o předběžné otázce*, p. 321-335.

²⁵ C-6/12, *P Oy*, ECLI:EU:C:2013:525.

²⁶ C-66/14, *Finanzamt Linz v. Bundesfinanzgericht, Außenstelle Linz*, ECLI:EU:C:2015:661.

²⁷ KRÁLÍK, J. - JAKUBOVIČ, D. (2004): *Finančné právo.*

financial targets. The fact that tax measures may constitute State aid was clarified by the CJEU in 1974.²⁸ They came into attention when the European Commission imposed a ban on aid as a means of combating „*harmful tax competition*.“ At least since the so-called Luxembourg leaks in 2014, the importance of national tax law has grown in the case of multinational corporations. The main criteria for examining the tax measure in the field of State aid are the existence of an economic advantage and, consequently, a close link - the so-called selectivity of the measure in question. Practical treatment of both criteria are very sensitive to discussion, and it appears that the state of the fiscal legislation has not yet been fully discussed.

4.1. Economic advantage

Granting an advantage by the state (in the widest sense) fulfil the condition of an aid. As an advantage in terms of Art. 107 (1) TFEU is generally understood any economic advantage which an undertaking could not obtain without State intervention. The nature of the advantageous measure or its legal status does not matter that a positive transfer of funds is not absolutely necessary. Sufficient proof of the existence of an economic advantage is the waiver of the advantage otherwise available for the State needs. Subsidies or reduced credit conditions are also an economic advantage in the form of a reduction of tax burden. Such tax advantages, such as special depreciation rules or administrative procedures, may favor tax treatment for certain undertakings.

Determining the economic advantage of the tax measure is made more difficult by the fact that the State does not provide, in the context of taxation, any means to undertakings. Unlike in case of open aid, where the amount of aid is paid to the beneficiary, it is necessary in case of fiscal aid to determine the remission of the burden by tax authorities. The question which arises in that regard is whether the tax measure in question reduces the burden on the undertaking which it otherwise bears. Fiscal measures of a purely general nature which do not favor certain undertakings or the production of goods therefore do not constitute an aid. Another challenge in the area of fiscal aid is that the benefit provided is not only identified in a specific case but also provided that such assistance is to be recovered. The fact that some Member States have completely different tax systems does not play any role in the question of economic advantage. The existing tax systems of the Member States are therefore treated equally. This is because there is no uniform or ideal EU tax system as an applicable reference value, which also corresponds to the principle of Member States' sovereignty in the area of (direct) taxes. It also follows that aid instruments

²⁸ C-173/73, Commission v. Italian republic, ECLI:EU:C:1974:71.

represent inappropriate means of harmonizing corporate taxation.

4.2. Selectivity

According to Art. 107 (1) TFEU, the State measure constitutes an aid if it „*favours certain undertakings or industries*“, that is, if it is „*selective*“. ²⁹ As other criteria are regularly fulfilled in tax measures, the selectivity of the measure is of fundamental importance in assessing the nature of the aid. ³⁰ Recent CJEU case law tends to broaden the notion of selectivity. ³¹ In principle, a distinction is made between the material and regional (geographical) selectivity of the measures. Regional selectivity may be present if the measures are not applied throughout the territory of a Member State. ³² Material selectivity exists where the measure favors certain undertakings or the industry in relation to economic operators which

²⁹ FUNTA, R. (2009): EC Law on State Aid: Legal Framework, Case Law and the Story in Alitalia State Loan Case, p. 314.

³⁰ Advocate General opinion, C-66/14, Finanzamt Linz v. Bundesfinanzgericht, Außenstelle Linz, ECLI:EU:C:2015:242, Point. 114. „In matters of tax law in particular, however, the decisive criterion is whether a provision is selective, because the other conditions laid down in Article 107(1) TFEU are almost always satisfied. It is thus settled case-law that it is not necessary to establish that the aid in question is actually distorting competition or having a real effect on trade between Member States, but only to examine whether the aid is liable to distort competition and affect trade between Member States. Moreover, it is not even necessary for the beneficiary undertakings themselves to be involved in trade between Member States, it being sufficient that they might be so involved in future or that their foreign competitors might try to expand into the domestic market.“

³¹ Advocate General opinion, C-66/14, Finanzamt Linz v. Bundesfinanzgericht, Außenstelle Linz, ECLI:EU:C:2015:242, Point. 81. „Case-law repeatedly takes as its starting point the premiss that a tax regime is not selective if it applies to all economic operators without distinction. According to case-law, however, the mere fact that a tax regime grants an advantage only to those undertakings which satisfy its conditions is not in itself capable of establishing its selectivity. On the other hand, a tax regime also cannot always be said not to be selective on the ground that all economic operators are able without distinction to avail themselves of the tax advantage which it makes available, provided that they satisfy its conditions. For, in that event, a tax regime would always have to be deemed not to be selective.“

³² Advocate General opinion, C-66/14, Finanzamt Linz v. Bundesfinanzgericht, Außenstelle Linz, ECLI:EU:C:2015:242, Point. 91 and 93. „Selectivity usually involves a difference in the treatment of undertakings of the same State rather than a difference in the treatment of domestic and foreign undertakings. However, it is only in the case of cross-border as opposed to purely domestic discrimination that the Treaties, depending on the purpose of that discrimination, call for a particularly strict approach. The fact that legal persons alone are able to avail themselves of the amortisation of goodwill, but natural persons are not, does not therefore constitute selective favourable treatment of legal persons for the purposes of Article 107 TFEU.“

are in a comparable situation for the purpose of the measure. The measures, which apply without distinction to all undertakings and industries in the Member State concerned, are not, in principle, selective. However, according to the case law of the CJEU, the European Commission is not required to designate a group of companies with special characteristics to demonstrate the selective nature of the tax advantage.³³ The EU case-law has created specific conditions for the verification of material selectivity where it is first necessary to identify and examine a common or „normal“ regime under the tax system in force if the measure differs from other comparable situations and, finally, whether the different treatment is justified. Material selectivity may be de jure or de facto. While de jure selectivity results directly from the legal criteria for granting of measures formally reserved for certain undertakings (for example because they are of a certain size or legal form or are active in certain sectors),³⁴ the de facto selectivity exists if the conditions or obstacles imposed by a Member State, discourage some undertakings from using the measure.

4.2.1. Selectivity control of tax measures in three steps

In principle, tax benefits are available to all taxpayers who meet the criteria of the applicable legislation. In order to determine whether the tax measure in question is selective, it is necessary to carry out an analysis in three steps according to the case-law of the CJEU and the European Commission's position:

- *In the first step*, the (tax) reference system will be determined. The reference system consists of a „consistent set of rules that generally apply - on the basis of objective criteria — to all undertakings falling within its scope as defined by its objective. Typically, those rules define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of undertakings subject to it and the technicalities of the functioning of the system. In the case of taxes, the reference system is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates. For example, a reference system could be identified with regard to the corporate income tax system, the VAT system, or the general system of taxation of insurance. The same applies to special-purpose (stand-alone) levies, such as levies on certain

³³ Joined Cases, C-20/15 P and C-21/15 P, Commission v. World Duty Free Group SA, before Autogrill España SA, Banco Santander SA, Santusa Holding SL, ECLI:EU:C:2016:981.

³⁴ Commission Notice on the notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union (2016/C 262/01).

*products or activities having a negative impact on the environment or health, which do not really form part of a wider taxation system. As a result, and subject to special cases illustrated in paragraphs 129 to 131 above, the reference system is, in principle, the levy itself.*³⁵

- *The second step* has to examine whether the contested measure constitutes an exception from the reference system. It is necessary to determine whether the measure in question distinguishes between undertakings/economic sectors which find themselves in a situation comparable to the objective pursued by the measure.
- If there is an exception from the reference system, in *the third step*, it is necessary to examine whether the justification for the measure is considered. No aid exists if tax differentiation is carried out on the basis of objective criteria and monitors the nature or internal structure of the tax system.³⁶ If this is the case, the aid is considered to be an expression of the sovereignty of a Member State in tax matters. A measure which creates an exception to the application of the general tax system „may be justified if it results directly from the basic or guiding principles of that tax system. In that context, a distinction must be made between, on the one hand, the objectives attributed to a particular tax regime and which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives.“³⁷

4.2.2. De facto selectivity

Measures that apply at first glance to all undertakings may be selective if they favor certain undertakings or industries. When examining whether a measure differs from the rules of the Member State's reference system, it is necessary to review the limits of the reference system. If such measures were taken arbitrarily in order to favor certain undertakings which are in a comparable situation with respect to the scheme, such a measure is de facto selective. An example of the de facto selectivity of tax measures that tended to favor certain economic operators was Gibraltar's tax

³⁵ Commission Notice on the notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union (2016/C 262/01). Point. 133 and 134.

³⁶ T-289/03, British United Provident Association Ltd (BUPA), BUPA Insurance Ltd., BUPA Ireland Ltd, v. Commission, ECLI:EU:T:2008:29.

³⁷ C-78/08 to C-80/08, Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v. Paint Graphos Soc. coop. Arl., Adige Carni Soc. coop. arl, v. Agenzia delle Entrate, Ministero dell'Economia e delle Finanze, Ministero delle Finanze v. Michele Franchetti, ECLI:EU:C:2011,550, Point. 69.

advantages for so-called offshore undertakings.³⁸ In 2004, the European Commission decided that the measures notified by the United Kingdom to introduce three taxes to be applied to all undertakings in Gibraltar constituted State aid as they preferred Gibraltar-based undertakings. While the GCEU abrogated the European Commission's decision³⁹ because it did not demonstrate that certain elements of the aid scheme constitute exceptions to Gibraltar's tax regime, the CJEU decided on the existence of a selective advantage, since offshore undertakings were not subject to taxation, as opposed to undertakings established in Gibraltar.⁴⁰ In that regard, it should be noted that „*the fact that offshore companies are not taxed is not a random consequence of the regime at issue, but the inevitable consequence of the fact that the bases of assessment are specifically designed so that offshore companies, which by their nature have no employees and do not occupy business premises, have no tax base under the bases of assessment adopted in the proposed tax reform. Thus, the fact that offshore companies, which constitute a group of companies with regard to the bases of assessment adopted in the proposed tax reform, avoid taxation precisely on account of the specific features characteristic of that group gives reason to conclude that those companies enjoy selective advantages.*“⁴¹

4.2.3. Requirement to identify a group of benefiting undertakings

Measures of a general nature which do not favor certain undertakings or the production sector do not fall under the provisions of Art. 107 (1) TFEU.⁴² The

interpretation of the term „*certain undertakings or the production sector*“ has long been controversial. In its judgment, the CJEU adopted a clear position in regards to the Spanish tax advantage.⁴³ The subject of the dispute was the Spanish provision on the tax depreciation of financial goodwill for tax purposes in case of shareholding acquisition in foreign entities (in a foreign enterprise), and this shareholding is at least 5% on a continuous basis for at least one year. There was no such depreciation in gaining a shareholding in the domestic undertaking and, therefore the European Commission has disputed the compatibility of the measure with Art. 107 TFEU. In its decision of 7 November 2014, the GCEU ruled the compatibility of the Spanish provisions with Art. 107 (1) TFEU because the European Commission has not sufficiently demonstrated the selectivity of the Spanish law: in order to establish the existence of an aid, there must always be a specific group of undertakings which are the sole beneficiary of the measure. According to the GCEU, the exemption from the general tax system in the present case does not in itself justify the selectivity of the measure.

The GCEU pointed out that any tax measure subject to certain conditions should in any event be regarded as

diversity and size of the sectors to which they belong, provide grounds for concluding that a State measure constitutes a general measure of economic policy, if not all economic sectors can benefit from it. The fact that the aid is not aimed at one or more specific recipients defined in advance, but that it is subject to a series of objective criteria according to which it may be granted, within the framework of a predetermined overall budget allocation, to an indefinite number of beneficiaries who are not initially individually identified, is insufficient to call into question the selective nature of the measure“.

⁴³ Joined Cases, C-20/15 P and C-21/15 P, Commission v. World Duty Free Group SA, Banco Santander SA, Santusa Holding SL, ECLI:EU:C:2016:981. Point. 56, 58 and 60: „As regards, in particular, national measures that confer a tax advantage, it must be recalled that a measure of that nature which, although not involving the transfer of State resources, places the recipients in a more favourable position than other taxpayers is capable of procuring a selective advantage for the recipients and, consequently, of constituting State aid, within the meaning of Article 107 (1) TFEU. On the other hand, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute such aid. The concept of ‘State aid’ does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned is able to demonstrate that that differentiation is justified since it flows from the nature or general structure of the system of which the measures form part. It follows from all the foregoing that the appropriate criterion for establishing the selectivity of the measure at issue consists in determining whether that measure introduces, between operators that are, in the light of the objective pursued by the general tax system concerned, in a comparable factual and legal situation, a distinction that is not justified by the nature and general structure of that system.“

³⁸ European Commission Decision 2005/261 EC of 30.04.2004 on the aid scheme implemented by the United Kingdom for the tax reform of the Government of Gibraltar.

