

Piotr Podsiadło

Department of Local Government Finance
Cracow University of Economics, Poland

TAX SUBSIDIES AND STATE AID IN THE EUROPEAN UNION

Abstract

The purpose of this article is to investigate the permissibility, or otherwise, of state aid in the European Union in terms of the premise of economic benefit set out in the TFEU. This should also be seen from the perspective of the type of advantage gained, namely, the kind of state aid as defined by the European Commission using one of four groups of aid instruments. The research thesis was adopted that the financial and economic crisis has affected the structure of aid provided by Member States in such a way as to increase the share of tax subsidies in it. These subsidies involve reducing the burden of public contributions, or ceasing to collect them, so that the funds from these accounts are available to business entities, which means, in turn, that public cash has less of an impact on the public finance sector.

Keywords: state aid, European Union, treaty premises, economic benefit to the beneficiary.

1. Introduction

State aid for enterprises is applied in the European Union as a derogation from the rule of creating equal opportunities for starting and running a business in the Single European Market. The rules of state intervention in the economy have been defined precisely in this field and tend to seek a compromise between the position of the European Commission and the position of the Member State concerned regarding the admissibility of state aid (Heidenhain 2010, pp. 1–7). On the one hand, these rules prohibit the provision of state aid to avoid distortions of competition in the integrating countries, and on the other they allow public authorities to provide aid to correct imbalances in regional development, to stimulate or accelerate change, and to develop certain sectors of the economy.

The law on state aid helps to protect the competition mechanism, which is identified in the Treaty on the Functioning of the European Union (TFEU)¹ as one of the basic tools for accomplishing the tasks assigned in that document. The general prohibition on the provision of state aid is formulated in Article 107(1) of the TFEU, which offers a terse statement of what is incompatible with the internal market: “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”. Rather than establishing an absolute prohibition, the main objective of defining state aid is to select an action circle for testing any possible negative impact it may have on competition in the internal market (Marquardt 2007, pp. 53–55). Having established its terms of reference, the article now proceeds to examine a series of cases to determine for each whether the provisions of European law will or will not allow for the provision of state aid.

According to Article 107(1) of the TFEU, state aid confers economic advantage on certain enterprises or the production of certain goods, while excluding others². This is to say that the measure in question cannot be regarded as state aid if it brings no benefits to the addressed entity. State aid may therefore be described as a selective increment of financial benefits to an enterprise or a group of enterprises that creates a burden on the public finances (Choroszczak & Mikulec 2009, p. 11). This may take the form of public spending in favour of enterprises or of reducing the regulatory burdens imposed on them. The former case involves aid provided by active support mechanisms, such as grants, interest rate subsidies on bank credits, refunds, preferential and conditionally-discharged loans, sureties and credit guarantees. The latter case concerns aid in the form of the exemption and remission of tax (tax subsidies), the conversion of enterprise debt to capital, or of postponing the payment of specific public contributions.

The purpose of this article is to investigate the permissibility, or otherwise, of state aid in the European Union in terms of the premise of economic benefit set out in the TFEU. The research thesis was adopted that the financial and economic crisis has affected the structure of aid provided by Member States in such a way as to increase the share of tax subsidies in it. These subsidies involve reducing the burden of public contributions, or

¹ Consolidated version (2012): OJ C 326, 26 October 2012.

² See Case T-55/99 *Confederación Española de Transporte de Mercancías (CETM) v Commission*, ECR 2000, p. II-3207, para. 40.

ceasing to collect them, so that the funds from these accounts are available to business entities, which means, in turn, that public cash has less of an impact on the public finance sector.

2. Interpretation of the Treaty's Premise of Economic Benefit to the Beneficiary

State aid within the meaning of Article 107(1) of the TFEU is aid that confers a selective advantage on certain enterprises or sectors of the economy³. The condition of selectivity is not in itself sufficient for practical assessment, because not every measure identified by its selectivity is subject to the prohibition established in Article 107(1) of the TFEU. As early as 1974, the European Court of Justice, in its judgment on *Italy v Commission*, found that measures of a general nature that apply to all enterprises in the territory of a Member State are not selective and therefore their use is not subject to the Treaty provisions concerning state aid⁴. The general measures of intervention are of a systemic, common, and social nature. They are characterised by the use of objective criteria, are not discriminatory, and their implementation does not depend on discretionary public policy (Ross 2000, p. 406). General intervention measures do not favour certain enterprises or branches of production. Instead, they apply to all enterprises irrespective of the regions and sectors in which they conduct their business. Regarding the application of Article 107(1) of the Treaty, however, there are two facts that present major difficulty in the assessment of a given aid measure. The first is that the jurisdiction of the EU courts does not provide many examples of general measures and the second is that the judgements take extremely contradictory positions regarding the selectivity of the actions taken by Member States. It can be noted from an analysis of a relatively small number of judgments that a measure in favour of exporting enterprises is selective – although potentially any goods can be exported⁵. The fact that the measure is not limited to a predetermined group of enterprises, and is granted according to objective criteria, does not mean that it ceases to be selective⁶. That a large number of enterprises can benefit from the support, and that these enterprises belong to different

³ See Case T-210/02 *British Aggregates Association v Commission*, ECR 2006, p. II-2789, para. 105.

