

# **POLSKA W UNII EUROPEJSKIEJ**

## **— OD STOWARZYSZENIA DO PIĘTNASTOLECIA CZŁONKOSTWA**

**MONOGRAFIA JUBILEUSZOWA DEDYKOWANA  
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Redakcja naukowa  
Adam A. Ambroziak  
Alina D. Szypulewska-Porczyńska

**SGH** Oficyna  
Wydawnicza

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# EU STATE AID POLICY: POLAND'S PERSPECTIVE ON EVOLUTION<sup>1</sup>

*“Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”.*

Art. 107 of the Treaty on the Functioning of the EU

## Introduction

The above quoted provisions of the Treaty on the Functioning of the European Union have remained unchanged practically since the beginning of the European economic integration. The same wording can be found already in the Treaty establishing the European Economic Community signed in 1957. Subsequent amendments to the first Treaty, dictated by the new economic

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\* **Adam A. Ambroziak, Ph.D., Associate Professor** – SGH Warsaw School of Economics, e-mail: adam.ambroziak@sgh.waw.pl. ORCID: 0000-0002-4618-8497.

<sup>1</sup> This text seeks to assess the evolution of the State Aid policy pursued in Poland and in the EU based on studies conducted so far by the author which is why references are made mostly to his published works with all courtesy to references. It must be stressed that many of the articles and chapters in monographs were prepared thanks to the unquestionable scientific support and advice of Professor E. Kawecka-Wyrzykowska.

challenges, such as the building of the EU internal market (Single European Act of 1986) or the Economic and Monetary Union (Maastricht Treaty of 1992), as well as political motivations (Treaty of Amsterdam, Treaty of Lisbon) and subsequent enlargements of the EU (in 1973, 1981, 1986, 1995, 2004, and 2013) did not introduce any material changes except replacing the term “common market” with “internal market” in the Treaty on the Functioning of the European Union. Does it mean that after more than 60 years when these provisions have been binding, they should be modified to, as some people suggest, in order to better reflect today’s challenges? What position should Poland adopt in this field? To answer these questions, we need to take a closer look at premises and circumstances surrounding the adoption of this provision, its nature and consequences for the entire EU and for individual Member States, including Poland in the association period and over fifteen years of the country’s EU membership.

## 1. State aid and European economic integration

The stepwise theory of economic integration developed by Béla Balassa assumed the removal of subsequent barriers to trade in goods, services, the movement of production factors, the right of establishment, and adoption of common solutions (relating mainly to trade) vis-à-vis third countries. Starting with the free trade area and the customs union’s attention focused first on the reduction of tariff barriers and elimination of quantitative restrictions. However, governments continued to have at their disposal a number of protectionist instruments applied to goods and companies from other member states of a given integration grouping. They included mainly border controls and checks, different methods of validating technical requirements, as well as broadly understood tax policy concerning direct and indirect taxes. The application of the above listed instruments of economic policy allowed improving the competitiveness of domestic manufacturers and service providers by means of the foreign exchange policy and government interventions in the market.

Next step in economic integration – common market is based on the implementation of the following four freedoms: free movement of goods, freedom to provide services, seeking and taking up employment, and free movement of capital. From entrepreneurs' point of view, the goal can be achieved, on the one hand, by the removal of subsequent barriers, including, e.g.: physical border checks, different technical requirements, divergent tax systems and, on the other hand, by advancing unification or harmonisation, and, finally, the principle of mutual recognition of technical norms, qualifications, and professional experience. To governments of member states of a given integration grouping this next step means losing further regulatory mechanisms which could have helped in rationing access of foreign entities, workers, as well as entrepreneurs and products offered by them, to the domestic market. Consequently, economic decision makers were left with public intervention tools that they could use only in real and financial spheres. These tools are eliminated when the most advanced format of economic integration: an economic and monetary union which can adopt a single currency has been put in place.

The above considerations incline us to conclude that the more advanced the economic integration in a situation where member states have already achieved a higher level of mutual interdependences created and protected by, inter alia, the elimination of barriers to transborder movement of goods, services, workers (and, more broadly, people), and capital, the more visible and tangible potential effects of government intervention instruments in the economy. Their efficiency, however, perceived from the perspective of their effects to economic processes is doubtful. That is because the government may impact entrepreneurs' decisions and behaviours in at least two ways: by providing an adequate legal framework or offering financial incentives. In both cases the objective is to encourage entrepreneurs to undertake actions which are not driven by regular market forces or, in other words, actions which they would not pursue without governments' engagement. The point is to accomplish a concrete objective set by the government (political decision makers): improvement of the quality of life of the country residents. Supporters of the free market economy advocate the advantages of leaving further actions

exclusively to market forces. On the other hand, the supporters of the active involvement of the state in the economy believe that this goal can be achieved by either allowing exclusively the public sphere (state-owned enterprises) to operate, which – as shown by our experience – has not been successful to date, or by directing private entrepreneurs to specific behaviours. In the latter case, state intervention may take place at both legal (regulatory or administrative) and financial levels.