³⁹ Joined Cases, C-106/09 and C-107/09, Government of Gibraltar and Great Britain and Northern Ireland v. Spain, ECLI:EU:C:2011:732, Point. 71.

⁴⁰ On the notion of freedom of establishment in EU law and on the notion of free movement of companies, see: SUCHOŽA, J. a kol. (2016): Obchodný zákonník a súvisiace predpisy-Komentár, p. 54; or FUNTA, R. - BOVOLI, V. (2011): Freedom of Establishment of Companies in the EU/La libertà di stabilimento delle società dell'UE, p. 11 and follows; or KARPAT, A. (2017): Voľný pohyb spoločností v judikatúre Súdneho dvora EÚ, p. 102-110.

⁴¹ Joined Cases, C-106/09 and C-107/09, Government of Gibraltar and Great Britain and Northern Ireland v. Spain, ECLI:EU:C:2011:732, Point. 106 and 107.

⁴² Commission Notice on the notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union (2016/C 262/01), Point. 118: „Measures of purely general application which do not favour certain undertakings only or the production of certain goods only do not fall within the scope of Article 107 (1) of the Treaty. However, the case-law has made it clear that even interventions which, at first appearance, apply to undertakings in general may be selective to a certain extent and, accordingly, be regarded as measures designed to favour certain undertakings or the production of certain goods. Neither a large number of eligible undertakings (which can even include all undertakings of a given sector), nor the

selective although the recipient undertakings do not have any special characteristics which distinguish them from other undertakings. The CJEU, in its decision, followed the Advocate General's opinion. Although the CJEU did not definitively decide on the classification of the State aid scheme of the Spanish plan, but returned the case to assess the discriminatory nature of that provision to the GCEU, it considered, in its detailed reasoning the question of the various views of the GCEU and the Advocate General concerning the selectivity of the measure. The CJEU stated that in order to assess the selectivity condition presupposes „whether, under a particular legal regime, a national measure is such as to favour ‘certain undertakings or the production of certain goods’ over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and who accordingly suffer different treatment that can, in essence, be classified as discriminatory.”⁴⁴ In any event, the characteristic feature of selectivity does not require the identification of particular characteristics which are common to the undertakings benefiting from the tax advantage and which make it possible to distinguish them from undertakings to which an advantage does not apply. Although the CJEU statements raise criticism - the risk of unlimited state aid, the CJEU has brought more light in the review of aid. The assessment of selectivity must essentially be regarded as a test in which the benefit must be provided without discrimination in accordance with national tax law. Similarly, Advocate General Kokott also argued in his opinion in the Finanzamt Linz Case.⁴⁵ The recent case-law of the CEU has thus strengthened the position of the European Commission in state aid proceedings.

5. Overview of the European Commission's state aid practices in relation to tax benefits

State aid law in relation to tax benefits has changed over time. In a nutshell, the overview of the European Commission's practice in this area can be summarized as follows:

5.1. Approval of preferential tax regimes

At the end of the 1990s, the European Commission only sporadically questioned Member States' tax advantages in terms of State aid. Unlike today, many of the preferential tax regimes granted by individual Member States to certain undertakings or industries were allowed. Examples of permitted tax benefits are, for example, Center for Financial and Insurance Services in Terste, Italy, and offshore business center in Madeira, Portugal. Germany also provided various regional tax benefits approved by the European

⁴⁴ Joined Cases, C-20/15 P and C-21/15 P, Commission v. World Duty Free Group SA, Banco Santander SA, Santusa Holding SL, ECLI:EU:C:2016:981. Point. 54.

⁴⁵ Advocate General opinion, C-66/14, Finanzamt Linz v. Bundesfinanzgericht, Außenstelle Linz, ECLI:EU:C:2015:242, Point. 82 and follows.

Commission, in particular the various support measures in the East German Countries.⁴⁶

5.2. Use of State aid law to combat harmful tax competition

The Code of Conduct for Business Taxation adopted by the Council in December 1997 is probably a key rule in the European Commission's state aid practice. Following the publication of the Code of Conduct, the European Commission has established the criteria for controlling State aid for tax benefits at national level.⁴⁷ Subsequently a number of cases challenged by the European Commission increased. Many of the tax benefits initially approved by the European Commission for certain regions or sectors have been banned with the effect of a new notification.

5.3. New specification of the concept of aid in relation to fiscal measures

Under the so-called „Europe 2020 strategy”⁴⁸ the European Commission has fundamentally revised and modernized state aid legislation. The objective of modernization is to promote sustainable, smart and inclusive growth in the EU single market as well as to simplify rules and rapid decision-making.⁴⁹ Thus, the state aid procedure as well as the concretization of state aid were modernized.

Communication from the European Commission on the concept of State aid referred to Art. 107 (1) TFEU contains, in relation to the selectivity chapter, comprehensive information on tax measures.⁵⁰ It replaces the European Commission's 1998 Communication. The main remarks can be summarized as follows:

- *Cooperative societies*: Given the specific characteristics of cooperative societies, in regards to their operational principles and membership rules (compared to undertakings), they should be excluded from the scope of the State aid rules if they act in the economic interest of their actively

⁴⁶ KALESNÁ, K. - HRUŠKOVIČ, I. - ĐURIŠ, M. (2011): Európske právo, p. 235.

⁴⁷ The Commission notice on the application of the State aid rules to measures relating to direct business taxation (98/C 384/03) of 1998 was replaced by the Commission notice on the concept of State aid referred to in Article 107 (1) of the Treaty on the Functioning of the European Union (2016/C 262/01).

⁴⁸ Commission Communication "Europe 2020 - A strategy for smart, sustainable and inclusive growth", COM (2010) 2020 final of 3 March 2010.

⁴⁹ Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Modernizing EU State Aid (COM (2012) 209 final of 8 May 2012).

⁵⁰ Commission Notice on the notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union (2016/C 262/01).

involved members. Thus, their advantageous tax treatment does not have to fall within the scope of the State aid rules if they „act in the economic interest of their members, their relations with members are not purely commercial but personal and individual, members are actively involved in the business, they are entitled to a equitable distribution of economic profit.“⁵¹

- *Collective investment undertakings:* Tax measures to ensure the tax neutrality of investment in investment funds or investment firms should be considered non-selective if they result in the elimination of double economic taxation in accordance with the general principles of the tax system. Tax neutrality means equal treatment with all taxpayers, regardless of whether the investment is made directly or through investment funds.
- *Tax Amnesty:* means total or partial exemption from taxes, fines, criminal sanctions.⁵² In some proceedings, the tax due must be paid in full, in others only in part. The European Commission considers that, subject to certain conditions, a tax amnesty for an undertaking may be regarded as a general measure. All measures must be open to undertakings of all sectors and sizes; moreover, the tax administration can not have a discretion as to the award and the intensity of the measure. Time-limited application of tax amnesty „which apply only for a short period to tax liabilities which were due before a pre-defined date and which are still due at the time of the introduction of the tax amnesty, is inherent to the concept of a tax amnesty that aims to improve both the collection of taxes and taxpayers.“⁵³
- *Administrative decisions:* The fact that the application of the tax advantage in some Member States is subject to prior administrative authorization does not lead to the selectivity of such a measure. If the administrative authorization is based on objective and non-discriminatory criteria known in advance, it is not possible to speak about an aid.
- *Tax settlements:* According to the European Commission, settlement agreements

between the tax authorities and the taxpayer on the tax amount (in order to avoid a lengthy tax procedure) may constitute an aid if the taxed amount is reduced without any clear or inappropriate reasoning.

6. Tax Rulings

In the action plan to combat tax evasion and tax fraud, published on 6 December 2012,⁵⁴ the European Commission presented a comprehensive list of measures against aggressive tax planning to protect Member States' tax revenues. The Directorate-General for Competition set up a working group on tax planning, which analyzed in particular the preliminary price agreements for internationally active undertakings in the context of State aid law. In June 2013, the European Commission conducted tax investigations in several EU Member States. After publishing so-called „Luxembourg Leaks“ in November 2014, in which a group of journalists published nearly 30.000 pages with over 500 preliminary proposals from the Luxembourg tax authorities, the European Commission increased pressure on the transparency of cross-border tax decisions. It has also extended its state aid investigation: it has called all Member States to provide information on the practice of issuing tax decisions and to identify all businesses that have received tax decisions from 2010 until 2013. Overall, the European Commission has examined more than 1.000 tax decisions. The European Commission subsequently launched a review exercise assessing their compatibility with the State aid law. These were individual tax decisions issued to individual taxpayers (most notably tax decisions issued by Luxembourg (Amazon and McDonald's), Ireland (Apple) and the Netherlands (Starbucks)). On 18 March 2015, the European Commission presented a proposal to increase transparency in tax decision making as part of the Transparency Package. On 8 December 2015, the European Council adopted an amendment to the Mutual Assistance Directive. The amendment was looking for an automatic exchange of information within the European Union on cross-border tax benefits and on transfer pricing agreements between internationally connected undertakings. Within the Slovak Republic there was a change of Act No. 442/2012 Coll. on International Assistance and Cooperation in the Administration of Taxes, as amended by Act No. 359/2015 Coll. Implementing Council Directive 2015/2376 of 8 December 2015 which amended Directive 2011/16/EU in regards to mandatory automatic exchange of information in the field of taxation. The aim is to increase tax transparency and combat undesirable cross-border business tax practices. Thus, the automatic exchange of tax information on cross-border binding opinions has been widened.

⁵¹ Commission Notice on the notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union (2016/C 262/01). Point. 158.

⁵² In regards to imposition of criminal penalties, see: IVOR, J. - KLIMEK, L. - ZÁHORA, J. (2013): Trestné právo Európskej únie a jeho vplyv na právny poriadok Slovenskej republiky.

⁵³ Commission Notice on the notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union (2016/C 262/01). Point. 167.

⁵⁴ COM(2012) 722 final from 6.12.2012.

6.1. Interpretation of tax decisions by the European Commission

In its working document from 3 June 2016, the Directorate-General for Competition summarized the preliminary results of the review of the tax decisions required by the European Commission from the Member States. The European Commission considers that such tax decisions do not comply with the arm's length principle.⁵⁵ The European Commission stated in this document that the Directorate-General for Competition focuses on cases which are manifestly contrary to the arm's length principle.

In the European Commission's view, the tax deduction constitutes an aid insofar as it leads to a reduction in the recipient tax burden in the Member State concerned compared to undertakings in a similar situation. The European Commission provides in the State Aid Notice three groups of cases in which tax decisions can provide a selective advantage to their recipients.

- in the tax decision, national tax law is applied „*incorrectly*“, which leads to a lower tax;
- other undertakings which are in a similar situation as the tax recipient can not apply such a tax decision; or
- the tax administration favors the recipient of the tax return compared to other taxpayers who are in a similar situation. In the European Commission's view, such an advantage exists if the tax authority accepts an agreement which is not in line with the arm's length principle or if the tax decision allows the recipient to apply indirect settlement methods for the calculation of taxable profit, even when direct pricing methods are available.

In assessing selectivity, it is irrelevant whether and in what form is the arm's length principle included in the national law of the EU Member State concerned because the taxation of profits of undertaking which belongs to one group of undertakings is comparable to that of independent undertakings. The European Commission understands the arm's length principle as an expression of the application of Art. 107 (1) TFEU and justifies it in particular with the decision of the CJEU on the Belgian tax system for the coordination centers.⁵⁶

⁵⁵ The arm's length principle is set out in Art. 9 of the OECD Model Tax Convention on Taxation. It is based on a comparison of the conditions applied by the joint ventures and the conditions that would apply between independent undertakings.

⁵⁶ T-538/11, *Belgium v. Commission*, ECLI:EU:T:2015:188. Point. 65 and follows.

7. Final remarks

The growing importance of EU state aid for national tax law is clear. On the basis of the above it can be said that in case of EU State aid we speak about competition law with specific substantive and procedural rules. The aim is to prevent distortions of competition between undertakings operating in the EU single market. In principle, Member States are free to propose their own national tax regimes. For several years the European Commission has been applying an increasing amount of State aid law to tax measures. The tax measures falling under the category of harmful tax competition (coordination centers, etc.) have come into broader focus, followed by inadequate agreements on issues having cross-border implications. The rules of national tax law are also subject to control of State aid law. In regards to the jurisdiction of the EU Courts in tax matters, it is possible to observe the widening of the concept of State aid law. This concerns in particular the design and interpretation of the selectivity criterion. This all extends the application of Art. 107 (1) TFEU.

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Adaptation of Ukrainian legislation on environmental safety requirements to European Union law

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Abstract

The purpose of this article is to explore actual problems of harmonization of environmental legislation of Ukraine with the requirements and principles of EU environmental policy and development of proposals for the improvement of Ukrainian legislation. Main features of harmonization of Ukrainian legislation in the sphere of environmental protection and prospects for improvement of legal liability of business entities which activity is highly hazardous for violation of environmental law will be analyzed. As a result the study called "On prevention and elimination of damage caused to the environment" was elaborated.