⁴ Case 173-73 *Italy v Commission*, ECR 1974, p. 709.

⁵ See Joined Cases 6 and 11-69 *Commission v France*, ECR 1969, p. 523.

⁶ See Case T-55/99 *Confederación Española de Transporte de Mercancías (CETM) v Commission*, ECR 2000, p. II-3207, para. 40.

sectors of the economy, is insufficient to undermine the selectivity of an aid measure⁷. In many of the cases in which the parties have contested the general nature of aid measures, the EU courts have found that they are selective. This leads to the conclusion that the distinction between general and selective intervention measures is not easily definable (Kurcz & Vallindas 2008, p. 159; Bartosch 2010, p. 729). That the recipients of aid receive a benefit is therefore more decisive when distinguishing state aid from general measures of intervention than is selectivity. Instruments of state intervention that deliver the same benefit to all enterprises operating in a given country are not selective and do not constitute public aid according to Article 107(1) of the Treaty. However, measures directed at enterprises in only one sector, or in a few selected sectors, cannot be considered general intervention measures.

The use of the criterion of selectivity when assessing aid measures is further justified in that, alongside the general measures, there also exist measures that are justified by the nature or scheme of the system, which deprives the given aid measure of its selectivity. In other words, even if the aid measure cannot be regarded as a general measure of intervention, it cannot be classified as state aid if its application can be justified by the nature or scheme of the system⁸. The distinction between general measures of intervention and measures justified by the nature or scheme of the system appeared for the first time in the judgment of the European Court of Justice of 1974 referred to above. While making clear that general intervention measures cannot be considered exemptions from the overall fiscal burdens imposed on enterprises operating in a given sector, it also pointed to the derogation from this principle: the nature of the system. In the judgment on the Treaty it was stated that: “any measure intended partially or wholly to exempt enterprises in a particular sector from the charges arising from the normal application of the general system without there being any justifications for this exemption on the basis of the nature or general scheme of this system, creates state aid”⁹. If they are the result of the nature or general scheme of the system, measures that give rise to diversity at enterprises do not constitute state aid¹⁰. A statement of the selectivity of a measure should be examined to determine whether the

⁷ See Case C-409/00 *Spain v Commission*, ECR 2003, p. I-1487, para. 48.

⁸ See Case T-233/04 *Netherlands v Commission*, ECR 2008, p. II-591, paras 97–100.

⁹ Case 173-73 *Italy v Commission*, ECR 1974, p. 709.

¹⁰ See Joined Cases C-128/03 and C-129/03 *AEM SpA (C-128/03) and AEM Torino SpA (C-129/03) v Autorità per l'energia elettrica e per il gas and Others*, ECR 2005, p. I-2861, para. 39.

diversity of a company in terms of the benefits or burdens it introduces is consistent with the nature or scheme of the general system applicable to the case¹¹. In other words, the test of selectivity to be performed to assess the use of a specific instrument of state intervention in terms of the prohibition of state aid established in Article 107(1) of the TFEU should consist of two stages: 1) distinguishing general from selective measures, and 2) determining whether the selective measures are justified by the nature or general scheme of the system (Honoré 2009, pp. 527–38), which may be one of tax¹² or social insurance¹³. It should be noted with regard to the tax systems of the particular Member States and their use of various fiscal instruments to selectively favour certain taxpayers (e.g. tax progression), that if such a differentiation is justified “by the nature or general system” of a given tax system (e.g. constructing a tax on the principle of adjusting the amount of tax payable to the individual abilities to pay of every taxpayer) then these diverse instruments will not be classified as selective within the meaning of Article 107(1) of the TFEU and, as a consequence, will not be considered as state aid (O’Brien 2005, p. 224; Nicolaidis & Rusu 2012, pp. 791–803). A similar interpretation can also be applied to the social security system. Here, the selectivity test is fulfilled when the measure differentially affects enterprises in a comparable situation and where this is not justified due to the nature or general scheme of the system under which the given measure is established (Golfinopoulos 2003, p. 546). It is therefore extremely important when applying Article 107(1) of the TFEU to evaluate the resulting diversification of benefits for the enterprises, as well as all of the exclusions, deductions, exemptions, and other preferences, which are not general measures of intervention and, at the same time, are not mandatory preferences resulting from national laws or, more broadly, from EU law¹⁴.

It is indispensable from the point of view of the application of Treaty provisions concerning state aid to define the idea of economic benefit precisely which, in turn, depends on the idea of aid that has been adopted. The most frequent ideas of aid referring to the determination of economic benefits are those of net aid, gross aid, and medium aid. Net aid defines

¹¹ See Case T-210/02 *British Aggregates Association v Commission*, ECR 2006, p. II-2789, para. 107.