When it comes to legal intervention, the EU Member States have a partially restricted room for manoeuvre in the internal market area. First, vast majority of the domestic legislation remains influenced by the EU legislation. Second, increasingly more often EU directives, which require Member States to adopt some laws to transpose them, are replaced by directly applicable EU regulations, which eliminate potential (and relatively frequent) risk of incorrect transposition of the European law into the national legal order<sup>2</sup>. At the same time, regulations reduce (although not eliminate) the possibility of Member States adopting national laws that would be incompliant with the implemented EU legislation<sup>3</sup>.

On the other hand, financial interventions may boil down to widely understood support granted to entrepreneurs from public coffers with an intention to improve their competitiveness in international markets as well as reduce social costs of their restructuring (forced out by years of neglect) or transformation (induced by new challenges). Irrespective of indirect goals pursued by such instruments, they result not only in artificially (and, if resources are used inappropriately, also short-term and ineffectively) improved position of beneficiaries vis-a-vis third partners or reduction of social tensions. Such measures may also be counterproductive to liberalisation efforts undertaken to eliminate

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<sup>2</sup> A.A. Ambroziak, *Bilans dwudziestolecia istnienia rynku wewnętrznego Unii Europejskiej – aspekty wdrażania legislacji unijnej* (title in English: *20 Years of the EU Internal Market*), “Studia Europejskie”, 2012, no. 64(4), pp. 51–78.

<sup>3</sup> J. Stefaniak, A.A. Ambroziak, “Pakiet usługowy” Komisji Europejskiej – remedium na bariery na unijnym rynku usług? (title in English: *European Commission “Service Package” – A Remedy to Barriers in the EU Service Market?*), “Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu” 2017, no. 487, pp. 306–317.

barriers at subsequent stages of economic integration. Government's intervention in economy exercised by granting subsidies or preferential financial treatment relatively improves the position of a domestic entrepreneur in relation to a foreign one. After all, this is the objective of most barriers to trade (not mentioning fiscal aspects): to limit the import of goods or access of service providers to the domestic market, to protect and, from the perspective of the internal demand, to foster the position of domestic companies.

The absence of regulations concerning government's financial intervention in the market would destroy the effect of the elimination of barriers in trans-border trade. Thus, the general ban on State aid in the EU<sup>4</sup> flows directly from the fact that within the internal market most barriers to trade in goods<sup>5</sup> and (although intentionally) services<sup>6</sup> have been eliminated. At the absence of any traditional barriers to trade, as well as other physical, technical and fiscal barriers in the EU, support given to entrepreneurs in one Member State strengthens their competitive position in relation to any other economic operator not only from outside of the EU but, above all, within the EU internal market (due to the above-mentioned absence of other barriers). Allowing this to happen flies in the face of the provisions of all the existing European treaties, including the currently binding Treaty on the Functioning of the European Union, which in its preamble declares that “the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade, and fair competition”.

<sup>4</sup> *Pomoc publiczna dla przedsiębiorców. Wybrane zagadnienia. Perspektywa podmiotu udzielającego pomocy i jej beneficjenta w Polsce* (title in English: *State Aid for Entrepreneurs. Selected Aspects. Perspective of Aid Donor and Beneficiary in Poland*), eds. A.A. Ambroziak, K. Pamuła-Wróbel, R. Zenc, Wolters Kluwer Polska, Warsaw 2019.

<sup>5</sup> A.A. Ambroziak, *Handlowe skutki ewolucji prawa swobodnego przepływu towarów. Bilans dwudziestolecia istnienia rynku wewnętrznego UE* (title in English: *Trade Effects of the Evolution of EU Law on Free Movement of Goods. Consequences of the 20 Years Internal Market of the European Union*), “*Studia Europejskie*” 2013, no. 65(1), pp. 75–100.

<sup>6</sup> A.A. Ambroziak, *Handlowe skutki ewolucji prawa swobody świadczenia usług. Bilans dwudziestolecia istnienia rynku wewnętrznego UE* (title in English: *Trade Effects of the Evolution of EU Law on Freedom to Provide Services. Consequences of the 20 Years of Internal Market of the European Union*), “*Studia Europejskie*” 2013, no. 66(2), pp. 55–74.

## 2. Beginnings of the European State aid policy

Already the Treaty establishing the European Coal and Steel Community of 1951 contained specific solutions on State aid. It was treated on equal footing with protectionist or discriminating instruments contradictory with the Treaty. Pursuant to Art. 54 of the ECSC Treaty, if the High Authority delivered an adverse opinion having the force of a decision binding upon those to whom it was addressed, beneficiaries were prohibited from drawing on these resources in carrying out a given investment project. It resulted from the assumption laid down in Art. 4, according to which “subsidies or aids granted by States, or special charges imposed by States in any form whatsoever (...) are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community”. The point was to accomplish the task entrusted to the Community in Art. 5, based on which it was expected to ensure “the establishment, maintenance and observance of normal competitive conditions and exert direct influence upon production or upon the market only when circumstances so require”.

Remarkably, the original regulations were unambiguous in their interpretation: they boiled down to seeing any public intervention as incompatible with the Treaty provisions. The ECSC Treaty did not provide for any exemptions or special treatment of diverse State aid categories. That was the effect of the then understanding of the common market as an area free from traditional barriers to trade whose elimination represented the essence of liberal approach to free market economy.

