

DOPING FOR NATIONAL ECONOMIES WITHIN THE LIMITS GIVEN BY THE EUROPEAN UNION

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Abstract in original language:

V tomto článku se autoři zabývají problematikou současné ekonomické resp. finanční krize z pohledu práva. Analýza je zaměřena především na problematiku státních podpor a jejich regulace v právu Evropské unie, protože to mohou být právě státní podpory, co může přispět ke zmírnění důsledků krize a k rychlému ekonomickému zotavení. Autoři se zabývali zejména otázkou, jaké podmínky musí být splněny, aby v současné době určitá státní podpora mohla být legálně poskytnuta, a dále, jaké změny *de lege ferenda* by měly být zakotveny tak, aby členské státy mohly v maximální možné míře využít pozitivních efektů státních podpor. Hlavní důraz je v článku věnován sdělení Komise – Dočasný rámec Společenství pro opatření státní podpory zlepšující přístup k financování za současné finanční a hospodářské krize (2009/C 16/01) a jeho dopadu na současnou právní úpravu státních podpor, jejich posuzování a na činnost Evropské Komise v této oblasti.

Key words in original language:

Ekonomická krize; státní podpora; export; import.

Abstract:

In this article the authors deals with the current economic/financial crisis from the legal point of view. The analysis is focused on the issue of state aids and their regulation in European Union law as state aids may contribute to fast economic recovery. The main questions that authors try to answer are which state aids comply with the recent legal regulation and can be therefore granted in order to stimulate the economy and which changes of law of the European Union should be introduce in order to maximize the potential positive effect of state aids. Author focus mostly on new Commission communication No. 2009/C 16/01 Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis and its impacts on recent state aid regulation and Commission action.

Key words:

Economic crisis; state aid; export; import, *de minimis* rule.

1. INTRODUCTION

Despite the fact that the current economic crisis is serious it is most probably not the worst financial/economic world crisis ever. The truth on the other hand is that most of us are too young to have any similar personal experience with such situation. The Czech Republic has never gone through any similar situation in its modern history as the monetary crisis in 1997 was caused by completely different conditions. The period before 1989 on the other cannot be taken into the account as the Czech Republic's economy was based on a socialistic model of functioning.

Not only the Czech Republic but also the European Union¹ and its other Member states are heavily affected by the crisis. As the Czech Republic is a Member State of the European Union, also its law must be taken into the account.

New and very specific economic situation has impact on both the economy and the European and national laws as well. The current European and Czech legislation was made mostly in "good times" and as such is now being heavily tested. Both the European and Czech legislators had not predicted that such economic situation will appear.

2. ECONOMIC AND LEGAL ASPECTS

It is hard to tell what the best solution of the recent situation is. Economic analytics see the solution of the current crisis in massive fiscal stimulation of national economies. Such stimulation may really be useful from the economic point of view. The question is whether it is possible under the law for states to use public finances in order to stimulate business and if so then to what extent.

It is necessary to underline that all economic actions taken by the Member States or the European Union must be conducted within the limits given by the law. The law on the other hand must comply with current economic needs. One without the other is cannot effectively and legally work.

Our article has no intention to judge on economic aspect of this issue. Its aim is to deal solely with its legal aspects. However, some economic aspects will be mentioned as the legal regulation is determined by economic situation and *vice versa*. The problem is that any state aid, even such which is justified from the economic point of view by the current economic crisis, must be provided in accordance with recent legal regulation of state aid.²

3. STATE AID - THE LEGAL PROBLEM TO SOLVE

The abovementioned text implies that this article will be focused on the issue of state aids and their legal regulation. The questions which will be solved are:

1. which state aids comply with the recent legal regulation and can be therefore granted in order to stimulate the economy;
2. which changes of law should be introduced in order to maximize the potential positive effect of state aids.

¹ in order to simplify, we use the term European Union; however, everything that will be said in this article regards only to the first pillar of the EU and therefore it would have been more precise if we spoke about European Community. We have decided to use this term as it is more progressive as the Lisbon Treaty, if it comes into the force, will mean the end of the pillar structure and the European Union will replace the European Community.