¹² See Case C-308/01 *GIL Insurance Ltd and Others v Commissioners of Customs & Excise*, ECR 2004, p. I-4777, paras 72–78.

¹³ See Case C-301/87 *France v Commission*, ECR 1990, p. I-307, para. 41; Case C-75/97 *Belgium v Commission* (“*Maribel I*”), ECR 1999, p. I-3671, paras 32–39.

¹⁴ See Case T-335/08 *BNP Paribas and Banca Nazionale del Lavoro SpA (BNL) v Commission*, ECR 2010, p. II-nyr, paras 161–63.

state aid as the difference between the transfer of resources to the enterprise and the costs incurred by the enterprise in connection with the transfer. According to the idea of general benefit to the enterprise it is essential to deduct the cost of providing public services, of adapting to business conditions introduced by the law and of mutual considerations made when implementing agreements with the state for the public authorities to purchase goods and services. Finally, there are those costs specifically chargeable to the enterprise, such as unfavourable business conditions related to location and geographical conditions (Rizza 2005, pp. 67–73). It should be noted, however, that the concept of net aid has not found acceptance in the courts of the EU. They have argued that it is not possible when determining aid within the meaning of Article 107(1) of the TFEU to deduct costs arising from the transfer of resources to an enterprise (i.e. costs specifically chargeable to that enterprise) when they are incurred as a result of an unfavourable business location (Grespan & Santamato 2008, p. 287). That there should be equal opportunities for enterprises operating in regions distinguished by an unfavourable location and unpromising geographical circumstances is in fact the main assumption of the European Union's regional development policy, whose conduct is required to take account of the admissibility of state aid¹⁵. The idea of gross aid stands in opposition to that of net aid. Gross aid can be said to exist where state aid to an enterprise is equal to the transfer of financial resources from the state to the enterprise after the state has deducted the costs incurred in purchasing goods or services for its own use – on condition that payment for these purchases is made at market prices¹⁶. In this arrangement, the economic benefits are not for the enterprise and, provided the compensation the state pays the enterprise, and all other benefits the latter receives, comply with the rules of civil liability, and provided that the state adheres to the principles of an investor operating in market conditions, do not therefore constitute state aid. The idea of medium aid extends the assumptions of gross aid. In this arrangement, the benefit is equal to the transfer of financial resources from the state to the enterprise. In addition, under strict conditions intended to

¹⁵ See Case C-225/91 *Matra SA v Commission*, ECR 1993, p. I-3203; Cases C-75/05 P and C-80/05 P *Germany (C-75/05 P), Glunz AG and OSB Deutschland GmbH (C-80/05 P) v Kronofrance SA*, ECR 2008, p. I-6619; Case C-415/07 *Lodato Gennaro & C. SpA v Istituto nazionale della previdenza sociale (INPS) and SCCI*, ECR 2009, p. I-2599; Case T-27/02 *Kronofrance SA v Commission*, ECR 2004, p. II-4177.

¹⁶ See Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, and Opinion of Mr Advocate General Léger delivered on 19 March 2002, ECR 2003, p. I-7747.

ensure that the state pays the market price for them, the benefits received by an enterprise are not considered as payment for goods or services for public needs¹⁷.

In terms of both gross and medium aid, the mutual benefits received when implementing obligations under the rules of private law are not considered as economic benefits. Firstly, this category includes benefits provided by the state operating according to the principles of a private investor in market conditions. Depending on the nature of the state's activities, there are many variations on the theme of private investor in market conditions. The tests we can distinguish most often are those of market (private) investor, market (private) lender, market (private) creditor and market (private) buyer or seller (Anestis & Mavroghenis 2006, pp. 109–27). For example, the purpose of the market investor test is to determine the difference between the conditions under which the state provided the funds to the enterprise and conditions acceptable to a private investor that would find it reasonable to provide funds to such an enterprise under normal market conditions. Where the private investor principle is fulfilled, the enterprise does not receive the economic benefit and, within the meaning of Article 107(1) of the TFEU, no state aid is given. In certain circumstances, however, an indirect benefit can be received by enterprises that are not direct contractual partners of the state. In other words, the beneficiary is an entity other than the entity to which the aid is formally addressed¹⁸. In this case, state aid will be identified as so-called indirect aid (Buendia Sierra & Hancher 1998, pp. 901–45).

Secondly, the category of mutual benefits occurring when implementing obligations under the rules of private law, which are not considered an economic advantage in the light of EU competition law in the area of state aid, includes compensation payable according to the general rules of civil liability. This exemption does not apply, though, when the state voluntarily assumes an obligation to pay compensation, or where the state pays damages for which it has no civil liability, such as those resulting from a natural disaster or other extraordinary event. If the state does not pay compensation as an entity under private law, the compensation is treated as an economic advantage to the enterprise and thus constitutes state aid which, based on the relevant provisions of the Treaty, may be considered as consistent with the internal market.