Slightly more flexible regulations were laid down in the Treaty establishing the European Economic Community of 1957 (Art. 90 para. 1). Pursuant to them, State aid that affects trade was considered incompatible with the common market<sup>7</sup>. Thus, the aid was not prohibited but only considered incompatible with the internal market to the extent to which it affected trade between Member

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<sup>7</sup> *Pomoc publiczna... op.cit.*

States. In the perspective of integration processes, this premise is crucial for the identification of State aid in the EU. Obviously, trade in this case means, above all, trade within the European Union, although it does not exclude the impact on relations with third countries. One needs to bear in mind, however, that first, the subject of exchange between the Member States was not identified, meaning it concerns the movement of goods, services but also people and capital in the form of, e.g., foreign direct investment. Thus, the provision discussed in this section declares as incompatible with the EU market aid which *de facto* hinders the accomplishment of at least one of the four Treaty freedoms put in place as a result of the elimination of subsequent barriers. Therefore, we may argue that the more advanced the liberalisation of movement achieved through the elimination of administrative and regulatory barriers within the EU internal market, the more extensive and detailed State aid provisions<sup>8</sup>.

At the same time, in the Treaty establishing the EEC there are many mandatory and discretionary exemptions willingly exploited by the Member States and the European Commission. Criteria applied to decide on the compatibility of aid with the internal market are based either on political consensus (e.g., Art. 107 para. 2 letter c of the TFEU) or on intuitive approval of support granted to economic actors in specific situations (social aid – Art. 107 para. 2 letter a and aid to make good the damage caused by natural disasters based on Art. 107 para. 2 letter b). In turn, aid which may (but does not have to) be considered compatible with the EU market must meet the criteria which, *de facto*, should at least intentionally identify market failures. As a result, compatible aid includes, inter alia, regional investment aid (failure consisting in low attractiveness of poorly developed regions and adequately higher costs to be incurred by potential investors), aid for research, development, and innovation (mitigating high risk of the failure of research), aid for employment, training, and for small and medium-sized enterprises (as a support in reducing unemployment and mobilisation of entrepreneurship), aid for environmental protection and

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<sup>8</sup> A.A. Ambroziak, *State Aid Policy and Industrial Policy of the European Union*, in: *New Industrial Policy of the European Union*, ed. A.A. Ambroziak, Springer, Switzerland 2017.



improving energy efficiency (motivating entrepreneurs to invest in order to fulfil the requirements above the minimum level agreed by the EU).

Still in the 1970s and 1980s sectoral aid targeting concrete industries was fairly popular in the EU. However, at that time there were many barriers in the internal market although traditional ones (customs duties and quantitative restrictions as well as measures having equivalent effect) had been eliminated by the establishment of the customs union in 1968. Nevertheless, in connection with the creation of the internal market launched in 1993, excess supply observed in certain industries and poor adaptation to new global challenges, sectoral aid was gradually limited and, finally, prohibited in the mid-1990s with respect to the so-called traditional industries<sup>9</sup>.

Next, sectoral aid transformed into horizontal aid while in the late 20th century and in the first decade of the 21st century the Commission expanded the system of the so-called block exemptions from the requirement of prior notification of each aid scheme to the Commission. For obvious reasons, Member States started availing themselves of this possibility increasingly more frequently as it accelerated the granting of aid and ensured its compatibility with the internal market (no grounds for the Commission to launch explanatory proceedings)<sup>10</sup>. Thus, we may conclude that currently, the General Block Exemption Regulations (GBER) acts as a guidepost for Member States and potential beneficiaries telling them what types of activities can be subsidised from public resources in the EU and to what extent such aid serves to secure the interest of the entire EU (the more the accomplishment of a particular goal is expected at the EU level, the higher allowable intensity of aid and broader scope of eligible costs)<sup>11</sup>.

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<sup>9</sup> A.A. Ambroziak, *The Relationship Between Public Support and the Industrial Sector in the European Union*, in: *New Industrial Policy...*, *op.cit.*

<sup>10</sup> A.A. Ambroziak, *Pomoc publiczna w świetle zmian przepisów o jej udzielaniu w latach 2004–2016* (title in English: *State Aid in the Light of Changing State Aid Provisions over the Period 2004–2016*), in: *Pomoc publiczna...*, *op.cit.*

<sup>11</sup> *Commission Regulation (EU) no. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty*, OJ L 187, 26.6.2014.

### 3. State aid law in the Europe Agreement

The first agreement concluded in 1989 between Poland and the then EEC on trade and economic cooperation<sup>12</sup> made no references to competition rules or State aid. Unsurprisingly rather, as at that time the Community was only contemplating the idea to include these rules in international agreements and the agreement did not provide for any liberalisation between the partners (it confirmed the binding force of some rules stipulated in GATT, including the most favoured nation clause).