Keywords

Environmental policy, environmental safety, adaptation of Ukrainian environmental legislation to EU standards.

1. Introduction

Today Ukraine's cooperation with the European Union, and in particular in the field of environmental protection is carried out within the framework of implementation of the EU-Ukraine Association Agenda. Environmental issues in the Association Agenda are traditionally enshrined in the "Other areas of cooperation" and are related to the preparation for the implementation of *acquis communautaire* and support of Ukraine in: development and implementation of strategy and action plans on environment; strengthening administrative capacity; development and implementation of legislation, strategies and plans in the field of environmental protection, particularly on environmental impact assessment, access to information and public participation; development of national implementation instruments according to multilateral agreements in the field of environmental protection; implementation of the roadmaps for achieving the Millennium Development goals relating to water and goals of Integrated Water Resources Management.¹

According to Art. 363 of the Association Agreement between the European Union and the European Atomic Energy Community and their member states, on one part, and Ukraine, on the other part, gradual approximation of Ukrainian legislation to EU law and policy on environment shall proceed in accordance with Annex XXX to this Agreement. According to this Annex Ukraine undertakes to gradually approximate its legislation to 29 Directives and Regulations within the stipulated time frames in such sectors: environmental governance and integration of environment into other policy areas; air quality; waste and resource management; water quality and water resource management, including marine environment; nature protection; industrial pollution and industrial hazards; climate change and protection of the ozone layer; genetically modified organisms. In order to fulfill these tasks Ukraine has adopted a number of regulations aimed at organizational and legal support of this process. Implementation of the EU-Ukraine Association Agreement means, among other, the need for introduction of European standards and norms in the field of environmental protection and demands obligatory coordination of organizational, economic and legal aspects of governance that is crucial for its effective functioning.

2. Directions of implementation of European environmental policy in Ukraine

In 2011 the Law of Ukraine "On the Fundamental Principles (Strategy) of Ukraine's State Environmental Policy for the Period until 2020" came into force. According to the Strategy, it is extremely important to introduce ecosystem approach to management activities and ensure adaptation of Ukrainian legislation in the field of environmental protection in accordance with requirements of EU directives by 2020.² The main priorities of this process should be: development of national strategies in the sphere of environmental protection; implementation of ideology of "green" economy, introduction of the "best available technologies"; activation of instruments of effective transition to sustainable consumption and production through the introduction of environmental audit tools, certification, labeling, etc.³

² Law of Ukraine "On the Fundamental Principles (Strategy) of Ukraine's State Environmental Policy for the Period until 2020" Bulletin of the Supreme Council of Ukraine. – 2011. – № 26 – St. 218

³ Andronov V. A., Majstro S. V. (2014): Directions of transformation of state environmental policy in conditions of

¹ EU-Ukraine Association Agenda.

Root causes of environmental problems in Ukraine are as follows: inherited economic structure with the dominant share of resource- and energy-intensive industries, negative impact of which was intensified by transition to market conditions⁴; depreciation of fixed assets of industrial and transport infrastructure⁵; existing system of governance in the field of environmental protection, regulation of use of natural resources, lack of clear separation of environmental and economic functions⁶; lack of understanding of priorities of preserving the environment and benefits of sustainable development in society⁷; failure to comply with environmental legislation; insufficient monitoring of compliance with legislation; insufficient funding for environmental measures.⁸ Environmental policy and law takes a prominent role in the European integration project.⁹ Ukraine-EU Action Plan foresees adaptation of Ukrainian environmental legislation to the EU legislation and implementation of European models of management and protection of natural resources. Adaptation of Ukrainian legislation to EU legislation is one of essential preconditions for moving to the next stages of integration, including in the foreseeable future the obtainment of EU membership by Ukraine.¹⁰ At the same time, according to the candidate countries for EU membership, implementation of the EU environmental policy is one of the most difficult reform packages in the whole European integration process.

3. Problems of adaptation of Ukrainian legislation on environmental safety requirements to European Union law

Current ecological situation in Ukraine has extremely negative parameters. Industrial accidents became more frequent, that have demonstrated improper situation concerning the compliance by business entities, which activity is highly hazardous, with requirements of environmental legislation and ignoring of basic safety rules. This determines the necessity of increased attention of the legislator to solution of problems of

prevention of such cases and increase of responsibility of business entities in this area. In Ukraine most of the laws on economic activities provide compensation for damage due to environmental pollution, but they are not sufficient to ensure the prevention and elimination of damage caused to the environment. In order to adapt domestic legislation to the European legislation on environmental protection and Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, prevention and elimination of damage caused to the environment, in particular, in our opinion, it is necessary to adopt in Ukraine the Law "On prevention and elimination of damage caused to the environment". The law should define a) the rights and obligations of business entities, which activity is highly hazardous, in the sphere of prevention and elimination of environmental damage, b) the role of public authorities in the sphere of prevention and elimination of environmental damage, c) liability for breach of duties under this law.

The law should be aimed at:

- a) companies that produce or store hazardous chemicals;
- b) petrochemical companies;
- c) operators of waste management and landfill sites (of city, district, etc.);
- d) agricultural enterprises;
- e) water management organizations;
- f) carriers of dangerous chemicals;
- g) suppliers of electricity;
- h) investors who invest in land and real estate;
- i) environmental consultants.

Some work in the sphere of regulation of obligatory ecological insurance is carried out in Ukraine. In particular, the draft law "On compulsory insurance of liability of business entities which activity is highly hazardous" of July 9, 2015 № 2327a was submitted to the Verkhovna Rada of Ukraine.¹¹ Draft law establishes common conditions and procedure of mandatory insurance of responsibility of business entities which activity is highly hazardous, and aims to compensation for damage caused to property interests of individuals and legal entities as a result of environmental pollution caused by accident. According to the explanatory note to the draft law civil liability of companies consists in compensation for harm, which is caused by ecological violations of specific individuals to third parties.¹² Instead, the purpose of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention

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⁴ LADYCHENKO, V. - GOLOVKO, L. - SHULGA, E. - KIDALOV, S. (2015): Legal basis of management in the sphere of forest and water resources, p. 232.

⁵ VITIV, V. (2015): The state policy in the field of drinking water and water supply in the light of the new doctrine of administrative law, p. 71.

⁶ LADYCHENKO, V. - GOLOVKO, L. - SHULGA, E. - FESCHENKO, I. (2012): Organizational and legal mechanisms of environmental management, p. 6.

⁷ LADYCHENKO, V. (2015): Human right to drinking water in the system of human rights, p. 64.

⁸ ZERKALOV, D. (2012): Environmental safety and environment, p. 259.

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¹⁰ SHULGA, E. (2015): Some aspects of the effectiveness of international legal protection of human rights to a healthy environment, p. 234.

¹¹ Draft law "On compulsory insurance of liability of business entities which activity is highly hazardous" of July 9, 2015 № 2327a.

¹² Explanatory note to the Draft Law of Ukraine "On compulsory insurance of liability of business entities which activity is highly hazardous".

and remedying of environmental damage, prevention and elimination of damage caused to the environment is to establish the framework of environmental responsibility for the prevention and elimination of environmental damage based on the *polluter-payer principle*. This Directive does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding these types of damages. Thus, the main purpose of Directive 2004/35/EC of the European Parliament and of the Council is to protect the environment and the purpose of the Draft Law of Ukraine "On compulsory insurance of liability of business entities which activity is highly hazardous" – the protection of property rights of individuals and legal entities. In our opinion, the provisions of the Draft Law "On compulsory insurance of liability of business entities which activity is highly hazardous" of July 9, 2015 № 2327a is not sufficient to ensure the prevention and elimination of damage caused to the environment.

In our opinion, the Law of Ukraine "On the prevention and elimination of environmental damage" should also include provisions, which would enable the public to influence decisions concerning the necessary preventive measures. Non-governmental organizations working on the environmental protection and persons who suffered the adverse effects or are able to experience the damage from environmentally hazardous activities should have the right to require the competent authority to take the necessary preventive measures. This requirement is necessary because in Ukraine the public has actually no real impact on the environmentally significant decisions.

In our opinion, the Law of Ukraine "On the prevention and elimination of environmental damage" should provide for the establishment of the national automated information system of prevention and elimination of environmental damage. Information system of prevention and elimination of environmental damage should include the following information: a) type of damage caused to the environment or its direct threat, place and date of occurrence of harm or threat of its occurrence, its volume, dates of the beginning and the end of the proceedings in the case of an offense; b) full name and address of the entity; c) adopted and implemented preventive and remedial actions, including measures to mitigate environmental damage, the results of remedial action, d) the amount of spending on preventive actions and the size of spending on remedial actions: 1) incurred by entity; 2) from indemnity insurance; 3) not received from the entity with specifying the reason why they have not been received; 4) from the state budget; e) state of the environment and public bodies and organizations where is possible to get information necessary to determine the state of the environment, as well as other information on the environment, collected, stored and distributed in accordance with the law "On prevention and elimination of environmental damage" or according to special laws.

4. Final remarks

Most European directives and regulations are formulated very specific, with the establishment of parameters and criteria of quality of environmental components, specific responsibilities of specific subjects. Instead, Ukrainian environmental legislation establishes general requirements, defines the principles, goals, but does not determine the ways of their achievement. Specific regulatory parameters can be found only in the state standards, most of which are not in the public domain. Ukrainian environmental legislation is declarative, does not contain the terms for achieving quantitative and qualitative results, does not establish effective system of control. Penalties for failure (improper execution) of relevant requirements are not set. Provisions of Ukrainian legislation are not sufficient to ensure the prevention and elimination of damage caused to the environment and must be improved. In particular, Law "On prevention and elimination of damage caused to the environment" and State concept of realization of human rights to qualitative and safe drinking water should be adopted. To ensure the implementation of European environmental standards into Ukrainian legislation a simple adoption of laws is not enough. For implementation it is also necessary to ensure the availability of appropriate institutions and budgets for the implementation of these laws and other normative legal acts. It is also necessary to create an effective system of monitoring and sanctions in order to insure that requirements of the laws are implemented completely and appropriately.

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Diverging narratives of economic sanctions – some observations on the EU sanctions against Russia

Balazs Horvathy

Abstract

The economic sanctions can be approached from two different perspectives. In the narrative of the international law and international economic law the economic sanctions are legal instruments applied exceptionally with the aim of implementing objectives of foreign and security policy. The legality of the measures requires here the justification of legal concepts (e.g. the essential security of the sanctioning country). From the perspective of the international relations and foreign policy, however, the legality of the measure plays no significant role. The justification of the sanction is based on the pure interest of the country, therefore the legality is only a formal question of how to adopt and implement the measures and not a prerequisite for the justification itself. The paper intends to examine the legal narrative of economic sanctions in order to establish the criteria of their legality and to apply this concept to the sanctions imposed by the European Union on the Russian Federation. The paper will argue, however, that the economic sanctions are Janus-faced instruments of international relations: even though it can be interpreted by way of external trade policy and law considerations, in practical terms, their fundamental objectives unavoidably stretch beyond the legal narrative and may appear to merely serve the foreign policy of the country.

Keywords

Economic sanctions, EU law, International economic law, WTO law, Russia, Ukraine

1. Introduction

The economic sanctions are Janus-faced instruments of international relations. On the one hand, the legal basis of economic sanctions is well anchored in international law and international economic law that lay down the framework of application of sanctions in a collective way under the umbrella of the United Nations or in a unilateral manner without specific mandate of the international community. In this narrative, the economic sanctions are legal instruments that are to be applied exceptionally in order to implement objectives of foreign and security policy. These instruments are logically similar concepts to the public policy exceptions of international economic law, where the legality of the exceptional measures

always requires justification on specific policy (moral, public policy, environmental etc.) grounds.

On the other hand, the economic sanctions are also interpreted as instruments of foreign policy, which implies the second face of these restrictive measures. From this point of view, the legality of the measure plays no significant role. The justification for the sanction is here not based on legal concepts, but only on the pure interest – or in terms of the dominant realist paradigm: the national interest¹ – of the country, therefore the legality is only a formal question (e.g. in which form the sanction could be implemented), but not a prerequisite for the justification.

Taking the perspective of the first face of the economic sanctions and examining these measures as legal instruments, the main objective of the paper is to establish the criteria of their legality and to apply this concept to the sanctions imposed by the European Union on the Russian Federation after the annexation of Crimea and escalation of crisis in Ukraine in 2014. Forasmuch as the EU measures are considered unilateral economic sanctions, the analysis restricts its scope to the context of the international economic law and pay less attention to the whole international law complexity of sanctions.²

After a short introductory analysis on the ‘EU-Russia sanctions war’ (*II.*), the paper places conceptually the economic sanctions into the context of the international economic law (*III.*); then the criteria of legality is applied to the EU sanctions in the subsequent chapter (*IV.*); and finally, the paper is closed by conclusion (*V.*).