¹⁷ See Case C-251/97 *France v Commission*, and Opinion of Mr Advocate General Fennelly delivered on 26 November 1998, ECR 1999, p. I-6639.

¹⁸ See Case T-177/07 *Mediaset SpA v Commissions*, ECR 2010, p. II-nyr, para. 75.

State aid within the meaning of Article 107(1) of the TFEU is that which brings benefits to certain enterprises or advantages in the production of certain goods, while excluding others¹⁹. In other words, a measure cannot be regarded as state aid if it does not bring any benefits to the entity to which it is addressed. This thesis is confirmed in the judgment of the European Court of Justice in the case of *Tiercé Ladbroke v Commission*, which concerned the collection of a charge made by *Pari Mutuel Urbain* (PMU), a French, state-controlled betting system, for bets placed in France on horse races in Belgium²⁰. Ladbroke, which administered the bets in Belgium, said that the amounts transferred by PMU to its Belgian counterparts, *Mutuel Unifié Belge* and *Auxiliaire PMU Belge* (together, in effect, the Belgian version of PMU), constituted state aid because they were higher than the corresponding amounts received by PMU from its Belgian counterpart in the case of bets organised in Belgium on horse races held in France. The Court stated that the proportions of the collected fees passed by PMU to its Belgian counterpart could not exceed the amount the Belgian organisation could get from bets placed abroad on races organised in Belgium. Consequently, the Court found that where there is no financial benefit for a specific enterprise, the Treaty rules concerning state aid do not apply. It is worth emphasising that benefit as a criterion for identifying a given measure as state aid covers both unpaid benefit and benefit that could not be obtained under normal market conditions.

State aid also involves measures whereby enterprises gain benefits only indirectly. It is worth quoting the judgment of the European Court of Justice in the case of *Steenkolenmijnen v High Authority*. Though, admittedly, this concerns an interpretation of Article 4(c) of the Treaty establishing the European Coal and Steel Community, both the European Commission and the European Court of Justice adopted it to interpret Article 107(1) of the TFEU²¹. It concerned the German authorities' proposal to grant a tax-free bonus to mining workers, which the enterprises were to pay by tax deductions on salaries. Though the measure granted no direct benefit to the enterprises, it meant that wage growth, which would otherwise have been required to prevent miners leaving to work in other sectors of the economy, could be avoided. The Court concluded that the premium was actually an indirect

¹⁹ See Case T-55/99 *Confederación Española de Transporte de Mercancías (CETM) v Commission*, ECR 2000, p. II-3207, para. 40.

²⁰ Case C-353/95 P *Tiercé Ladbroke SA v Commission*, ECR 1997, p. I-7007.

²¹ Case 17/57 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*, ECR 1959, p. 1.

subsidy. Granting it meant that the enterprises were spared costs they would otherwise have incurred. It should be noted here that the European Court of Justice has, from the beginning, been of the opinion that the concept of state aid should be interpreted broadly and that it is definitely more complex than a donation. This is because it not only includes positive benefits, such as the subsidies themselves, but also intervention measures, which in their various forms reduce the fiscal burdens on enterprises. Though, in the strict sense of the word, instruments such as these are not subsidies, their nature is the same and they produce the same result²². In the case of *Steenkolenmijnen v High Authority*, the Court clearly stated that “a subsidy is normally defined as a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces. An aid is a very similar concept, which, however, places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help. The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect” (Rosińska 2004, p. 4).

Hence the advantage can take a variety of forms, which returns us directly to the wording of Article 107(1) of the TFEU, which states explicitly that aid may be provided in “any form whatsoever”. In practice, the European Commission applies a division of forms of state aid into four groups (Survey 2001). Group A, which has two sub-groups A1 and A2, includes aid instruments whose use results in the transfer of a total amount of aid to a recipient. Sub-group A1 is for aid provided directly from the budget (grants, refunds) and A2 for aid provided by the tax or social security system (tax exemptions and tax relief, reductions in social security contributions). Group B covers a Member State’s forms of capital commitment in an enterprise’s capital – with the exception of cases in which

²² See Case 30–59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*, ECR 1961, p. 1, para. 39; Case C-276/02 *Spain v Commission*, ECR 2004, p. I-8091, para. 24; Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium SA v Ville de Seraing (C-393/04) and Province de Liège (C-41/05)*, ECR 2006, p. I-5293, para. 29; Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04 *France (T-425/04), France Télécom SA (T-444/04), Bouygues SA and Bouygues Télécom SA (T-450/04) and Association française des opérateurs de réseaux et services de télécommunications (AFORS Télécom) (T-456/04) v Commission*, ECR 2010, p. II-nyr, para. 213.

the state is acting as a private investor (private investor test). Group B's sub-groups are B1 (provision of capital to an enterprise) and B2 (converting enterprise debt into capital). Group C concerns the transfer of funds in which the value of the aid is equal to the interest a beneficiary does not have to pay while the capital in question is at its disposal. Group C's sub-groups are C1, which is composed of so-called soft credit instruments (loans and preferential credits) and C2, which is composed of tax deferrals and other obligatory payments within the terms of public law. The final group, D, is made up of active aid in the form of sureties and guarantees provided by the public authorities.