Far more elaborate provisions were laid down in the Europe Agreement<sup>13</sup>. The significance of provisions concerning competition is confirmed by the fact that they were incorporated into the so-called Interim Agreement<sup>14</sup>, which entered into force in March 1992, slightly more than two months after it had been signed and more than two years before the Europe Agreement became fully operational. At that time, trade and economic relations in this area were governed by a mixture of somewhat modified solutions binding in the EU. Art. 63 para. 1 of the Agreement states “any State aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods” (...) shall be incompatible “with proper execution of the Agreement so far as it affects trade between Poland and the Communities”. Hence, it was a slightly changed version of the provisions of the then binding Art. 92 para. 1 of the Treaty establishing the EEC. Reference was made to the main premises used to identify incompatible State aid: aid granted from public resources, distortion

<sup>12</sup> *Agreement of 19 September 1989 between the People's Republic of Poland and the European Economic Community concerning trade and commercial and economic cooperation*, Journal of Laws of 1990, no. 38, item 214.

<sup>13</sup> *Europe Agreement of 16 December 1991 establishing an association between the Republic of Poland and the European Communities and their Member States*, Journal of Laws of 27 January 1994, no. 11, item 38.

<sup>14</sup> *Interim Agreement of 16 December 1991 on trade and trade-related matters between the Republic of Poland and the European Economic Community and the European Coal and Steel Community*, Journal of Laws of 28 February 1992, no. 17, item 69.

of competition, selective favouring of beneficiaries, and impact on trade. At this point, it is worth stressing, however, that they were significantly restricted (e.g., with regard to the territorial scope of effects on trade) compared to the dynamically developing interpretation of State aid definition. We also need to highlight that, similarly to State aid granted within the EU which, if it fulfils certain criteria, is incompatible with the internal market, aid referred to in the Europe Agreement was interpreted as incompatible with proper execution of the Agreement. As a result, the association agreement did not consider such aid invalid or unlawful. On the other hand, it would be unreasonable to expect the solutions adopted in the Agreement to be equally restrictive as those binding upon the Member States of the European Community. It is worth remembering that the Europe Agreement provided only for the establishing of a free trade area for industrial goods and only partial and selective liberalisation of trade in agricultural products. Thus, the existing barriers which were not subject to liberalisation over the period of association were fully sufficient to protect the European market against potentially subsidised goods from Poland.

In the Europe Agreement it is also stressed that any conduct incompatible with the above quoted provisions would be assessed against the criteria stemming from the application of, inter alia, Art. 92 of the Treaty establishing the European Economic Community. To this end, over three years after these provisions had become effective (based on the Interim Agreement) principles necessary to apply the above regulations were supposed to be adopted. It meant that in 1995, that is when Poland started liberalising access to its market, both parties of the Agreement worked out special procedures in this area<sup>15</sup>. Finally, the “Rules” were adopted by the Council of the Association as late as 2001<sup>16</sup>. They were guidelines for the establishing (although the process started already

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<sup>15</sup> A.A. Ambroziak, E. Kaliszuk, *Przyjęcie zasad stosowania reguł konkurencji. Zasady stosowania przepisów o pomocy państwa* (title in English: *Acceptance of Implementing Rules on Competition. Implementing Rules on State Aid*), “Wspólnoty Europejskie” 1996, no. 63(11), pp. 25–26.

<sup>16</sup> *Decision no. 3/2001 of the EU-Poland Association Council of 23 May 2001 adopting the implementing rules for the application of the provisions on State aid referred to in Article 63(1)(iii) and (2) pursuant to Article 63(3) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of*

in the mid-1990s) of a body that would monitor State aid in Poland and be equipped with competences including, inter alia, the right to assess aid schemes or data collection, which would also act as a substantive interlocutor for the European Commission. At institutional level, originally a unit was established at the Ministry of Economy which developed into an effectively performing Department of State Aid Monitoring in the Office of Competition and Consumers Protection (OCCP). At the legal level, act of 2000 on the conditions of admissibility and supervision of State aid for entrepreneurs entered into force<sup>17</sup>. The act was rather peculiar as it included elements of not just procedural but also material law, as a result of which, already four years before the EU accession, Poland assessed aid measures against the main criteria used to assess State aid in the EU. On the one hand, it meant that still before the EU accession, Polish bodies which manage public resources earmarked for entrepreneurs and beneficiaries of financial support could familiarise themselves and understand the idea behind the general ban on granting State aid as well as mandatory and discretionary exemptions from it. On the other hand, pursuant to the Europe Agreement the European Commission was not competent to assess aid measures applied in Poland, which was left for the formally independent OCCP. Thus, an effective enforcement of legislation in this area could be exercised after the EU accession, not in the association period.

#### 4. Transition periods for State aid in the Accession Treaty

Poland began accession negotiations on 31 March 1998, that is over two years before the entry into force of the act that initially regulated the conditions for State aid admissibility and supervision as well as the above-mentioned principles of the implementation of State aid provisions based on the Europe

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*the other part, and in Article 8(1)(iii) and (2) of Protocol 2 on European Coal and Steel Community (ECSC) products to that Agreement (2001/615/EC), OJ L 215/38.*

<sup>17</sup> *Act of 30 June 2000 on conditions for admissibility and supervision of State aid for entrepreneurs*, Journal of Laws of 28 February 2000, no. 60, item 703.

Agreement. Following the screening of Polish legislation against its compatibility with the EU law, Poland declared the adoption of State aid rules in its negotiating position making also three main requests concerning: a) the map of regional aid and a transition period for granting unlimited investment aid in the form of exemption from income tax to undertakings operating in special economic zones, b) in addition to transition periods for the implementation of some environmental directives, the increase in intensity of admissible aid to enterprises granted for adjustments to the EU requirements, and c) State aid granted under the restructuring scheme to the steel industry in Poland<sup>18</sup>.