II. The EU sanctions on Russia

In 2014, after Russia has annexed Crimea, the EU Member States decided to impose complex economic sanctions on Russia, as EU diplomatic efforts –

¹ Here I refer only to a general definition of national interest, namely it includes the perceived needs and desires of one state in relation to other states comprising the external environment, in other words national interest always says what is best for a society in foreign affairs. See ROSENAU, J. (1968): *National Interest*, p. 34–40; NUCHESTERLEIN, D. (1976): *National Interests and Foreign Policy: A Conceptual Framework for Analysis and Decision-Making*, p. 246–266.

² For a detailed analysis, see: ALEXANDER, K. (2009): *Economic sanctions*; BOSSCHE, P. v. d. / ZDOUC, W. (2013): *The Law and Policy of the World Trade Organization*; and ABASS, A. / WHITE, N. (2006): *Countermeasures and Sanctions*; SZÉP, V. (2018): *Foreign policy without unilateral alternatives?*

intended to compel the Russian Federation to act decisively to prevent the further escalation of the Ukrainian crisis – had been proven ineffective.³ The early sanctions contained restrictions on Russian and Ukrainian individuals (freezing of private assets and travel bans),⁴ however, as the deepening conflict between Russia and Ukraine escalated, the Council repeatedly amended the sanction legislation and expanded the scope of application of the restrictive measures. The most recent substantive amendments were effected in December 2017⁵ and March 2018⁶ and the sanctions have been extended until July 2018 (economic sanctions) as well as September 2018 (individual restrictive measures) and March 2019 (asset freezes against certain persons).⁷

The aim of the economic sanctions imposed by the European Union was to condemn and punish Russia for its role in the intensification of the Ukrainian crisis and the related legal measures build on two main objectives. First, as a general objective, the sanctions

put pressure on Russia to abandon policies that escalate the Ukrainian crisis, i.e. any actions that undermine the territorial integrity and sovereignty of Ukraine, thereby endangering the stability and security of the region (e.g. cessation of military support for pro-Russian separatists). Second, the economic sanctions also constitute a response to the violations of human rights committed in Ukraine and to the annexation of part of Ukraine and are aimed at decision-makers, politicians, companies and other legal entities that can be held liable for the occurrence of these infringements. On the basis of these objectives, it is therefore evident that the economic sanctions imposed by the European Union serve the purpose of achieving broader foreign policy and security policy goals, and should be considered relevant not merely on the basis of their economic content. Hermann van Rompuy, former President of the European Council was therefore apt when he described the nature of the EU sanctions as belonging to the arsenal of foreign policy, and representing "not an objective in themselves, but a means of achieving an objective".⁸

Therefore, the economic sanctions are markedly easier to interpret as instruments of foreign policy rather than as legal instruments. However, it cannot be disputed that the Treaties lay down the basic legal framework and thereby limit the European Union's scope for policy action when it comes to applying economic sanctions. In line with this, since no international (UN) embargo is in force relating to the Ukrainian crisis, the economic sanctions analyzed here may be considered autonomous policy instruments of the European Union.

Three types of sanctions imposed by the European Union can be distinguished.⁹ Some are general economic and trade restrictions, others are restrictive measures on the assets and movement of individuals, and there are particular provisions of economic diplomacy. The first category, namely economic and trade sanctions against the Russian Federation and the Crimean Peninsula entails the introduction by the EU of a general export and import ban on products on the Common Military List of the European Union.¹⁰ These restrictions were subsequently extended to include the export of so-called dual-use goods and technologies, and special import restrictions were imposed on products from the Crimean region. An exception to

³ On the historic context of the escalation of the Russia–Ukraine crisis and the imposition of EU sanctions, see: Doraev, M. (2015): The "Memory Effect" of Economic Sanctions Against Russia, p. 355–419.; Ingelevič-Citak, M. (2015): Crimean conflict – from the perspectives of Russia, Ukraine, and public international law, p. 23–45.; Horvathy, B. / Nyircsak, A. (2014): EU-Russia Sanctions War. Part I: The legal framework, HAS CSS Lendület–HPOPs Research Group, Budapest. (6 October 2014, available at: <http://hpops.tk.mta.hu/en/blog/2014/10/eu-russia-sanctions-war-part-i-the-legal-framework>).

⁴ Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ L 78, 17/03/2014); and Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ L 78, 17/03/2014).

⁵ Council Decision (CFSP) 2017/2426 of 21 December 2017 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 343, 22.12.2017).

⁶ Council Implementing Regulation (EU) 2018/388 of 12 March 2018 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ L 69, 13.3.2018).

⁷ The economic sanctions has been extended by the Council on 21 December 2017 and are in force until 31 July 2018 (see: Russia: EU prolongs economic sanctions by six months, Press Release of the Council, 821/17; 21/12/2017) and the restrictive measures relating to asset freeze and travel bans has been prolonged on 12 March 2018 until 15 September 2018 (see: EU prolongs sanctions over actions against Ukraine's territorial integrity until 15 September 2018, Press Release of the Council, 120/18; 12/03/2018). Moreover, on 5 March 2018 the Council extended also the assets freezes of individuals responsible for the misappropriation of Ukrainian state funds until 6 March 2019 (see: Misappropriation of Ukrainian state funds: EU prolongs asset freezes against 13 persons by one year, Press Release of the Council, 104/18; 05/03/2018).

⁸ EU strengthens sanctions against actions undermining Ukraine's territorial integrity (Press Release of the Council, 21/03/2014, available at: http://www.consilium.europa.eu/uedocs/cms_Data/docs/press_data/EN/foraff/141741.pdf.)

⁹ See for an alternative categorization, GRUSZCZYNSKI, L./MENKES, M. (2017): Legality of the EU Trade Sanctions Imposed on the Russian Federation under WTO Law, p. 39–41.

¹⁰ Common Military List of the European Union (equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, 17 March 2014), OJ C 107/1 (09/04/2014).

these rules are cases where the "clean" origin of a product is certified by official Ukrainian documents.¹¹ In addition, certain investment activities are also subject to restrictions. These restrictions impact investments in Russia in the transport, telecommunications and energy sectors, including projects in oil and gas production as well as mining. The hold on investment was augmented by a ban on the export of vital products and technologies for these strategic sectors, with the provision of financial and insurance services related to such projects also being prohibited.

The second category of sanctions includes the freezing of certain assets and shares as well as travel bans for individuals (natural persons and companies). According to the latest data (15 May 2018), asset freeze and travel bans are in force against 150 persons and 38 companies, which includes a number of companies in the Crimean region whose ownership changed – in the wake of the annexation – in contravention of Ukrainian law.¹²

Measures aimed at freezing of assets include investments and economic interests of any kind of the persons designated by the EU provisions, including cash, cheques, bank deposits, stocks and shares, etc. In practice, this means that the persons concerned do not have access to, and cannot sell or transfer these assets. Travel restrictions affect individuals in that the person is denied entry into the European Union. The Council maintains the list of sanctioned persons in addendums to the legislation while also providing for legal remedy: the persons concerned have the right to comment on the list, as well as have the opportunity to challenge the Council decision at the European Court of Justice.¹³

Moreover the second category also includes specific restrictions imposing obligations on EU citizens and businesses in the context of the action against Russia, particularly restrictions on Russian state-owned banks, based on which EU citizens and businesses may not conduct financial transactions with the banks under

sanctions, nor trade financial instruments (bonds, etc.). Consequently, economic sanctions in this category do not only impact foreign persons, but may also restrict the activities of EU citizens and economic entities.

The third category includes specific punitive measures of economic diplomacy against Russia, which were introduced by the European Union in order to enhance the political clout and effects of the economic sanctions. This includes the Council decision requesting that the European Commission reassess, on a case by case basis, partnership programs between the EU and Russia, and to suspend certain programs.¹⁴ Exempt from this review are programs implementing cross-border cooperation, as well as those involving Russian civil society. Furthermore, the Union cancelled a planned EU-Russia summit¹⁵ and decided against holding the usual bilateral negotiations, among others suspending negotiations on visa policy cooperation and on a new partnership agreement. As a joint diplomatic move, EU Member States prompted the suspension of accession negotiations between Russia and the OECD, as well as its associated International Energy Agency. In addition, the 40th G8 summit, originally planned for Sochi was cancelled in 2014, and instead, a G7 meeting without Russia was held in Brussels on 4-5 June 2014.¹⁶ Also of significance is that the European Council on 16 July 2014 urged the European Investment Bank to postpone the signing of a new financing scheme for Russia,¹⁷ with Member States indicating that they would be taking similar steps before the Board of Directors of the EBRD regarding approval of new funding schemes.

III. Economic sanctions in narrative of the international economic law

The subject of the subsequent analysis is the trade related provisions falling under the scope of WTO law, therefore the restrictions on weapons, dual-use products, goods and services related to special investments, the import ban on goods from the Crimean and rebel-controlled territories, as well as restrictions on business transactions involving certain companies on blacklists are of significance. However, we do not assess here neither the measures of

¹¹ Council Decision 2014/386/CFSP of 23 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol.

¹² See the current list of persons and entities under EU restrictive measures is available in the Annex of the consolidated version of Council Decision 2014/145/CFSP.

¹³ Decision has so far been reached in the case of Andriy Portnov, former deputy leader of the Ukrainian president's administration: the Court upheld Portnov's appeal, annulled the freezing of his assets and stated that listing Portnov's name had not complied with the criteria of the EU law. See also other cases before the Tribunal: T-331/14 Mykola Yanovych Azarov v. Council (Prime Minister of Ukraine 2010 to 2014); T-339/14 Serhiy Vitaliyovych Kurchenko v. Council (Ukrainian businessman); T-347/14 Viktor Fedorovych Yanukovych v. Council (President of Ukraine 2010 to 2014); T-434/14 Sergej Arbutov v. Council (Prime Minister of Ukraine February to January 2014); T-717/14 and T-720/14 Arkady Rotenberg v. Council (Russian businessman). The cases involving companies include the proceedings initiated by Russian oil company Rosneft: T-715/14. NK Rosneft et al v. Council.

¹⁴ See EU sanctions against Russia over Ukraine crisis. European Union Newsroom. Available at: http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm.

¹⁵ EU restrictive measures in view of the situation in Eastern Ukraine and the illegal annexation of Crimea (Council, Background Note, Brussels, 29/07/2014). Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/press_data/EN/foraff/144159.pdf.

¹⁶ The Brussels G7 Summit Declaration (European Commission, Memo, Brussels, 5/06/2014). Available at: http://europa.eu/rapid/press-release_MEMO-14-402_en.htm.

¹⁷ See EU restrictive measures in view of the situation in Eastern Ukraine and the illegal annexation of Crimea (Council, Background Note, 29/07/2014). Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/press_data/EN/foraff/144159.pdf.

economic diplomacy limiting Russia's room to manoeuvre within international economic relations, nor the sanctions restricting movement of individuals. These economic sanction measures, at the first glance, seem to be contrary to the principles of the WTO law. First, the unilateral sanction might be incompatible with principle of most favored nation treatment¹⁸ that requires a WTO Member State to grant other Member States any preference immediately and without conditions in respect to its provisions on imports and exports, which the Member State in question provides to third countries. GATS incorporates the principle of most favored nation treatment,¹⁹ therefore the principle also involves the aspects of the EU sanctions on trade in services, such as the ban on oil industry investments or the activities of the banking sector. Second, the sanctions imposed by the EU are not compatible with the principle of national treatment (equal treatment). Under this principle, WTO members may not give products of other Member States inferior treatment from a regulatory perspective, than they do their own domestic products.²⁰

Therefore, the economic sanctions imposed by the European Union are in breach of the above principles, i.e. the EU's obligations based on GATT 1994 and GATS. Thus the essential question arises of whether the WTO law provides exceptions, legal basis for justifying the sanctions introduced by the EU. Not considering the exceptions that can be excluded *prima facie*,²¹ the only exceptional provision whose application could reasonably be taken into account is the exception based on "essential security interest."²² Therefore I focus on this provision.