It should be emphasised, therefore, that because state intervention measures classified as state aid within the meaning of Article 107(1) of the TFEU also include indirect measures as well as direct payment transfers, they cannot only be defined as subsidies. Aid may result from a normative act that provides a legal basis for a universal aid programme that fulfills the conditions specified by enterprises. Aid may also be provided based on an administrative decision, which is the course of action taken in the case of tax exemptions, tax reductions, and other preferential terms regarding the compulsory charges enterprises are obliged to pay within the terms of public law. A civil law contract, which is used, for example, in the case of grants, preferential credit and preferential loans or guarantees, represents another vehicle public authorities can employ to provide aid. State aid may also involve taking up stocks or shares in commercial enterprises and conducting public procurement on preferential terms, and can also play a role in the execution of public-private partnership contracts and purchase-sale transactions. The latter occur when the state sells goods at a reduced price, when an enterprise purchases land or buildings on preferential terms, and in the purchase of goods or services from an enterprise at lower-than-market-prices.

The Treaty's reference to benefits that enterprises would not have obtained under normal market conditions is, in general terms, connected with the state's use of instruments of intervention from the spheres of *empire* and *dominion* to modify the operation of a market or sector. The state can intervene in the economy using the prerogatives of public authority (i.e. instruments from the sphere of *empire*), through ownership or control of certain assets and by making purchase-sale transactions of certain goods and services (i.e. instruments from the sphere of *dominion*). The benefit to the enterprise may come in the form of direct grants or through the use of fiscal instruments, which means benefits that can arise through removing

some enterprises from the subjective scope of tax, from not subjecting some goods to the objective scope of tax, and through tax relief, tax exemption, and other tax advantages. The use of these instruments can, under certain conditions, take the form of so-called negative aid. In this way an enterprise obtains a measurable economic benefit because it is relieved of burdens that continue to be imposed on other enterprises (Bacon 2003, vol. 24).

3. Tax Subsidies as a Form of State Aid in the EU Member States

The use of a fiscal instrument to grant state aid has no bearing on the application of the European Union's competition rules because Article 107(1) of the TFEU applies to aid measures "in any form". A fiscal measure, implemented as part of a group of tax subsidies, can be referred to as aid within the meaning of Article 107(1) if it fulfills the following four criteria.

Firstly, it must give the aid recipients an economic benefit releasing them from burdens that are normally deducted from their budgets. These privileges may be provided by reducing the tax load on an enterprise in a variety of ways:

- reduction in the tax base (special deductions, special or accelerated depreciation, introducing reserves to the balance sheet),
- total or partial reduction in the amount of tax (exemption from tax payment or a tax credit),
- remission or cancellation of tax liability.

Secondly, the benefit must be granted by the state or from public funds. The loss of tax revenues is equivalent to the consumption of state resources in the form of financial expenses. The public support offered in this way can be provided by tax provisions of a legislative, executive or administrative nature, as well as via the tax authorities.

Thirdly, the measure must affect competition and trade between Member States. This rule assumes that:

- the aid recipient performs an economic activity involving trade between Member States,
- the aid received strengthens the position of an enterprise compared with its competitors trading on the Single European Market.

Fourthly, the measure must fulfill the criterion of selectivity, which should be understood as promoting selected enterprises, sectors of the economy, regions of the country, and products. In addition, state aid only concerns enterprises insufficiently profitable to be funded by private investors, who seek a long-term return on capital invested plus a reasonable profit. The aim

of public authorities providing aid in a given field is to accomplish specific economic and social objectives. State aid therefore means financial support from public funds that is provided where the involvement of private funds is not economically justified.

Tables 1 and 2, which are appended, present information on the structure of state aid to industry provided in the Member States of the European Union over the last 21 years, i.e. during the period 1992–2012.

The state-aid instruments deployed in Group A are characterised by the transfer of the total support provided in such a way that the amount of aid is equal to the transfer of funds from individual budgets. In this case, state aid can either be provided directly from the budget or at the budget’s expense. Budgetary aid, which means instruments from the A1 sub-group, primarily take the form of grants, interest-rate-reductions on bank credits, refunds, and export bonuses. The average volume of budgetary aid in the EU Member States is EUR 49 billion per year, which accounts for approximately 60% of all support instruments (see Figures 1 and 2). While in 2008–09, a period that witnessed intense implementation of aid programmes in the real economy, the nominal value of budgetary aid increased, a gradual decline has been noted since 2010. An increase in the share of the A1 Group in forms of state aid is nevertheless visible. Finally, the percentage share of grants in the total amount of aid provided by Member States has been increasing steadily since 2007.