When it comes to aid in special economic zones (SEZs) attention should be paid to the fact that they were established in the mid-1990s to, inter alia, support restructuring in selected regions of Poland. The idea was identical with the idea behind various types of industrial or processing zones known in less developed countries. The exemption from income tax was intended to encourage potential entrepreneurs to invest in the regions struggling with social and economic problems stemming from economic transformation of the country. Yet, no limit imposed on eligible costs made the instrument applicable throughout the entire lifetime of a given zone, i.e., in most cases by the end of 2017. Due to the need to protect competition in the EU market whose member Poland became on the day of its EU accession, EU Member States could not approve such an arrangement. Poland's request was dictated by the protection of entrepreneurs' acquired rights and the wish to ensure their trust in the Polish state. Finally, deadlines were introduced by which small and medium-sized entrepreneurs could benefit from the exemptions without limitation (until the end of 2011 and 2010, respectively) while large ones had to fully adapt themselves to the binding EU regulations on the date of receiving the permit to operate in a zone<sup>19</sup>.

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<sup>18</sup> A.A. Ambroziak, E. Kaliszuk, *Granting State Aid in Poland after Accession to the European Union*, in: *Poland in the European Union*, eds. E. Kawecka-Wyrzykowska, E. Synowiec, Foreign Trade Research Institute, Warsaw 2004.

<sup>19</sup> A.A. Ambroziak, *Rozwiązanie kwestii udzielania pomocy publicznej w specjalnych strefach ekonomicznych w Polsce I* (title in English: *Special Economic Zones in Poland – Negotiations and*

Thus, although in the accession period Poland did not fully observe regional State aid rules, finally on the day of accession aid limits were imposed retrospectively on large companies. This was how the European Commission partially enforced regulations in these field in Poland. When it comes to the effects of having special economic zones, unfortunately, they cannot be seen as unambiguously positive. Strongly dispersed zones that may incorporate private plots missing innovation-related criteria and making requirements restricted to the amount of invested capital and the number of newly created jobs in most cases exerted poor impact upon the economic growth of regions, in which they are located<sup>20</sup>. More detailed analyses captured their negative effects resulting from the lack of cooperation with local business, expecting even cheaper labour force, monopolisation of the labour market in smaller towns, restricting competition through tax preferences, and impact upon the inflow of foreign investment<sup>21</sup>. Remarkably, the proposed transition periods and changes to law were introduced so smoothly that they did not exert any negative impact upon investment attractiveness of Poland.

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*Transition Arrangements I*), "Wspólnoty Europejskie" 2003, no. 137(2), pp. 16–26; A.A. Ambroziak, *Rozwiązanie kwestii udzielania pomocy publicznej w specjalnych strefach ekonomicznych w Polsce II* (title in English: *Special Economic Zones in Poland – Negotiations and Transition Arrangements II*), "Wspólnoty Europejskie" 2003, no. 138(3), pp. 37–48; A.A. Ambroziak, *Problem udzielania pomocy publicznej w specjalnych strefach ekonomicznych w ramach negocjacji Polski o członkostwo w Unii Europejskiej* (title in English: *Problem of State Aid in Special Economic Zones in the Negotiations of Poland's Accession to the EU*) in: *Okresy przejściowe w Traktacie o Przystąpieniu Polski do Unii Europejskiej*, ed. E. Kawecka-Wyrzykowska, SGH Publishing House, Warsaw 2003.

<sup>20</sup> A.A. Ambroziak, *Krajowa pomoc regionalna w specjalnych strefach ekonomicznych w Polsce* (title in English: *Regional State Aid in Special Economic Zones in Poland*), SGH Publishing House, Warsaw 2009; A.A. Ambroziak, *Efekty funkcjonowania specjalnych stref ekonomicznych w Polsce* (title in English: *Effects of Special Economic Zones in Poland*), "Zeszyty Naukowe" Collegium of World Economy, SGH Publishing House, Warsaw 2009, no. 24, pp. 111–141; A.A. Ambroziak, *Income Tax Exemption as a Regional State Aid in Special Economic Zones and Its Impact upon Development of Polish Districts*, "Oeconomia Copernicana" 2016, no. 7(2), pp. 245–267.

<sup>21</sup> A.A. Ambroziak, Ch.A. Hartwell, *The Impact of Investments in Special Economic Zones on Regional Development: The Case of Poland*, "Regional Studies", 2018, no. 52(10), pp. 1322–1331; W. Dziemianowicz, J. Łukomska, A.A. Ambroziak, *Location Factors in Foreign Direct Investment at the Local Level: The Case of Poland*, "Regional Studies" 2019, no. 53(8), pp. 1183–1192.

Environmental protection and the adjustments made by Poland in this area are particularly sensitive, especially nowadays when the EU strives to make its economy climate neutral. In the course of accession negotiations, Poland expected the extension of the period provided to it to implement certain environmental directives as well as the increasing of State aid's intensity ceilings with respect to all legal acts covered by transition periods under the "Environment" negotiating chapter.