The provision on essential security interest had been present in the original 1947 text of GATT, and was left unchanged by the 1994 revision. This same text was also used in Article XIV***bis*** of GATS. On the whole, this exception provides leeway for Member States in cases where their essential security and their

national security or security policy interest is at stake, and in such cases authorizes them to derogate from the obligations laid down by GATT 1994 and GATS. It identifies three types of justification. First, Member States may refuse any provisions that would oblige them to issue information the disclosure of which would be contrary to the security interests of the Member State.²³ Second, it authorizes Member States to freely take measures necessary for the protection of their national security interests, specifically referring to trade in arms, munitions and war material, as well as to times of war and to other emergencies in international relations.²⁴ As the third option, it reaffirms that Member States may take measures to implement their tasks serving the maintenance of international peace and security under the UN Charter.²⁵

Among these options, the second might bear substantive significance in the context of legality of EU sanctions. However, past practice involving national security exceptions is restricted to a few concrete disputes, and so far no final decision has ever been issued in any dispute settlement procedure where a Member State has successfully based its justification of restrictive measures on the exception provisions of GATT Article XXI or GATS Article XIV***bis***. However some concrete cases in practice where consideration of national security interests was raised, suggest criteria that are relevant to the evaluation of the case of EU sanctions. The most important cases are as follows:

a) Applicability of GATT Article XXI was raised for the first time in procedures²⁶ brought by Czechoslovakia against the United States in 1949, the subject of which were export controls and a licensing system introduced by the USA. According to the United States, these restrictive measures were needed for national security reasons, and were applicable only to a narrow range of goods usable for military

¹⁸ Article I of the General Agreement on Tariffs and Trade ("GATT"). If there is significance of the citing the earlier revision of the GATT text, this will be indicated by "GATT 1947"; Published in: Council Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), Annex 1 (b), OJ L 336 (23/12/1994) page 1 [Marrakesh Agreement].

¹⁹ Marrakesh Agreement, Annex 1 (b): General Agreement on Trade in Services (GATS) Article II paragraph (1). GATS defines the principle of most favored nation treatment as follows: "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country."

²⁰ GATT Article III.

²¹ Because of the special facts of the case, the general exceptions (GATT Article XX) do not apply and any other exemption allowing deviation from the principles is also logically excluded, such as free trade zones and customs unions (GATT Article XXIV).

²² GATT Article XXI and GATS Article XIV***bis***.

²³ GATT Article XXI paragraph (a): "[Nothing in this Agreement shall be construed] to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests [...]"

²⁴ GATT Article XXI paragraph (b): "[Nothing in this Agreement shall be construed] to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations (...)"

²⁵ GATT Article XXI paragraph (c): "[Nothing in this Agreement shall be construed] to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

²⁶ US – Export Restrictions, GATT/CP. 3/SR.22 (8 June 1949), Third Session – Summary Record of the Twenty-Second Meeting, pp. 4–10. Available at: https://www.wto.org/gatt_docs/English/SULPDF/90060100.pdf.

purposes. The legal basis of the measures was cited to be GATT Article XXI paragraph (b) (iii), i.e. it referred to an emergency in international relations to justify the measures. The GATT contracting parties subsequently rejected Czechoslovakia's application²⁷ and did not set up a working group for an inquiry into the dispute.²⁸ In addition, no definition of the essence of the essential security interest had been formulated, which at the end of the negotiations Czechoslovakia interpreted as Member States themselves being able to determine what measures they consider necessary for the protection their security interests.²⁹

b) While not considered formal dispute resolution, the relevance of GATT Article XXI was raised in connection with Portugal's accession in 1961. At that time, Ghana maintained a boycott of goods originating from Portugal, in response to the Portuguese Government's policy towards Africa, specifically in reference to the crisis in Angola. Similarly to the previously discussed case, Ghana also cited GATT Article XXI paragraph (b) (iii) as the basis for its restrictive measures and concluded that both concrete and potential dangers may threaten the security interests of a state.³⁰

c) In 1975, in the case of a ban introduced by Sweden on footwear used by the military,³¹ reference was also made to GATT Article XXI, however, that case also did not make it to formal dispute resolution. Sweden argued that the import ban served to maintain – in reality, protect – its crisis-hit domestic production, a measure necessary for Swedish national security policy. Member States made an important determination to the effect as stated that GATT Article XXI does not require consultation,³² i.e. a state whose interest is served by restrictions may take the necessary measures unilaterally.³³ As elsewhere, it is apparent in this case that the applicability of the article is greatly influenced by who is able to interpret the scope of GATT Article XXI, whether the Member State itself is allowed to autonomously determine the scope of goods considered national security risks, or

whether there are objective conditions for that.³⁴ These questions still remain unanswered.³⁵

d) The past case closest to the current EU sanctions against Russia concerns the economic sanctions imposed on Argentina by the EEC, Canada and Australia, the background to which was the armed conflict in the Falkland Islands between the United Kingdom and Argentina, as well as the implementation of the subsequent UN Security Council decision 502 of 1982.³⁶ As a result of the negotiations of the GATT contracting parties, a separate decision was adopted on issues concerning the application of GATT Article XXI.³⁷ The importance of the decision lay in that it clarified several procedural issues around the application of the national security exception. First, it stated that contracting parties subject to restrictions must be provided the broadest possible information by the sanctioning state about the measures implemented. Above all, this was meant to clarify the application of the exception referred to by GATT Article XXI paragraph (a). In other words, it sought to prevent interpretation of the above-mentioned GATT Article XXI paragraph (a) in a way that allowed the sanctioning state to fully restrict the disclosure to the affected state of information relating to the sanctions. Second, it also made it clear that states subject to sanctions retain all their rights deriving from their GATT membership. Last, the decision authorized the GATT Council to specify, on request, further criteria with reference to specific economic sanctions. The decision did not address the substantive issues, however, two additional aspects are evident from the text. Firstly, the wording of the document implied that judging the existence of national security interests is at the full discretion of Member States.³⁸ Secondly, the decision clearly stated that signatories introducing restrictions must take into account the interests of affected third states.³⁹

²⁷ US – Export Restrictions, pp. 8–10.

²⁸ This initial case arose before the establishment of the WTO panel.

²⁹ US – Export Restrictions, p. 10.

³⁰ Summary Record of the Eleventh Meeting, SR.19/11/Corr.1 (28 December 1961), p. 196. Available at: https://www.wto.org/gatt_docs/English/SULPDF/90280183.pdf.

³¹ Sweden – Import Restrictions on Certain Footwear, L/4250, 17 November 1975. Available at: https://www.wto.org/gatt_docs/English/SULPDF/90920073.pdf.

³² Sweden – Import Restrictions on Certain Footwear, p. 3.

³³ GATT Council Meeting, Minutes of Meeting (10 November 1975), C/M/109, p. 9. Available at: https://www.wto.org/gatt_docs/English/SULPDF/90430147.pdf.

³⁴ Taking an example, the connection between army boots and the essential security interest is palpable, but it is questionable whether a state should be able to restrict trade e.g. in slippers used by the military.

³⁵ ALFORD, R. P. (2011): The Self-Judging WTO Security Exception, p. 697–759.

³⁶ The decision acknowledged that the UK may cite self-defense if Argentine troops did not leave the Falkland Islands. See: Resolution 502 (1982) of 3 April 1982. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/502%281982%29.

³⁷ Decision concerning Article XXI of the General Agreement (30 November 1982), L/5426 (2 December 1982). Available at: https://www.wto.org/gatt_docs/english/SULPDF/91000212.pdf.

³⁸ Decision concerning Article XXI of the General Agreement, first paragraph of the preamble: "Considering that the exceptions envisaged in Article XXI of the General Agreement constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved"

³⁹ Decision concerning Article XXI of the General Agreement, third paragraph of the preamble.

e) The dispute on the embargo imposed by the United States on Nicaragua in 1985 was also a case of significance.⁴⁰ The United States cited GATT Article XXI as justification for the economic sanctions on the grounds that the revolutionary Sandinista leadership governing Nicaragua at the time posed a real threat to US national security and foreign policy.⁴¹ Nicaragua rejected this argument, and requested to set up a panel. However, since the panel's mandate did not allow to examine the USA's justification referencing GATT Article XXI, i.e. the existence of the national security interest cited by the USA, the panel in its conclusions could not state that the USA had complied with the requirements arising from GATT Article XXI, nor that it was in violation of its obligations under GATT.⁴² The limited mandate of the panel and its self-restriction allows us to conclude that GATT Article XXI leaves to Member States the justification of the existence of the national security interest, i.e. it is up to each Member State's judgment and discretion what circumstances can be considered essential to its security.

f) After the establishment of the WTO, there has been one case under the new dispute settlement procedure where the possibility of exemption based on GATT Article XXI was raised: the dispute initiated by the EC against the United States,⁴³ in the wake of the sanctions introduced by the Helms Burton Act.⁴⁴ The restrictions imposed by the USA included sanctions on goods of Cuban origin, entry restrictions on Cuban nationals and other economic sanctions against Cuban companies. The EC argued that the embargo measures violated several obligations arising from GATT. According to the US, imposition of sanctions served its essential security interests, and also cited the fact that it was not considered entirely commercial in nature, so it argued that the dispute did not fall within the scope of the provisions of GATT-WTO.⁴⁵ After consultation, the Dispute Settlement Body set up a

⁴⁰ For a substantial analysis, see: HENDERSON, J. C. (1986): *Legality of Economic Sanctions under International Law: The Case of Nicaragua*.

⁴¹ BOSSCHE, P. V. D. / ZDOUC, W. (2013): *The Law and Policy of the World Trade Organization*, p. 597–598.

⁴² US – Trade Measures Affecting Nicaragua (Report by the Panel, L/6053, 13 October 1986), para. 5.3. Available at: https://www.wto.org/gatt_docs/English/SULPDF/91240197.pdf.

⁴³ US – The Cuban Liberty and Democratic Solidarity Act (Helms Burton) (DS38).

⁴⁴ The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms–Burton Act, Pub.L. 104–114, 110 Stat. 785, 22 U.S.C. §§ 6021–6091). The federal law was intended to further tighten the embargo on Cuba. A 1996 incident in which the Cuban air force downed two private aircraft flying under American flag played a part in the bolstering of the legislation. The aircraft were operated by an association established by Cuban refugees, and which they used to regularly fly into Cuban airspace to spread flyers.

⁴⁵ Minutes of DSB meeting of 16 October 1996 (WT/DSB/M/24), p. 7. Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocument/s21715/Q/WT/DSB/M24.pdf.

panel, but later suspended its proceedings at the request of the EC, and eventually the proceedings ended without a decision on the case's merits.

The GATT Article XXI paragraph (c), i.e. taking measures to implement tasks serving the maintenance of international peace and security under the UN Charter has not been cited in any dispute settlement case so far. Similarly, there has not been any past practice to date involving the exception provision in GATS Article XIVbis, however, since the text of that article is identical to GATT Article XXI, the past practice examined above might also be applicable to GATS.

IV. The legality of economic sanctions imposed by the EU on Russia

Considering the above criteria arising from the past case law, it is plausible that the exception in GATT Article XXI paragraph (a) does not bear significant relevance, since the economic sanctions imposed by the EU were adopted and published in a transparent way as part of the foreign and security policy decision-making process, so justification on the retention of information is likely not necessary. It is important to note, moreover, that GATT Article XXI – and also similarly GATS Article XIVbis – does not define additional criteria beyond the aforementioned exceptions, i.e. it does not contain requirements like the introductory provisions of GATT Article XX (the so-called *chapeau*). In addition to that, also GATT Article XXI paragraph (c) can be excluded from the scope of the analysis, since the economic sanctions imposed by the European Union on the Russian Federation were introduced unilaterally and not on the basis of a UN mandate. Therefore, the justification of the EU's restrictive provisions – hypothetically – could be based on GATT Article XXI (b).

When applying the exceptions under GATT Article XXI paragraph (b), the EU must justify the existence of national security interests, the necessity of the action and the circumstances of any special cases (trade in fissionable material or weapons and war or emergency). Justification of the existence of the national security interest in the case of the European Union sanctions provides much leeway, since on the basis of the above-mentioned practice (Czechoslovakia-USA trade dispute; and decision issued on the embargo by the EEC, Canada and Australia on Argentina) the determination of the national security interest is at the discretion of the state concerned. In particular, the argument appearing in the US-Nicaragua dispute implies that the merits of such a decision on the existence of the security interest cannot be reconsidered by the panel.

As a result, it is up to the discretion of the EU to determine the extent to which the Russian-Ukrainian crisis, deepening in the wake of the annexation of Crimea, is considered a threatening concern to the national security and foreign policy of Member States. Such a concern could be the fact that the Russian

Federation had violated the sovereignty of Ukraine, had engaged armed forces, which the heads of state and government condemned in their declaration of 6 March 2014 and also called on Russia to immediately recall its forces to their permanent bases in accordance with the relevant agreements.⁴⁶ In addition, the aspects emerging from the Portugal–Ghana dispute further expand the room for manoeuvre, namely not only actual but potential security risks may also be cited as circumstances threatening the national security interest.

Another question is what requirements to apply for the justification of necessity. In contrast with GATT Article XX, which requires the express justification of necessity, it is a plausible interpretation of GATT Article XXI that proof of necessity is merely a formal requirement. This can be deduced grammatically from the wording of the text, which refers to a national security interest "*which [the contracting party] considers necessary*". It also follows logically from the above that if the definition of a national security interest is entirely at the discretion of the Member State, then the national security interest also in itself implies that the sanctions imposed are necessary for the protection of this interest. Thus if we accept broad discretion, the latter interpretation seems probable.