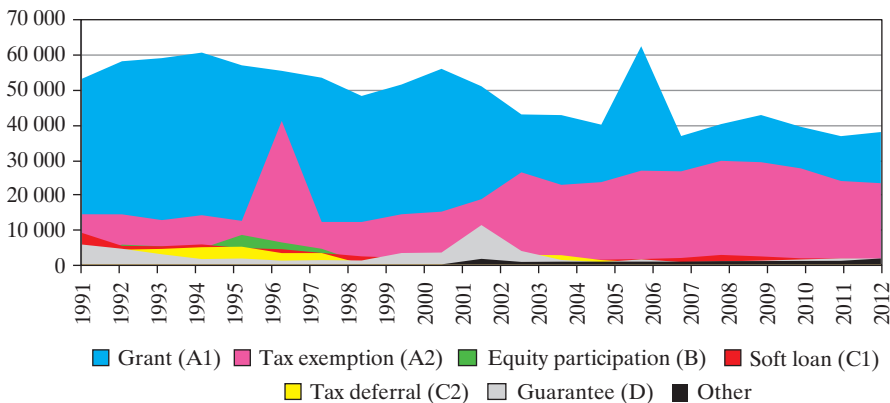


Fig. 1. Share of State Aid Instruments in EU Member States in 1992–2012 (million EUR)

Source: DG Competition.

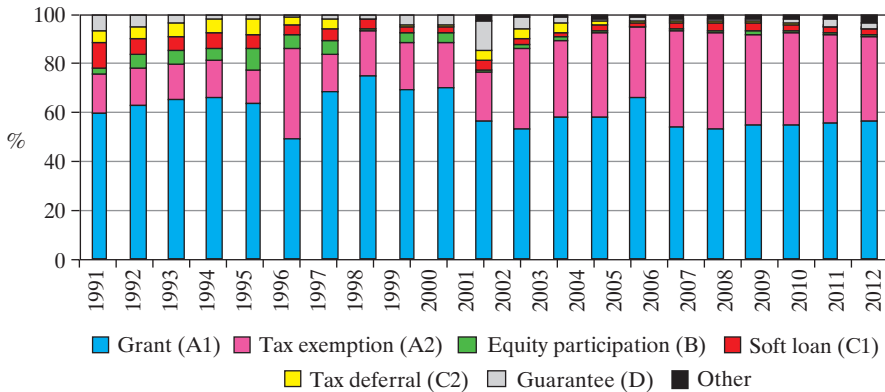


Fig. 2. Share of State Aid Instruments in EU Member States in 1992–2012 (% of Total Aid)

Source: DG Competition.

Turning now to aid that depletes budget revenues, and thus to Group A2 (tax exemption, tax relief, the postponement and rescheduling of tax collection, reductions in social security benefits, non-execution of para-budgetary debts, ceasing to collect interest on overdue public-legal liabilities), the level of aid granted remained steady at an average of EUR 21 billion per year, which accounted for approximately 26% of all support instruments. In 2008–09, a period which saw intense implementation of aid programmes in the real economy, the value of Group A aid increased in nominal terms. Since 2009, however, which is approximately a year earlier than in the case of grants, a gradual decline has been noted. There has been a more intense increase than that observed for grants in the share of the state-aid instruments that make up sub-group A2. If we focus our analysis on the 2000s, when the Lisbon Strategy was being implemented, it can be seen that in the “pre-crisis” years up to 2007, the average share of tax subsidies in the aid provided by Member States of the EU was 28%, whereas this share reached an average level of 37% in 2008–12, which represents an increase in the share of tax subsidies of 9 percentage points. If we consider grant aid during implementation of the Lisbon Strategy we find an average share of 61% in aid structure by 2007 and an average share of 55% in 2008–12. Comparing the two periods, we can see that the share of grant aid in the total amount of aid fell by 6 percentage points.

4. Conclusion

The straightforward statistical analysis conducted in section 2 allows us to accept the thesis set out in the introduction: that the financial and economic crisis has affected the structure of aid provided by Member States in such a way as to increase the share of tax subsidies in it. We are now free to construct a further thesis, namely, that where aid in the form of tax subsidies is provided to encourage enterprises to start investing, and is limited in relation to the costs of carrying out the project, it is no different from a grant and may be treated in the same way. In a situation such as this, aid involving the depletion of budget revenues can be identical to a grant (according to the European Commission, the most prominent support instrument exercised by the public authorities) only if the aid is small and is focused not on specific sectors of the economy but on pro-developmental horizontal and regional objectives, which mainly include research and development, environmental protection, training and employment, and the development of small and medium-sized enterprises.