The main argument in favour of Polish demands was the cost of adjustments to be incurred by Polish enterprises and the lack of financial resources. It was the effect of many years of neglect in the implementation of environmental solutions in Poland and viewing them as a less important goal compared to economic growth. At the same time, EU Member States, especially Scandinavian ones, which paid huge costs triggered by the restructuring of their industries and had to meet very high environmental standards, were afraid of eco-dumping exercised by, inter alia, Poland. Finally, the EU agreed to raise aid limits (slightly less than Poland expected) for transition periods lasting from several to more than dozen years (the last one ended in 2017) negotiated for five directives: 76/464/EEC on pollution caused by certain dangerous substances discharged into the aquatic environment if the Community, 91/271/EEC concerning urban waste-water treatment, 1999/31/EC on the landfill of waste, 96/61/EC concerning integrated pollution prevention and control, and 2001/80/EC on the limitation of emissions of certain pollutants into the air from large combustion plants. On the one hand, Polish entrepreneurs were given more time for adaptation and could benefit from higher aid ceilings compared to their competitors from the other EU Member States. Looking from this angle, they maintained their competitive position in the market and could slowly adjust to the EU requirements. On the other hand, transition periods for the chapter "Environment" relating to State aid slowed down the processes or perhaps even put to sleep Polish authorities and enterprises, mainly those from the energy sector. Apparently, years of neglect pre-dating economic transformation overlapped with inefficient performance in this area in the pre-accession period and were not counterbalanced with fast

and bold steps made over 15 years of the EU membership when access to significant EU resources was relatively easier. Today, when speaking in favour of slowing down environmental adjustment efforts Poland repeats the same arguments as the ones put forward during accession negotiations twenty years ago. Hence the dilemma of choosing between rapid adjustments to new challenges of climate-neutral economy undertaken with clean environment for people in mind and the economic costs of such a transformation to enterprises, consumers, and all of the economy, remains unresolved.

Aid to steel industry was a separate issue under the negotiation chapter “Competition”. In parallel to formal accession negotiations, talks were going on the restructuring of this industry and admissible State aid. As a result, already in the Europe Agreement special solutions were provided for enterprises offering products covered by the Treaty establishing the European Coal and Steel Community. Pursuant to Art. 8 of Protocol 2 to the Europe Agreement, Poland could be granted State aid in the steel industry by the end of 1996 on condition that it introduces, inter alia, a restructuring programme that would rationalise and reduce the capacity of this industry and, once it is finished, ensure the survival of companies which benefited from the aid scheme under regular market conditions. Such arrangements were by far more liberal compared to the then binding EU legislation which allowed granting aid almost exclusively to research and development, for environmental protection, partial restriction of production of manufacturing companies or its discontinuity in the case of the least competitive steelworks.

In March 2003 the Council of Ministers adopted the “Restructuring programme for iron and steel industry up until 2006” agreed with the European Commission, which was a more extended version of the previous programmes. The industry, suffering from excess employment, obsolete production methods, and little investment in new technologies had called for powerful capital injections practically since the early 1990s. The programme foreseen the consolidation of the production of several enterprises under the umbrella of the Polskie Huty Stali S.A. (PHS S.A.) [Polish Steelworks Joint Stock Company], liquidation of inefficient and unprofitable capacity, restructuring of



employment, production, and financial management and, finally, privatisation. These processes were to be supported with substantial public resources allocated against the criteria of the then binding EU law. An important step towards a well performing steel sector in Poland was taken with the privatisation of the PHS S.A., which was taken over by the LNM Holdings (Lakshmi Mittal global steel holding). Until 2006, within the period provided for in the accession treaty, the new investor fully complied with the restructuring programme while in subsequent years, under the name of Mittal Steel Poland S.A. and later ArcelorMittal Poland after the merger, he carried out important investment projects maintaining the employment at the level of over 11k people.

Notably, already in the course of adjustments the European Commission in its opinion of 1997 issued in response to Poland's application for the EU membership indicated the need to restructure three industries: steel, shipbuilding, and coal mining<sup>22</sup>. The Commission declared aid granted after the accession to the largest state-owned shipbuilding companies as incompatible with the internal market and it had to be recovered which, in the absence of interest of private investors, led to the closure of these companies<sup>23</sup>. When it comes to coal mining, despite a number of restructuring programmes it continues to be subsidised with public funds, not mentioning the dependence of the Polish energy sector on coal and the need to import it from outside of the EU. In contrast, steel industry turned into one of the most modern and the fastest developing industries in Poland and the currently reported issues connected with competition from outside of the EU and growing energy prices have nothing to do with the outcomes of accession negotiations with respect to competition and State aid granted until 2006.

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<sup>22</sup> European Commission, *Agenda 2000 – Commission Opinion on Poland's Application for Membership of the European Union*, DOC/97/16, Brussels, 15th July 1997.

<sup>23</sup> *Commission Decision of 6 November 2008 on State aid C 19/05 (ex N 203/05) granted by Poland to Stocznia Szczecińska*, OJ L 5, 8.1.2010; *Commission Decision of 6 November 2008 on State aid C 17/05 (ex N 194/05 and PL 34/04) granted by Poland to Stocznia Gdynia*, OJ L 33, 4.2.2010.