Finally, it should be noted that in justifying the special circumstances in the context of the application of the EU sanctions, GATT Article XXI paragraph (b) (i), which exempts restrictions on fissile materials, is irrelevant for the case in point. In contrast, either of the other two options may be considered as the legal basis for justification. In paragraph (b) (ii) the provisions on the traffic in arms, ammunition and implements of war for the purpose of supplying a military establishment are related to the parts of the EU economic sanctions dealing with the arms embargo. Due to the aspects of past practice, however, it is not determined whether this exception is applicable to dual-use goods such as war supplies serving, among others, military establishments. Fundamentally, deciding this point is not necessarily essential, since of the third basis for exception, i.e. the special circumstances in paragraph (b) (iii), namely war or other emergency in international relations, the latter appears to be justifiable in the context of the escalation of the Russian-Ukrainian conflict. This exception allows for the justification of provisions with substantially broader and general scope and without specific focus on particular goods and, could therefore, if necessary, be applied to restrictions on dual-use products. The interpretation of "other emergency" is not clear, but as before, the grammatical interpretation here also allows for a great degree of discretion. In addition to war, "other emergency" could mean a broader set of international conflicts, however, on the basis of the context, these

are supposedly serious conflicts in essence comparable to war.⁴⁷

In cases relying on this as the legal basis for justification, it is therefore assumed that the grave nature of the crisis would play a role, however we could not find examples in past practice which would provide guidance for this issue. Of the previously cited examples, the boycott imposed by Ghana on Portuguese goods is comparable to the Russia-Ukraine crisis. In this case, Ghana claimed that the crisis afoot in Angola constituted a continued threat to peace and security in whole Africa, and used this to cite GATT Article XXI paragraph (b) (iii), but as mentioned above, the proceedings did not result in a decision on the merits of the case. Consequently, in justifying the EU sanctions, the events following the annexation of the Crimean peninsula, tacit support for armed resistance in rebel-controlled areas and the consequent crisis may be argued to support the reference to "other emergency".

V. Final remarks

I have argued in the above analysis that the justification of the economic sanctions imposed by the EU on Russia might be feasible by reference to the 'essential security interest'. GATT Article XXI grants great discretion for justifying the existence of an essential security interest and of special circumstances, but fundamentally due to the slight background of the relevant case law, the precise interpretation of the specific provisions of the exception clauses is not clear in all respects. In addition, both past practice and the current case at hand clearly demonstrate that economic sanctions are considered instruments that can be interpreted by way of external trade policy and law considerations, but in practical terms, their fundamental objectives unavoidably stretch beyond trade policy and may appear to merely serve foreign policy objectives. In other terms, the two perspectives of the 'Janus-faced' economic sanctions are bound to each other at the point of the justification. The 'legal face' is referring to the essential security interest of the states introducing sanctions, which leads us back to the pure interest of the country. Therefore, the circle is complete: the concept behind the 'essential security interest' is in fact a similarly indefinite concept of 'national interest.'

That is vital because this nature of economic sanctions inherently makes legal review difficult and therefore the WTO Member States rather opt to resolve their disputes on economic sanctions outside the WTO. As a consequence, the analysis can only conclude that hypothetically, the legality of measures comparable to the EU economic sanctions can be derived from application GATT Article XXI (b), however, due to the nature of the measure, it is not expected that the questions regarding the legality will be channeled into the dispute settlement mechanism. Accordingly the

⁴⁶ See Council decision of 2014/145/CFSP, first paragraph of the preamble (OJ L 78/16, 17/03/2014).

⁴⁷ SINGH, S. (2012): WTO Compatibility of United States' Secondary Sanctions Relating to Petroleum Transactions with Iran.

legal perspective of the 'Janus-faced' economic sanctions could not become more characteristic and the foreign policy perspective can continue to dominate the scene.

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The merger control – a pillar of EU competition law

Luca Messina

Abstract

In essence the merger control is a structural control: it should have a preventive effect and prevent future restrictions on competition. It is true that abuse control is an instrument that allows, under certain conditions, to correct or mitigate adverse effects of mergers at a later date. But there is an international consensus that abuse control can not replace merger control: on the one hand, mergers eliminate all competition between associated companies and reduce the number of market participants. As a result, competition in a market can be damaged without a breach of competition law in the narrower sense. On the other hand, detecting and proving abusive behavior can be extremely difficult and time-consuming. At the beginning, we explain why a modern economy requires merger control and how it fits into the system of competition law. After that, the European SIEC test will be explained. In addition, we will provide an overview of how the merger control is applied in selected European countries. The summary contains conclusions and summarizes the recommendations of this study.

Keywords

Competition law, EU, Merger control

1. Introduction

Competition law is designed to ensure the existence of effective competition.¹ It should prevent that private market participants will affect the functioning of competition. The prerequisite is the existence of market power. This occurs when companies are able to escape the sanction effects of competition law because of their market position. From this logic, the focus of competition law is the fight against cartels, the abuse of dominant position and the implementation of merger control. The fight against cartels and merger control serve primarily to guarantee competitive market structures and to prevent the existence of market power. Abuse control, on the other hand, is intended to ensure that a dominant company behaves "fairly" vis-à-vis other market participants. By its nature, merger control is a structural control: it has a preventive effect by limiting the creation of market power through fusion-driven growth.

¹ SHAPIRO, C. (1996): Mergers with differentiated products.

It aims to avoid future restrictions of competition. It is true that abuse control is an instrument that allows, under certain conditions, to correct or mitigate adverse effects of mergers at a later date. However, there is an international consensus that abuse control can not replace merger control. On the one hand, mergers eliminate all competition between associated companies and reduce the number of market participants. On the other hand, detecting and proving abusive behavior can be extremely difficult and time-consuming.

2. Possible economic effects of mergers

From a competitive point of view, mergers are not per se problematic: most mergers do not create a situation in which the new company that is coming into being gains significant market power.² In addition, mergers can stimulate competition, generate efficiencies and have other welfare enhancing effects. The specific competitive effects of a merger are primarily dependent on whether they are horizontal, vertical or conglomerate. We speak about a horizontal merger when companies operating on the same market (i.e. direct competitors) merge together. In the case of a vertical merger, the transaction affects companies operating on upstream or downstream markets. For example, the merger between a manufacturer and the distributor of a given product would be considered vertical. Finally, conglomerate mergers refer to cross-industry mergers in which the companies have neither a horizontal nor a vertical relationship. Such a merger occurs, for example, when an IT company takes over a bakery. The result is a so-called conglomerate.

2.1. Horizontal mergers: unilateral and coordinated effects

Many competition authorities have issued regulations to assess horizontal mergers. In the US, the Horizontal Merger Guidelines determine how a horizontal merger should be examined. Since 2004, the "Guidelines on the assessment of horizontal mergers" have existed in the EU for this purpose.³ Horizontal mergers can, on the one hand, lead to efficiency gains (for example due to economies of scale), which generally have a price-

² KOKKORIS, I. - SHELANSKI, H. (2014): EU Merger Control.

³ LINDSAY, A. - BERRIDGE, A. (2012): The EU Merger Regulation.

reducing effect. On the other hand, the elimination of competitors leads to a market concentration, which, especially in oligopolistic markets, is accompanied by an increase in the market power of individual players.⁴ Especially if the products of the companies involved in a merger are close substitutes, this may lead to so-called unilateral effects. A typical example of a unilateral effect is unilateral price increase by merging parties, which subsequently trigger price adjustments for other market participants and ultimately result in a generally higher price level.

In addition to the unilateral effects, horizontal mergers can also produce coordinated effects. By this is meant that a merger changes the market structure in a way that favors collusive behavior: instead of competitive behavior, there is tacit or explicit coordination of market participants. In addition to market concentration, other factors, such as the number and symmetry of remaining companies in the market, the demand characteristics or the increasing market transparency, can produce coordinated effects.

2.1.1. Non-horizontal mergers: foreclosure

There are also specific rules for vertical and conglomerate mergers. Analogous to the "Horizontal Merger Guidelines", the United States has issued the "Non Horizontal Merger Guidelines", a guideline that regulates the examination procedure for vertical and conglomerate mergers. The EU's "Non-Horizontal Merger Evaluation Guidelines" explicitly state that non-horizontal mergers tend to give rise to less competition concerns than horizontal ones.

This is justified by the fact that, firstly, non-horizontal mergers do not lead to any direct abolition of competition between the merging companies. Unlike horizontal mergers, there is typically no direct competitor for non-horizontal mergers and thus there is no addition of market share. Second, non-horizontal mergers offer considerable scope for efficiency gains, for example through the integration of complementary activities and products. A concrete example of efficiency gains from vertical mergers, which is also mentioned in the EU guidelines, is the avoidance of "double marginalization". Thus, a reduction in margins - that is, a price reduction - in the downstream market (e.g. trade) leads to an increase in demand on the upstream market (e.g. production). This increases the gains at the upstream level. By avoiding double marginalization, the profits of the integrated company can be increased, and vertical mergers can result in price reductions and increased production.

Nevertheless, non-horizontal mergers can also have anti-competitive effects, again distinguishing between coordinated and unilateral effects. In the case of unilateral effects foreclosure effects are in the

forefront. For example, a non-horizontal merger may hinder the access of actual or potential competitors. Such an effect occurs, for example, when an integrated company seeks to increase profits by strategically increasing the intermediary price of non-integrated companies to make them less competitive ("raising rivals' cost"). However, such a strategy always presupposes that the integrated company has market power in the wholesale market and is thus exposed to no or only insufficient competitive pressure.

Non-horizontal mergers, like horizontal mergers, can also produce coordinated effects. This is particularly the case if the existing competition is changed in such a way that a co-ordinated behavior between companies becomes simpler, more stable and more effective.

2.1.1.1. Unilateral effects

Numerous empirical studies show that horizontal mergers in oligopolistic markets can lead to unilateral effects.⁵ The earliest studies assessing the price effects of mergers date back to the early 1990s and are primarily focused on airlines mergers. Over time, the effects of mergers on prices have been further explored in various other sectors, notably the banking, hospital and petroleum industries. Most of these studies are case studies that look at a single merger or analyze multiple mergers in a specific industry and over a period of time. Common to all these mergers is that they have been considered by the competition authorities to be rather critical, but ultimately have been approved.

3. The merger control in the EU

As mentioned at the beginning, merger control aims to prevent future restrictions of competition. To clarify whether a merger harms competition, today most competition authorities rely on one of the following three tests:

- Market dominance test

A market dominance test may prohibit a merger if it creates or strengthens a dominant position which significantly impedes competition. The concept of market dominance is not clearly defined in economics. In principle it is focused on situation where the merged entity becomes the market leader and is no longer subject to sufficiently competitive pressure. In addition to individual market dominance, the market dominance test generally also covers collective market dominance. A merger can therefore be prohibited even if it changes the market structure in such a way that the remaining market participants tacitly coordinate their behavior and no significant competition takes place. The market dominance test is to a large extent

⁴ STROUX, S. (2004): US and EU Oligopoly Control.

⁵ KOKKORIS, I. (2012): Merger Control in Europe: The Gap in the ECMR and National Merger Legislations.

form-based, as it focuses strongly on structural features such as market shares, etc.

- "Significant Lessening of Competition (SLC)" test

The SLC test examines whether a merger leads to a significant reduction of competition. In contrast to the market dominance test, this test focuses primarily on the merger-related market changes, in particular on the competitive loss between the companies. The SLC test is thus effect-based. Particular attention is paid to possible fusion-related price increases in the SLC test. Specifically, this means that with the SLC test, mergers can also be prohibited due to unilateral effects.

- "Significant Impediment to Effective Competition (SIEC)" test

The SIEC test is a "hybrid test" that combines elements of the market dominance test and SLC tests. In principle, it can be used to prohibit mergers that lead to a significant impediment to competition.

4. From dominance to SIEC test: changes in the EU law

At the beginning of the 2000s, a fundamental debate on strengthening the economic foundation in the application of competition law was initiated in the EU. This debate was focused on the "More Economic Approach". This is understood as a competition policy that does not judge entrepreneurial behavior according to "formalistic" rules, but because of its effects in individual cases. This debate was triggered mainly due to the decisions in the cases *Airtours*,⁶ *Schneider/Legrand*⁷ and *Tetra Laval/Sidel*,⁸ all of which had been overturned by the 2002 European Court of Justice. In all three cases, the European Commission was accused of not sufficiently clarifying the economic impact of the respective merger projects.

The discussion about the "More Economic Approach" in merger control centered on the question of whether the market dominance test could sufficiently take into account the harmful effects of mergers. The discussion was additionally fueled by the merger *Heinz/Beechnut*, which was prohibited by the US authorities due to the threat of unilateral effects. This was due to the fact that it was unclear whether unilateral effects below the market dominance threshold could be covered by the traditional market dominance test.