The new thesis presented above may serve as a base, guide, and stimulus for further research into the application of tax subsidies as a form of state aid by EU Member States. It is essential for the topic addressed in this paper, however, that where there is a need in everyday practice to interpret the tax rules, no room can be left open for discretionary treatment of enterprises. Any decision of the public authorities resulting from the general tax rules that confers benefits on an individual enterprise can, in principle, lead to a presumption that state aid has been granted and requires detailed analysis. For as long as the administrative provisions contain only a general interpretation of the rules, they admit no presumption of instances of the granting of aid. Nevertheless, the opacity of the decisions taken by the public authorities, and the freedom of action they sometimes enjoy, support the presumption that aid is granted or at least that the effects of their activities are, in certain cases, tantamount to the granting of aid.

Appendix

Table 1. Share of State Aid Instruments in EU Member States in 1992–2012 (million EUR)

Year	Grant (A1)	Tax exemption (A2)	Equity participation (B)	Soft loan (C1)	Tax deferral (C2)	Guarantee (D)	Other	Total
1992	53294.4	14335.4	2135.4	9438.3	4099.2	5726.6	0	89029.4
1993	58302.9	14310.2	5662.9	5562.2	4612.6	4515.1	0	92965.9
1994	59203.3	12659.7	5164.1	5444.4	4854	2922.7	0	90248.1
1995	60782.1	14060.2	4595.3	5988.3	5380.6	1535.7	0	92342.3
1996	57136.6	12449	8447.5	4891.2	5542	1701.1	0	90167.3
1997	55551	41023	6289.1	4563.8	3537.7	1091.7	0	112056.3
1998	53578.1	12135.6	4466.3	3430	3546	1243.2	0	78399.2
1999	48346.2	12122.8	561	2406.1	176.1	1126	0	64738.2
2000	51635.1	14332	2594.9	1971	343.7	3284.2	0	74160.9
2001	56130.4	15076.6	2742.9	2116.3	639.6	3418	0	80123.8
2002	51119.1	18647.8	712.9	3386.6	3502.8	11347.5	1981.5	90698.2
2003	43042.8	26324.5	953.8	2196.3	3031.9	3872.5	882.3	80304.1
2004	42848.7	22746.5	812.2	1673.3	2882	1280	973.5	73216.1
2005	40104.8	23522.4	627.6	1413	1360.4	652.8	980	68660.9
2006	62612.1	26793.2	160.1	1604.4	691	1458.1	989.1	94308
2007	36843.1	26615.2	200.7	1921.9	530.4	676.9	986.2	67774.4
2008	40267.4	29608.4	337.8	2837.2	406.9	859.8	1153.8	75471.4
2009	42866.2	29222.6	1180.5	2387.9	427.3	1092.6	1186.2	78363.4
2010	39468.2	27446.1	754.4	1823.2	154.7	1416.2	1238.4	72301.2
2011	36806	23851.2	243.9	1755.7	127.6	1732.3	1276.6	65793.3
2012	37990.3	23208.9	487.8	1515.9	164.3	1680.9	2109.9	67158

Source: DG Competition.

Table 2. Share of State Aid Instruments in EU Member States in 1992–2012 (% of Total Aid)

Year	Grant (A1)	Tax exemption (A2)	Equity participation (B)	Soft loan (C1)	Tax deferral (C2)	Guarantee (D)	Other	Total
1992	59.86	16.10	2.40	10.60	4.60	6.43	0.00	100
1993	62.71	15.39	6.09	5.98	4.96	4.86	0.00	100
1994	65.60	14.03	5.72	6.03	5.38	3.24	0.00	100
1995	65.82	15.23	4.98	6.49	5.83	1.66	0.00	100
1996	63.37	13.81	9.37	5.43	6.15	1.89	0.00	100
1997	49.57	36.61	5.61	4.07	3.16	0.97	0.00	100
1998	68.34	15.48	5.70	4.38	4.52	1.59	0.00	100
1999	74.68	18.73	0.87	3.72	0.27	1.74	0.00	100
2000	69.63	19.33	3.50	2.66	0.46	4.43	0.00	100
2001	70.06	18.82	3.42	2.64	0.80	4.27	0.00	100
2002	56.36	20.56	0.79	3.73	3.86	12.51	2.19	100
2003	53.60	32.78	1.19	2.74	3.78	4.82	1.10	100
2004	58.52	31.07	1.11	2.29	3.94	1.75	1.33	100
2005	58.41	34.26	0.91	2.06	1.98	0.95	1.43	100
2006	66.39	28.41	0.17	1.70	0.73	1.55	1.05	100
2007	54.36	39.27	0.30	2.84	0.78	1.00	1.46	100
2008	53.36	39.23	0.45	3.76	0.54	1.14	1.53	100
2009	54.70	37.29	1.51	3.05	0.55	1.39	1.51	100
2010	54.59	37.96	1.04	2.52	0.21	1.96	1.71	100
2011	55.94	36.25	0.37	2.67	0.19	2.63	1.94	100
2012	56.57	34.56	0.73	2.26	0.25	2.50	3.14	100

Source: DG Competition.