² Please note that it is necessary to distinguish between the state aid and export subsidy as the later mentioned are in the law of the European Union regulated separately as they affect primarily markets of third states and not the internal market. For details on this issue see Fojtíková, L., Lebiezík. M. - Společné politiky EU : historie a současnost se zaměřením na Českou republiku vyd. 1.. - Praha : C.H. Beck, 2008. ISBN 978-80-7179-939-9 pp. 114 and subsequent or Rozehnalová, N., Týč, V. Vnější obchodní vztahy Evropské unie. 1. vyd. Brno : Masarykova univerzita, 2006. p. 125 and subsequent;

4. STATE AID IN THE EUROPEAN UNION

The legal problem with fiscal stimulation and state aids most probably does not arise in unitary states or federations like are the USA or if it does it has a different nature. Unfortunately, the European Union is organized differently it is not a true federation and that causes in time of crisis unexpected difficulties. Where is the problem? Unlike ordinary states, the European Union is an international organization which has acquired only some competences in economic affairs that are traditionally exercised only by states.

European Union has power to regulate all issues concerning the internal market which includes regulation of free movement of goods, persons, services and capital, and external trade as well. European Union also regulates public procurement and state aid. In all the above mentioned areas measures suitable to stimulate the economy can be adopted. Member states also have some competence to regulate these issues. However, Member states are not free to introduce any measure, even if necessary from their point of view, if it such measure is not complying with European Union rules.

The reason why a state aid may be a problem is hidden in the fact that state aids are provided by Member states whereas conditions of their admissibility are set by the European Union. That's why our question whether it is possible under the law for states to use public finances in order to stimulate business must be extended and the legal framework of the European Union must be also taken into the account and examined.

5. LEGAL REGULATION OF STATE AID

5.1 REGULATION OF STATE AID IN PRIMARY LAW

The current legal regulation of state aid falls within the scope of both national and European Union law. As the national budgets are sources of state aids it is also the national law that regulates conditions of the state aid and its target undertakings. The European Union regulation on the other hand sets out general limits on state aid where the main aim is to prevent such situations where the competition is actually or potentially distorted. It is important to note that the European Community has the exclusive competence to set general rules on admissibility of state aids.

On the European Union level the legal grounds of the state aid regulation is given by the article 87 Sec. 1 of the EC Treaty. This provision generally prohibits any state aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, unless there is some exemption or otherwise provided in the EC Treaty.³

However, not all state aids are considered being harmful. Some of them may have the potential to distort the competition but their positive effects prevail. Such states aids are then considered as compatible with internal market and can be granted.

³ See also Tichý, L, Arnold, R., Svoboda, P., Zemánek, J., Král, R. *Evropské právo*. 3. vydání, Praha : C. H. Beck, 2006, pp. 592 and 593.

In order to be compatible the state aid must comply with the aims of the European Community as they are listed in the EC Treaty.⁴ These generally conceived aims are specified further in the EC Treaty. The EC Treaty therefore explicitly states:

1. which state aid is compatible⁵; and
2. which may be considered to be compatible with the internal market.⁶

The second mentioned state aid must be notified to the Commission which has a power to decide on its compatibility with the internal market.⁷ Without such a decision the state aid cannot be granted.⁸ In case of the first mentioned state aids notification is not necessary. They can be granted and Member States only have to submit information sheet about them to the Commission.⁹

5.2 STATE AID REGULATION IN THE SECONDARY LAW

The abovementioned legal regulation of the exemptions from general ban on state aids in the EC Treaty is further specified in a number of secondary legislation. The Council has adopted regulation No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid which makes it possible for the Commission to declare, by means of regulations, that some categories of state aid are considered compatible with the internal market.¹⁰ As such they do not have to be notified.

Based on this regulation the Commission adopted:

- regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid; and
- regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (Text with EEA relevance).

⁴ See Art. 2, 3 and 4 of the EC Treaty.

⁵ See Art. 87 Sec. 2 of the EC Treaty.

⁶ See Art. 87 Sec. 3 of the EC Treaty.

⁷ For criteria of admissibility see Svoboda, P. *Liberalizace obchodu zbožím v právu Evropské unie*. 1. vydání, Praha: C.H. Beck, 2003, 238 s. - ISBN 80-7179-815-0, pp. 35 and 36.

⁸ The procedure is well described in TÝČ, V. *Základy práva Evropské unie pro ekonomy*. 5. aktualiz. vyd. Praha : Linde, 2006. 287 s. Vysokoškolské právní učebnice. pp. 199 and 200.

⁹ For consequences of situation where state aid is granted without the Commissions permission see Kincl, M., *Veřejná podpora v Evropské unii - 1. vyd..* - Praha : Polygon, 2004. - 145 s. ISBN 80-7273-097-5 (váz.), pp. 89 and subsequent.