Another point fueled the reform debate: in *GE/Honeywell*,⁹ the European Commission banned a

merger, even though it had previously been given a green light by the US authorities.¹⁰ This disturbing result - especially in light of the increasing number of international mergers - raised the question of whether standardisation of the substantive test would not be beneficial. The United Kingdom and Ireland were among the strong proponents of a regime change. By contrast, Germany and Italy were unable to identify any need for reform and advocated to maintain the status quo. After it became apparent that a change to the SLC test would not find the necessary majority, a compromise solution has been agreed (introduction of the SIEC test, which - as mentioned - includes elements of the market dominance and the SLC test). Ultimately, the SLC and SIEC tests are perceived as largely equivalent in practice.

5. The revised EC Merger Regulation

Since the entry into force of the revised EC Merger Regulation (ECMR) on 1 May 2004,¹¹ are mergers being examined on the basis of the SIEC test. Art. 2 para. 3 of the ECMR states, that "Concentrations which significantly impede effective competition in the common market or in a substantial part of it, in particular by the creation or strengthening of a dominant position, shall be declared incompatible with the common market." Consequently, a merger is incompatible with the common market if a dominant position is found. However, in the recital, the ECMR clarifies that mergers leading to unilateral effects are also incompatible with the common market. The term "significant impediment to effective competition" should be interpreted as "That, in addition to the concept of market dominance, it extends exclusively to those anticompetitive effects of a merger resulting from the non-coordinated conduct of undertakings which would not have a dominant position in the relevant market." In the EU, mergers that significantly impede effective competition can now be banned, including unilateral effects below the market dominance threshold.

5.1. The efficiency defense

Efficiency criteria played no role in practice under the old EU market dominance test. However, switching from the dominance test to the SIEC test was fundamentally not motivated by giving efficiency considerations more space in merger control. Moreover, in the Guidelines on the assessment of horizontal mergers, the European Commission points out that, in analyzing the effects of mergers, it considers it appropriate to take into account justified and significant efficiency gains. This also makes it clear that efficiency defense is not an independent element of the SIEC test, but rather an integral part of the merger review. The Guidelines also set limits to

⁶ T-342/99, *Airtours v. Commission* [2002] ECR II-2585.

⁷ T-301/01, *Schneider Electric v. Commission* [2002] ECR II-4071.

⁸ T-5/02, *Tetra Laval v. Commission* [2002] ECR II-4381.

⁹ COMP/M.2220-*General Electric/Honeywell* (OJ 2004 L 48).

¹⁰ KOKKORIS, I. (2009): *The Reform of EC Competition Law: New Challenges*.

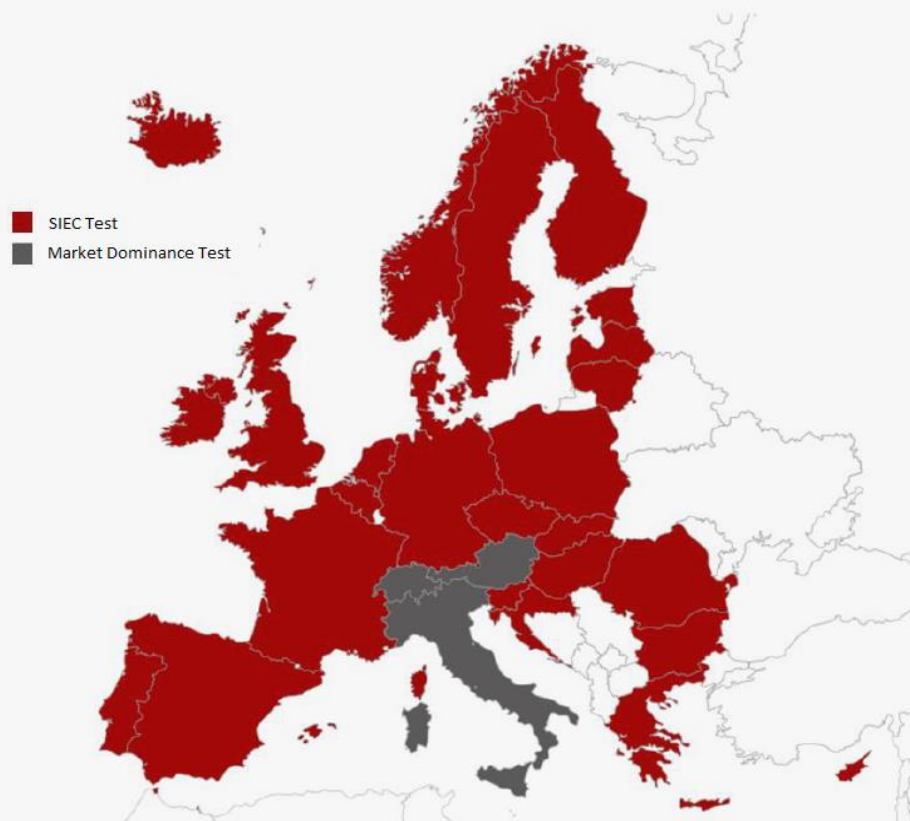
¹¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

efficiency. It is highly unlikely that a concentration leading to a market position which is close to a monopoly or a similar degree of market power could be declared compatible with the common market on the grounds that efficiency gains would be sufficient to counteract possible anti-competitive effects. Efficiency benefits are therefore more relevant in cases where the anticompetitive effects are less pronounced.

6. The merger control in EU Member States

As the policy debates on European merger control started in the early 2000s, several EU Member States were already applying an SLC test. Others were still applying at this time the market dominance test.

Thus, different substantive test standards were used within the EU. The change of regime from the dominance test to the SIEC test, which took place in the EU in 2004, sent a clear signal in which direction the harmonization efforts within the EU should go. Over time, towards the SIEC test has been replicated by more and more EU Member States. The following table provides an overview about the standards is used in EU Member States. On the following scheme can be seen the widely used SIEC test in Europe.



7. EU Member States overview

| Country | Test | Comments |
|----------------------|------------------|---|
| Belgium | SIEC | In Belgium, the switch to the SIEC test in 2006 was completed; previously the market dominance test was used. |
| Bulgary | SIEC | Bulgaria has merger control since 1991. With the revision of the Bulgarian Competition Protection Act in 2008, the SIEC test was introduced. |
| Denmark | SIEC | In Denmark, merger control was revised in 2000 and the market dominance test was introduced at the same time. The switch to the SIEC test took place five years later, in 2005. |
| Germany | SIEC | The German merger control was introduced in 1973. Germany was among those countries that opposed the introduction of the SIEC test in the EU. Nonetheless, Germany also switched to the SIEC test in 2013. |
| Estonia | SIEC | Estonia has merger control since 2001. The corresponding chapter in Estonian competition law was revised in 2006. Since then, the SIEC test has been used in Estonia. |
| Finland | SIEC | The first legal basis for merger control in Finland dates back to 1998. In 2011, the change from market dominance to SIEC test took place. |
| France | SLC/SIEC | French merger control was introduced in the late 1970s. France is one of those countries that did not need to change regime in order to bring its test standard closer to that of the EU. |
| Greece | SIEC | The Greek competition law did not contain any actual merger control. The corresponding regulation was only introduced into the legislation in 1991. |
| Great Britain | SLC/SIEC | The UK is pursuing the SLC approach in merger control. |
| Ireland | SLC/SIEC | In Ireland, the same test is used as in the UK. |
| Iceland | SIEC | Iceland merger control is based on the competition law introduced in 2005. |
| Italy | Market dominance | Italy and Germany are among those countries that opposed the introduction of the SIEC test in the EU. In contrast to Germany, the change from market dominance test to SIEC test was not officially completed in Italy until today. |
| Croatia | SIEC | Croatian competition legislation dates back to 2003, including merger control. Croatia joined the EU in 2013 and follows the SIEC approach in merger control. |

| Country | Test | Comments |
|------------------------|------------------|--|
| Latvia | SIEC | The Latvian merger control entered into force at the beginning of 2002. |
| Lithuania | SIEC | The Lithuanian competition law dates back to 1999. The test standard used today in merger control complies with the SIEC test. |
| Malta | SLC/SIEC | The merger control regime in Malta dates back to 2002. The test standard used complies with the SLC test. |
| The Netherlands | SIEC | In the Netherlands, the market control test was introduced in 1998. However, the SIEC test has been used for over ten years. |
| Norway | SIEC | The Norwegian merger control was based on a double test until 2016, which consisted of the SLC and an efficiency criterion. Today, a SIEC test is used in Norway. |
| Austria | Market dominance | Apart from Italy, Austria is the only country in the EU that still applies a "classic" market dominance test today. |
| Poland | SIEC | As early as 1990, the first legal bases for merger control were created in Poland. In 2000 a two-step market dominance test with extended economic analysis was applied. Since Poland's accession to the EU in 2004, the merger control test conforms to the European SIEC test. |
| Portugal | SIEC | The Portuguese merger control regime was last revised in 2012. Since then, it is no longer the market control but the SIEC test that is being used in Portugal. |
| Romania | SIEC | Since 2010, a full SIEC test has been used in Romania. |
| Sweden | SIEC | Sweden is using the SIEC test. This was introduced in 2008. Previously, the Swedish Competition Authority examined mergers under the market dominance test. |
| Slovakia | SIEC | The Slovak merger control law was revised at the beginning of the 2010s: On January 1, 2012, the market dominance test was abandoned and replaced by the SIEC test. |
| Slovenia | SIEC | Slovenia joined the EU in 2004 as part of the first eastward enlargement. The 2008 review of competition law also modernized merger control and introduced the SIEC test. |
| Spain | SLC/SIEC | In Spain since 1989, an SLC test is applied. In 2007, merger control was revised, but the standards remained. |

| Country | Test | Comments |
|-----------------------|----------|---|
| Czech republic | SIEC | In 2001, the market dominance test was defined as the test standard. In 2004, the Czech Republic took over to the SIEC test. |
| Hungary | SLC/SIEC | As part of the first Eastern enlargement round, Hungary joined the EU in 2004 and, as a result, gradually began to align its merger control with European rules. In 2009, a new test standard was introduced, which refers to the SIEC and SLC tests. |
| Cyprus | SIEC | Cyprus is also one of the countries that joined the EU in the first round of the Eastern enlargement in 2004. At that point in time, Cypriot merger control applied the market dominance test introduced in 1999. In 2014 the SIEC test was introduced. |

8. Final remarks

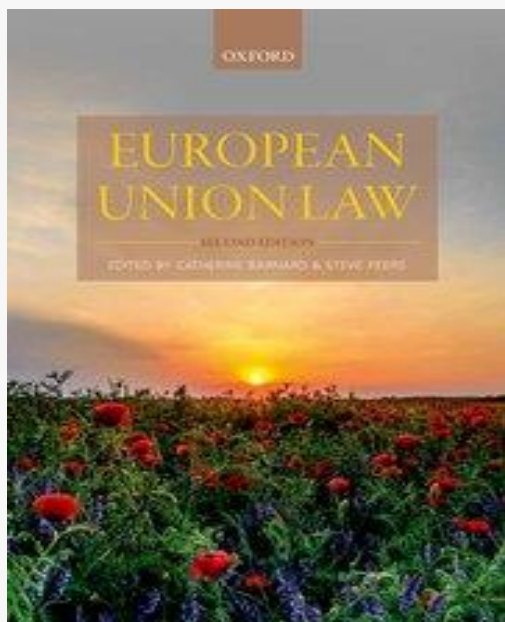
By its nature, merger control can be seen as a structural control: it should have a preventive effect and prevent future competition restrictions. The European Commission application of the EC Merger Regulation is considered to have been a success. The challenge for the European Commission will be to maintain the standards that have characterised the EC Merger Regulation's application up to now and identify ways how to reduce the administrative burden in regards to new challenges.

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European Union Law

(Edt. Catherine Barnard and Steve Peers)
book review



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Written by experts, this textbook offers students a unique, case-focused account of EU law. The text draws together a range of perspectives on EU law designed to introduce students to the key debates and case law which shape this vast subject.

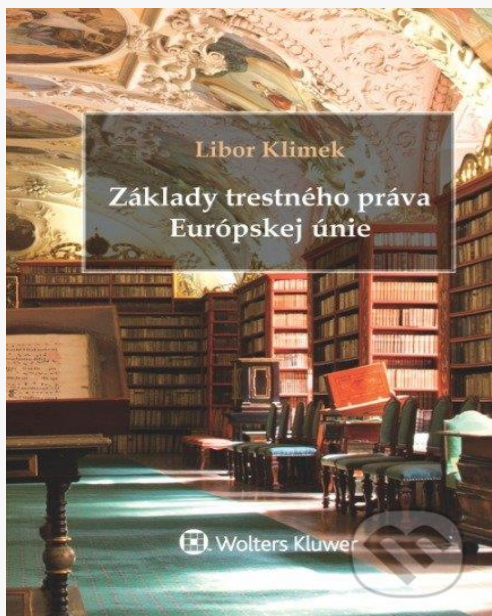
- Unique multi-contributor textbook to provide an introduction to the key principles and perspectives of EU law,
- A consistently engaging writing style and clear structure ensures every chapter is accessible for students with few or no prior knowledge of EU law, while still dealing with complex issues and debates to support further study and assessment preparation,
- Critical case studies are included throughout the book, illustrating how EU law functions in practice and presenting a distillation of the key cases to help prepare students for exams and further study,
- Broad coverage ensures the text is suitable for all undergraduate EU law courses,

- Comprehensive coverage of institutional EU law and the four freedoms as well as chapters on more specialised areas such as competition law, EU criminal law, and health law.