## Conclusions: evolution of State aid rules towards new challenges

Despite being based on unamended Art. 107 and Art. 108 of TFEU, State aid law has evolved over the years<sup>24</sup>. Changes to it were triggered by global economic transformations, new challenges emerging in the social and economic space, and ever deepening integration organised around the elimination of subsequent barriers which has brought more powerful public interventions in the market and adversely affected competition within the EU internal market. Consequently, in the 1990s the EU Member States withdrew from granting aid to concrete industries and shifted towards horizontal schemes addressed to economic actors investing in economically unattractive regions, interested in increasing employment, training workers, pursuing R&D effort, and, at a later stage, reflecting interest in innovation, environmental protection, and improving energy efficiency. The more advanced the EU integration and elimination of barriers combined with increasing market imbalances stemming from global excess supply and intensified price competition of the non-EU countries are, the more aid to concrete companies or industries gets reduced leaving, however, the room for responding to newly identified market failures. Simultaneously, which is worth underscoring, attempts were made to control the amount of resources supplied by the Member States to their economies by formulating political objectives and indicators in relation to the GDP<sup>25</sup>.

It does not mean that State aid intensity in all the Member States was reduced. In relation with, inter alia, global challenges or political needs calling for substantial financial resources, some Member States, including Poland, clearly increase their engagement with the market. In contrast to better developed European economies, in Poland for many years we have been observing the dominance of regional aid. And it is not just the investment aid granted

<sup>24</sup> A.A. Ambroziak, *State Aid policy...*, *op.cit.*

<sup>25</sup> A.A. Ambroziak, *Pomoc publiczna...*, *op.cit.*

in the form of tax allowances in special economic zones but an entire array of aid schemes offered under European funds to enterprises located in certain regions<sup>26</sup>. Sometimes the actions that are undertaken go beyond regular investment projects, yet as long as, based on subsequent amendments to the European Commission guidelines, all of the country's territory is covered by regional aid map<sup>27</sup>, such aid will be used most willingly. However, one needs to note that these aid schemes are available to new entrepreneurs who decide to locate their investment projects in a certain region; the less developed the region, the higher intensity of admissible aid in relation to eligible costs. Nevertheless, in this case we should not lose sight of at least two misgivings. First, sometimes local entrepreneurs who have planned to expand their companies anyway, decide to benefit from available aid. Hence, there may be cases of the so-called "idle gear effect" when existing businesses are being closed down to be immediately replaced with little modernised start-ups operating in the same industry and in the same region, although the latest adopted EU provisions seek to restrict such cases. Second, investors from outside of the region, both domestic and foreign ones, usually have sufficient financial resources. As a result, regional aid or, in other words, taxpayers' money, gets transferred not necessarily to the least developed regions but to more developed ones

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<sup>26</sup> A.A. Ambroziak, *Regional Dimension of State Aid to Entrepreneurs after Poland's Accession to the European Union*, in: *Regional Dimension of the EU Economic Policy in Poland*, ed. A.A. Ambroziak, SGH Publishing House, Warsaw 2015.

<sup>27</sup> A.A. Ambroziak, *Warunki dopuszczalności krajowej pomocy regionalnej w latach 2007–2013* (title in English: *Conditions of Admissibility of Regional State Aid in 2007–2013*), "Wspólnoty Europejskie" 2006, no. 171(2), pp. 11–25; A.A. Ambroziak, *Koncepcja mapy pomocy regionalnej w państwach członkowskich UE w latach 2014–2020* (title in English: *The Concept of Regional Aid Map in Member States of the EU for 2014–2020*), "Unia Europejska.pl" 2013, no. 221(4), pp. 31–40; A.A. Ambroziak, *The Legal Framework for Regional State Aid in the European Union in 2014–2020 and Its Impact on the Attractiveness of Poland's Regions to Investors*, in: *New Cohesion Policy of the European Union in Poland. How It Will Influence the Investment Attractiveness of Regions in 2014–2020*, ed. A.A. Ambroziak, Springer, Cham-Heidelberg-New York-Dordrecht-London 2014; A.A. Ambroziak, *Prawne i ekonomiczne aspekty pomocy regionalnej w Polsce po akcesji do Unii Europejskiej* (title in English: *Legal and Economic Aspects of Regional State Aid in Poland after Accession to the European Union*), in: *Unia Europejska w 10 lat po największym rozszerzeniu*, eds. E. Pancer-Cybulska, E. Szostak, "Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu" 2015, no. 380, pp. 177–188.

from which new investors originate. Unfortunately, as is the case of the SEZs, these new investment projects by offering only new jobs often monopolise the labour market, maintain business relations with their previous business partners without engaging local companies. Most probably for these reasons better developed Member States depart from regional aid schemes and shift towards horizontal aid.