¹⁰ See Dědič, J., Čech, P.: *Obchodní právo po vstupu ČR do EU*, RNDr. Ivana Hexnerová – BOVA POLYGON, Praha 2005, p. 330.

Under the first regulation state aid granted to any one undertaking that does not exceed EUR 200.000 over any period of three fiscal years or state aid granted to any one undertaking active in the road transport that does not exceed EUR 100.000 over any period of three fiscal years are deemed not to meet all the criteria of Art. 87 Sec. 1 of the EC Treaty. As such they are considered to be compatible with the internal market and excluded from the notification procedure.

Similar exemption with same consequences was adopted by the second abovementioned regulation in case of some aids to small and medium-sized enterprises, aids in favor of research and development, aid in favor of environmental protection, employment and training aid, and aid that complies with the map approved by the Commission for each Member State for the grant of regional aid.

5.3 COMMISSION COMMUNICATIONS - SOFT LAW REGULATION

The European Commission has also adopted several communications in the area of state aid regulation which are not legally binding documents but have a great role as they contribute to a higher predictability of Commission's actions. These documents introduce clarifications as regards the applicability of the Art. 87 Sec. 3 of the EC Treaty which sets the list of potentially compatible state aids.

The communications covers a broad area of measures that fall within the scope of the Art. 87 Sec. 3 of the EC Treaty.¹¹ From the perspective of this work which aim is to deal solely with the issues related to the economic crisis the communication from the Commission - Temporary framework for State aid measures to support access to finance in the current financial and economic crisis OJ C83 of 07.04.2009 (hereinafter referred to as the "communication") is the most important.

5.3.1 REACTION OF THE EC ON THE CRISIS IN THE AREA OF STATE AIDS

In the abovementioned communication the Commission reacts on the current economic and financial crisis. The rules contained in the EC Treaty and in regulations concerning state aids are modified and smoothened in order to help the economy of Member State to recover. The communication introduces several measures which we will describe and analyze.

As to the legal nature of the communication we would like to emphasize once again that it is not a formal source of law. Thus the communication is not according to our opinion binding on European Court of Justice and its decision making. And finally we would like to mention that the communication is only temporary measure and will not be applied by the Commission after 31 December 2010.

¹¹ In particular following communications were adopted: the Communication from the Commission - Criteria for the compatibility analysis of state aid to disadvantaged and disabled workers subject to individual notification; Communication from the Commission - Criteria for the compatibility analysis of training state aid cases subject to individual notification; Community framework for State aid for Research and Development and Innovation; Community guidelines on state aid for environmental protection; Community guidelines on State aid for rescuing and restructuring firms in difficulty; Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises.

5.3.2 MEASURES ADOPTED BY THE COMMISSION

In the communication the Commission has introduced several new measures and modifications of recent legal regulation of state aid in order to enable Member States to stimulate their economies. Following measures were introduced:

1. In the communication the Commission confirms that the current practices of several Member State (e.g. Germany, Slovakia) where consumers are motivated to replace old products (typically cars) with new ones, are legal. According to the Commission the Member States may grant financial support directly to consumers. The condition is that such an aid is granted without discrimination based on the place of the origin of the product.¹²
2. The Commission temporary increases in some cases¹³ the compatible limited amount of aid from EUR 200.000 (resp. EUR 100.000) up to 500.000 EUR; Contrary to *de minimis* aid this aid will fall under the scope of the Art. 87 Sec. 1 of the EC Treaty, the Commission will however consider such aid as compatible with internal market;
3. In order to encourage access to finance and to reduce the high risk aversion on the part of banks simpler rules on aid in the form of guarantees were introduced.¹⁴
4. Commission introduced more favorable rules on aid in the form of subsidised interest rate, where the state aid element is contained in the difference between the real interest rate and the reference rate defined by the Commission. Commission will accept that loans are granted at an interest rate which is at least equal to the central bank overnight rate plus a premium equal to the difference between the average one year interbank rate and the average of the central bank overnight rate over the period from 1 January 2007 to 30 June 2008, plus the credit risk premium corresponding to the risk profile of the recipient, as stipulated by the Commission Communication on the revision of the method for setting the reference and discount rates.¹⁵
5. In the communication the Commission also tries to promote the production of environmental friendly technologies and products. The admissible support may be provided in a form of subsidised loans that could encourage production of "green products".¹⁶
6. And finally the Commission has also introduced new rules and more lenient rules on risk capital measures;¹⁷

¹² This exemption is also contained directly in the EC Treaty in its Art. 87 Sec. 2(a).