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Základy trestného práva Európskej únie
Fundamentals of the Criminal Law of the European Union
(by Libor Klimek)
book review



Wolters Kluwer (2017)
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Prezentovaná učebnica je historicky vôbec prvou učebnicou trestného práva Európskej únie v Slovenskej republike, ako aj v Českej republike. Keďže obsahuje aj kritické pohľady, mohla by niesť názov Základy trestného práva Európskej únie s nadhľadom. Rozhodne nie je diktátom nudných poučiek, ale je pútavým výkladom.

Dnes už neplatí tradičné dvojrozmerné vnímanie trestného práva – „trestné právo hmotné“ a „trestné právo procesné“. Právna obec musí prijať skutočnosť, že „hmota“ ako aj „proces“ v členských štátoch Európskej únie sú ovplyvňované medzinárodnými či európskymi požiadavkami. Toho dôsledkom trestné právo dostalo ďalšie rozmery – „medzinárodné trestné právo“ a „trestné právo Európskej únie“.

Táto učebnica je určená študentom práva a študentom policajných akadémií, ako aj praktikom so záujmom o porozumenie trestného práva na úrovni Európskej únie. Keďže má medzinárodné spracovanie, je vhodná pre právnu obec v Slovenskej republike, ako aj v Českej republike. Predstavuje základný rozsah poznatkov, ktoré sú prepojením teoretických a praktických aplikačných otázok.

Obsah:

I. časť

Úvod do trestného práva Európskej únie

- 1: Pojem trestné právo Európskej únie
- 2: Vývoj trestného práva Európskej únie
- 3: Pramene trestného práva Európskej únie

II. časť

Hmotné právo

- 4: Trestná zodpovednosť
- 5: Európske trestné činy – úvod
- 6: Terorizmus
- 7: Obchodovanie s ľuďmi a sexuálne zneužívanie žien a detí
- 8: Obchodovanie s drogami
- 9: Pranie špinavých peňazí (legalizácia príjmu z trestnej činnosti)
- 10: Korupcia
- 11: Falšovanie platobných prostriedkov
- 12: Počítačová kriminalita
- 13: Organizovaná trestná činnosť (organizovaná kriminalita)
- 14: Rasizmus a xenofóbia
- 15: Poškodzovanie životného prostredia
- 16: Poškodzovanie finančných záujmov Európskej únie

III. časť

Procesné právo

- 17: Základné práva v trestnom konaní v Európskej únii
- 18: Ochrana obetí trestných činov
- 19: Spolupráca v trestných veciach v rámci Európskej únie
- 20: Spolupráca v trestných veciach v rámci schengenského priestoru
- 21: Spolupráca v trestných veciach s nečlenskými štátmi Európskej únie
- 22: Spoločné vyšetrovacie tímy

IV. časť

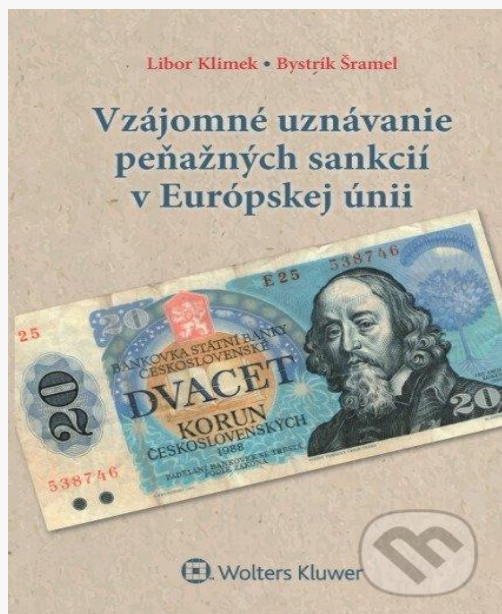
Orgány a jednotky podporujúce spoluprácu členských štátov Európskej únie v trestných veciach

- 23: Eurojust (Jednotka pre súdnu spoluprácu Európskej únie)
- 24: Europol (Agentúra Európskej únie pre spoluprácu v oblasti presadzovania práva)
- 25: Európske centrum boja proti počítačovej kriminalite
- 26: OLAF (Európsky úrad pre boj proti podvodom)
- 27: Sieť justičnej spolupráce v trestných veciach

Použité pramene

O autorovi

Vzájomné uznávanie peňažných sankcií v Európskej únii
Mutual recognition of financial penalties in the European Union
(by Libor Klimek & Bystrík Šramel)
book review



Wolters Kluwer (2017)
ISBN 978-80-816-858-11

Vzájomné uznávanie justičných rozhodnutí v trestných veciach v Európskej únii je kľúčovým konceptom európskeho justičného priestoru. Tento mechanizmus sa počas dlhých rokov vyvinul z futuristickej vízie na princíp, ktorý je oporným kameňom justičnej spolupráce v trestných veciach v Európskej únii. Jeho súčasťou je vzájomné uznávanie peňažných sankcií. Tento mechanizmus očakáva, že vzájomné uznávanie by sa malo uplatňovať na peňažné sankcie, ktoré uložili justičné alebo správne orgány s cieľom uľahčiť výkon týchto sankcií v inom členskom štáte, ako je štát, v ktorom sú uložené.

Monografia je určená právnej obci v oblasti trestného práva – advokátom, sudcom, prokurátorom a príslušníkom Policajného zboru. Cenné poznatky v nej nájdu taktiež tak akademici zaoberajúci sa trestným právom, ako aj študenti práva. Monografia je dielom so silným potenciálom oslovit' právnu obec jednak Slovenskej republiky, ale aj Českej republiky. Je to odôvodnené tým, že táto publikácia má medzinárodné spracovanie. Navyše, osobitné kapitoly sú venované predmetnej oblasti v podmienkach Slovenskej republiky, ako aj Českej republiky.

Brexit's Causes and Impacts on the EU

(by *Kludia Hrdličková*)

2018 ŠVOČ winner essay

Abstract

Since the United Kingdom had voted 52% in favour of leaving the European Union, numerous consequences and implications have risen up affecting not only European Union states but also the European Union itself. We are talking about the unique event in history since the creation of European Community, which has resulted in the activation of Article 50 regarding the conditions and laws in case of a member state leaving European Union. The introduction contains basic information about the situation immediately after voting for Brexit, one part is based on specific facts and data that complement the knowledge of Brexit as a whole. The main part of this thesis focuses on disruption of the customs union, the structural European funds, and the European common account budget. Furthermore, we focus on the European Parliament, economic growth, financial markets and the relocation of European institutions based in the UK.

Key words

Brexit, EU, UK, costs, causes, impact, Pound, Euro

1. Introduction

A country that has managed to keep the Pound as its national currency despite the European Union's (hereafter referred to as the EU) power, the United Kingdom with the fifth (until 2018) largest economy in the world which at the same time had given its citizens the option of voting in a referendum on remaining or exiting the EU. Out of the total 46.5 million registered voters, 51.9 per cent of the population expressed their inclination to leave the EU, which was represented by 17,410,742 supporters of leaving the strongest European organisation. Until the referendum took place, only Article 49 has been enshrined in the law defining all the important conditions for entry into the EU, but there was nothing mentioned about the possibility or right to leave. After 23 June 2016, the situation changed, with legal representatives having joined forces to work on the creation of Article 50, which precisely defined the steps a country must take to exit the EU.

2. Brexit's Causes and Impacts

On January 17, 2018, the British Parliament agreed on a key law to leave the EU which is currently being debated in the House of Lords. It is going to be necessary to amend approximately 20,000 EU laws which their Parliament would need to decide whether to abolish or leave in place. Following the activation of Article 50, the UK departure is scheduled for March 29, 2019. After this date, the Union offers a two-year period to fully compensate and adjust all trade, customs and obligations that result from Union membership. However, how are the different areas of political, economic and social life affected and what are the effects and consequences of Brexit? The very first important step, which is in the interests of both parties, is a common economic trade agreement as all the EU economic laws have superceded the UK's. If the EU does not agree with the UK on common economic trade agreements regarding goods and services, the UK would be forced to conduct its business activities in line with the World Trade Organization. Analysts predict that the country's economy will be significantly weaker and less efficient regardless of what trade agreement it signs with the EU. In case of a so-called hard Brexit, in other words leaving the EU without agreeing on a future business model, employment opportunities could shrink by up to half a million and total investment could decrease by as much as 50 billion Pounds. The negative effect of Brexit is the Pound dropping which has a significant impact on all sectors of their economy. Following Brexit, The EU was forced to relocate two European agencies from London and these were the European Medicines Agency (EMA) and the European Banking Authority (EBA). Both agencies employ more than 900 professionals of several nationalities in different age groups and are a key element of the EU's work in pharmacology and banking. Forced relocation before 2019 already has its winners. Slovakia was a contestant for the relocation of the EMA as we do not have any European agencies in our country, and Prague participated in the competition for the EBA. Ultimately, Amsterdam won the EMA and Paris is the new home for the EBA, so consequently both agencies remain in the Western part of Europe. The cost of Brexit is the abnormal spending by the EU to relocate not only agency itself but also all the staff working in it. At the same time, the UK loses the financial revenue resulting from those employees living, working, studying and shopping in the UK. The affected institutions are, of course, British banks which have maintained their status as the most productive and successful banks for many years amongst all

European countries. UK is gradually losing its good reputation as the cities of Frankfurt and Paris jostle to replace London as a world financial capital. Brexit threatens banks losing their passport rights and thereby losing access to the EU market, which is expected to worsen after the transition period of two years which ends in December 2020. Considerable interconnection between the EU and the UK is also evident through production, economic and business relationships. According to a sophisticated study at University in Rotterdam, the UK's undertaken risk of leaving the EU is five times higher than for the EU. The impact of Brexit on Slovak GDP is 1.31% which is more than 1 billion Euros. The impact on Slovakia will be particularly felt in the automotive industry, as the UK is an important market for Žilina-based KIA plant and Bratislava's Volkswagen factory. It is not only Slovakia which will be affected by the departure of the UK, European countries cooperate extensively with the UK, and as a consequence their sales and export will likely slow down.

Also, a number of citizens following the accession of various countries to the EU have decided to live and work in the UK which at the moment seems to be threatening to markedly change the conditions for foreign immigrants. For other countries, Brexit means a disadvantage, a threat or a reluctance to share its strength and maturity with anyone. At the beginning of 2018 EU set the budget from 2020 to 2026 and the financial priorities have changed a lot due to the departure of the UK. There are several unresolved priorities that have a negative impact: the completion of the banking union, the establishment of a tool to mitigate the asymmetric effects of economic shocks in the Eurozone area on members and the question of the democratic transparency in decision-making. Each EU member state is obliged, according to the strength of its economy, to contribute a certain amount of money into the common account with the UK paying between 10 to 12 billion. However, this budget period will be lacking the UK's contribution resulting in lower transfers of money to the Structural and Investment Funds for the whole Europe. The loss is being reflected in lower expenditures on infrastructure development, on reduction in regional disparities, on the improvement of public services and many other areas that individual countries need to sharpen. The UK has also pledged to settle all their financial commitments resulting from its withdrawal from the EU by 2020. The actual amount is still being negotiated, but according to the main European representatives for Brexit, the amount should be at least 60 billion Euros. It is in the interest of the UK itself that conditions whether economic, political or social should remain the same as much as possible to those applied so far. According to recent analyses and surveys conducted in the UK and elsewhere, most citizens prefer smoother parliamentary procedures. As the governments of the EU countries and the UK are, as a matter of priority, focused on solving Brexit, the Eurozone's problems will remain unresolved until

such time as an agreement is reached. Brexit impacts political activity too. On the one hand, UK's main opposition Labour Party is particularly concerned with remaining in the European customs union. According to the leader of this party, it is necessary to maintain the closest economic relations with EU, including a tariff-free custom agreement and to maintain the same conditions for the UK's borders with the Ireland and Northern Ireland. On the other hand, the Conservative government of Prime Minister Theresa May strongly rejects this move, arguing that by remaining in the customs union it would limit the country's freedom to conclude new trade agreements with the states around the world after March 2019.

3. Final remarks

Brexit does not influence the economy and political situation well all around the world. Since there are many threats for people losing their jobs, political stability to weaken, economic growth to slow down, the consideration of going on in the future with forgetting Brexit is unacceptable. There always will be a big mark between EU countries and UK. We will see what the future brings and if there will be some unexpected moments our countries will need to face.

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