When it comes to horizontal aid, its structure has been evolving differently from what has been reported in Poland. The main challenge faced by the European Union at the end of 2019 consists in achieving a climate-neutral economy objective by 2050. As a result, for some years already we can observe that State aid in the EU is not granted for research and development, employment and training or to small and medium-sized enterprises but for environmental protection and to the energy sector. It does not mean that environmentally friendly solutions or arrangements that would ensure higher energy efficiency, including the use of renewable energy sources, are not innovative. On the contrary, but activities undertaken in this area call for new manufacturing and management techniques, new types of links with industry and service providers, and a new, more rational deployment of available resources. The idea of servitisation, i.e., the manufacturing industries offering goods and services in one package, boils down to a more rational use of raw materials and, on the consumer side, shifting from owning (buying) a product to securing access to it<sup>28</sup>. Thus, recently we can observe that more than half of State's aid granted in the EU targets environmental measures and the energy sector. In Poland, as we have already stressed, regional aid schemes dominate while horizontal aid is granted to energy companies to reduce the cost of electricity to final consumers. – There is also a separate issue of receiving approval for granting State

<sup>28</sup> A.A. Ambroziak, *Servitization or Reindustrialization of the EU in the Context of the Economic Crisis of 2008–2010*, “Yearbook of Polish European Studies” 2017, no. 20, pp. 129–151; A.A. Ambroziak, *Towards a Modern Industrial Policy of the European Union*, in: *New Industrial Policy...*, *op.cit.*; A.A. Ambroziak, *Reindustrialization or Servitization: Trade Tendencies in the European Union Internal Market*, in: *Unia Europejska wobec wyzwań przyszłości. Aspekty prawne, finansowe i handlowe*, eds. E. Małuszyńska, G. Mazur, P. Idziak, Poznań University of Economics and Business Press, Poznań 2015, pp. 225–240.

aid. Art. 108 of the TFEU unambiguously states that European Commission is competent to decide whether a given aid scheme that has been duly notified to it, is compatible with the internal market. That is why the Commission drew up the General Block Exemption Regulation that has already been amended several times, according to which the Member States do not have to notify each case of granting aid to the Commission and wait for its decision provided the aid meets the criteria specified in detail in this very regulation. Increasingly more aid is being granted within the framework of the GBER which allows accelerating the process. Obviously, State aid granted to, e.g., an entrepreneur in a cross-border region who operates in markets other than the domestic one remains a separate and rather disputable issue as it impacts competition in the entire EU. However, the so far accumulated experience, tells us that the European Commission develops the concept embodied in the GBER and tends to focus on State aid cases the most important for competition. That was especially relevant for the accession of new Member States in 2004 and 2007. Their administrative mechanisms before the EU accession tended to grant much bigger State aid than what was admissible under the EU legislation.

The new idea of the establishing of a Just Transition Mechanism<sup>29</sup> that would support not only enterprises but also regions tackled with the transition to climate-neutral economy is surely worth addressing. Undoubtedly, Just Transition Fund should also be available to Polish enterprises and regions just like new special aid rules planned for this arrangement. We still have to answer the question whether in Poland aid, also from European funds, shall be granted exclusively to companies owned by the State Treasury or perhaps to a wider circle of entrepreneurs suffering from the effects of energy model transformation in the EU. The competitive position of Poland is equivalent to the competitive position of Polish companies in the EU market and outside of it. However, considering the growing share of intra-EU trade in the foreign trade of Poland, account must be taken of trends and attitudes emerging in this market.

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<sup>29</sup> European Council, *Conclusions*, 12.12.2019.

It concerns not just climate-related issues but also space industry aspects for which public resources are being earmarked for European entrepreneurs in proportion to the financial involvement of individual Member States through the European Space Agency, that is, outside of the EU State aid rules framework.

What remains is the question of the presence of subsidised companies from outside of the EU in the European market. In the face of advancing liberalisation of the access to the EU market, as well as digitalisation and e-commerce connected with it, competition rules, including State aid rules, are taking on a new dimension. Apparently, individual import from outside of the EU has become a mass phenomenon as a result of access to digital sales and marketing platforms. Consequently, European companies are faced with even more fierce competition of their competitors from outside of the EU. A serious problem arises, however, when competitors from outside of the EU, also those who offer access to Internet platforms, receive aid from public resources or belong to an industry managed by a country of origin. Then, restrictive EU regulations developed for a free market economy companies may decrease their advantages in fair competition with actors from third countries. In such cases, these actors do not observe market principles but use funds allocated to them by governments from outside of the EU. A protection instrument is offered in the solution proposed in the guidelines for R&D aid<sup>30</sup>, which provide for a possibility to grant aid to companies that conduct research and development if companies from outside of the EU could get subsidies for this purpose under their domestic aid schemes. So far, the mechanism has never been applied mainly because it is difficult to collect sufficient evidence to substantiate such cases. At the same time, we need be aware of the fact that subsidy war bears consequences similar to those of trade war which ends up with the escalation of subsidies<sup>31</sup>. Such a war improves the position of partners from

<sup>30</sup> A.A. Ambroziak *Recent Changes and Developments in State Aid for Research, Development and Innovation in the European Union*, "Studia Europejskie" 2016, no. 80(4), pp. 73–94.

<sup>31</sup> A.A. Ambroziak *Spór między USA a Unią Europejską o subsydiowanie produkcji dużych samolotów pasażerskich* (title in English: *Dispute Between the US and EU about Subsidising the Production of Large Civil Aircraft*), "Wspólnoty Europejskie" 2004, no. 157(12), pp. 20–28.

third countries in the global market while it dramatically distorts competition within the EU and hinders the operations of companies to which such aid is not granted.

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