Bibliography

- Anestis, P. and Mavroghenis, S. (2006) “The Market Investor Test” in M. Sanchez-Rydelski (ed.) *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade*. London: Cameron May Ltd.
- Bacon, K. (2003) “The Concept of State Aid: The Developing Jurisprudence in the European and UK Courts”. *European Competition Law Review* 24.
- Bartosch, A. (2010) “Is There a Need for a Rule of Reason in European State Aid Law? Or How to Arrive at a Coherent Concept of Material Selectivity?” *Common Market Law Review* 47.
- Buendia Sierra, J. L. and Hancher, L. (1998) “Cross-subsidization and EC Law”. *Common Market Law Review* 35.
- Choroszczak, J. and Mikulec, M. (2009) *Pomoc publiczna a rozwój firmy. Szanse i zagrożenia* [State aid and enterprise development. Threats and opportunities]. Warsaw: Poltext.
- European Commission (2008) “Communication from the Commission to the European Council – A European Economic Recovery Plan”. COM(2008) 800 final. Brussels, 27 November.
- Golfinopoulos, C. (2003) “Concept of Selectivity Criterion in State Aid Definition Following the Adria-Wien Judgment – Measures Justified by the ‘Nature or General Scheme of a System’”. *European Competition Law Review* 24.
- Grespan, D. and Santamato, S. (2008) “Favouring Certain Undertakings or the Production of Certain Goods: Advantage” in W. Mederer, N. Pesaresi and M. van Hoof (eds) *EU Competition Law, Volume IV: State Aid*. Leuven: Claeys & Casteels.
- Heidenhain, M. (ed.) (2010) *European State Aid Law. Handbook*. München–Oxford: C. H. Beck, Hart Publishing.
- Honoré, M. (2009) “Selectivity and Taxation – Reflections in the Light of Case C-487/06 P, British Aggregates Association”. *European State Aid Law Quarterly* 4.
- Kurcz, B. and Vallindas, D. (2008) “Can General Measures Be... Selective? Some Thoughts on the Interpretation of a State Aid Definition”. *Common Market Law Review* 45.
- Marquardt, P. (2007) *Pomoc publiczna dla małych i średnich przedsiębiorców* [State aid for small and medium enterprises]. Warsaw: LexisNexis.
- Nicolaides, P. and Rusu, I. E. (2012) “The Concept of Selectivity: An Ever Wider Scope”. *European State Aid Law Quarterly* 4.
- O’Brien, M. (2005) “Company Taxation, State Aid and Fundamental Freedoms: Is the Next Step Enhanced Cooperation?”. *European Law Review* 30.
- Rizza, C. (2005) “The Financial Assistance Granted by Member States to Undertakings Entrusted with the Operation of a Service of General Economic Interest” in A. Biondi, P. Eeckhout and J. Flynn (eds) *The Law of State Aid in the European Union*. Oxford.
- Rosińska, J. (2004) “Pomoc publiczna w świetle Traktatu ustanawiającego Wspólnotę Europejską i orzecznictwa Europejskiego Trybunału Sprawiedliwości” [State aid in light of the Treaty establishing the European Community and the Rulings of the European Court of Justice]. *Glosa* 05.
- Ross, M. (2000) “State Aids and National Courts: Definitions and Other Problems – A Case of Premature Emancipation?”. *Common Market Law Review* 37.

Survey (2001) *Ninth Survey on State Aid in the European Union*. COM(2001) 403 final. Brussels, 18 July.

Treaty (2012) “Treaty on the Functioning of the European Union – Consolidated Version 2012”. OJ C 326, 26 October.

Abstract

Subsidia podatkowe a pomoc publiczna w Unii Europejskiej

Celem artykułu jest przedstawienie zagadnienia dopuszczalności pomocy publicznej w Unii Europejskiej w ujęciu traktatowej przesłanki korzyści ekonomicznej, którą należy rozpatrywać także z perspektywy rodzaju takiej korzyści, czyli rodzaju pomocy publicznej definiowanej przez Komisję Europejską w ramach jednej z czterech grup instrumentów pomocy. Przyjęto, że skutki kryzysu finansowego i gospodarczego wpłynęły na strukturę pomocy udzielanej przez państwa członkowskie Unii Europejskiej w ten sposób, że obecnie zwiększył się w niej udział subsydiów podatkowych, które powodują zmniejszenie ciężaru danin publicznych bądź zaniechanie ich poboru i pozostawienie środków z tego tytułu do dyspozycji podmiotów gospodarczych, co jest tożsame z uszczupleniem wpływu środków publicznych do sektora finansów publicznych.

Słowa kluczowe: pomoc publiczna, Unia Europejska, przesłanki traktatowe, korzyść ekonomiczna dla beneficjenta.