¹³ Conditions are set by Art. 4.2.2. of the communication.

¹⁴ See Art. 4.3.2. of the communication.

¹⁵ Art. 4.4.2. of the communication.

¹⁶ See Art. 4.5.2 of the communication.

¹⁷ See Art. 4.6 of the communication.

The advantage for Member States and individuals is that all the above mentioned state aid granted under schemes that were notified by Member states to the Commission are considered being compatible with the internal market. Their regime is therefore temporary similar to the regime which is applied on state aid falling under the scope of Art. 87 Sec. 2 of the EC Treaty.

6. CONCLUSION

European Union may seem to be a power state like organization. The truth is different. Its main weakness is that it has only limited competences in the sphere of economic policy. Economic policy is indeed regulated by Articles 98 and subsequent of the EC Treaty. These provisions however clearly state that the economic policy is conducted primarily by the Member States and that the European Union is only to coordinate them.

The other problem related to the lack of real competences is that the Union has only limited funds which it can use to stimulate business and consumers to spend money which seems to be necessary in order to restore the market optimism and restart the economic growth. Such stimulation can mostly be introduced only by Member states.

What has been said so far implies that the European Union sets most rules concerning both the internal and external trade with goods and services, rules for state aid which also heavily affect the trade within the whole Union, but the financing and practical realization falls within the competences of Member States. This situation in combination with the principle of non-discrimination based on ground of nationality of origin creates a dangerous mix as states who try to help their national trade or business in fact often involuntarily finance and support undertakings from other states. Such situation is formally coherent with the aims of European Union and ideas of European integration, however the people/voters sense it negatively. This puts political elites into a pressure between *Scylla* and *Charybda* - should they grant state aid or not? And if yes, than, despite the voters feeling to everybody whatsoever nationality or place of origin.

All what has been said so far implies that it will be the Member states that have to primarily fight the crisis and bear the burden and costs of financial stimulus. The European Union is not totally helpless though.

Apart from traditional support of development and research policies¹⁸ the Commission has adopted the new communication No. 2009/C 16/01 Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis. This is not sufficient though. The best thing the European Union can do is:

¹⁸ For example the Competitiveness and Innovation Framework Programme (2007 to 2013) established by Decision No 1639/2006/EC of the European Parliament and of the Council of 24 October 2006 and the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013) established by Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 and the cohesion and development policy which is carried out by Structural Funds and Cohesion Funds. For more information on this issue see Marek, D., Kantor, M. Příprava a řízení projektů strukturálních fondů Evropské unie - 1. vyd. - Brno : Společnost pro odbornou literaturu - Barrister & Principal, 2007. - 210 s. ISBN 978-80-87029-13-8 pp. 17 and subsequent or Kosikowski, C. Financial law of the European Union. Bialystok : Temida2. 2008. ISBN 987-83-89620-41-5. pp. 140 and subsequent.

1. to establish the permanent platform which could help sharing of the experience, important data and closely coordinate state actions. This goal is currently performed by the Council. The question is whether it is sufficient. We do not think so;
2. adopt efficient and less restrictive rules on state aid and find more additional resources in the European Union's budget to directly finance some preferred key industries;
3. adopt efficient European Union rules on export subsidizing and locate resources on export guarantees and insurance in the European Union's budget;
4. heavily intervene in the area of communications. Pressure on Member states is necessary in order to develop more interstate highways and high-speed railways. Especially in the area of Central and Eastern Europe.

Legislation and soft law:

- Council regulation No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State;
- Commission regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid;
- Commission regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (Text with EEA relevance);
- Communication from the Commission - Temporary framework for State aid measures to support access to finance in the current financial and economic crisis OJ C83 of 07.04.2009;
- Communication from the Commission - Criteria for the compatibility analysis of state aid to disadvantaged and disabled workers subject to individual notification;
- Communication from the Commission - Criteria for the compatibility analysis of training state aid cases subject to individual notification;
- Community framework for State aid for Research and Development and Innovation;
- Community guidelines on state aid for environmental protection;
- Community guidelines on State aid for rescuing and restructuring firms in difficulty;
- Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises;
- Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European

Community for research, technological development and demonstration activities (2007-2013);

- Decision No 1639/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Competitiveness and Innovation Framework Programme (2007 to 2013);

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