

Regional investment aid under regional operational plans for 2014-2020

Jarosław ODACHOWSKI

WSB University of Wrocław, Poland

Abstract:

Aim: The implementation of numerous EU projects in the period 2014-2020 is bound to require that they are compliant with EU law, domestic law, relevant guidelines, programming documents, and the content of an agreement on co-financing a project. It is in this context that the issue of public aid should be examined. On the grounds that some EU projects are subject to the regime mentioned, what becomes vital is to comply with all binding regulations in this respect. It is in this delineated form that the legal form of regional investment aid should be considered. The aim of this paper is to examine individual material elements of which the legal construction mentioned above is composed – while taking into account existing legislation.

Research methods: The method that was adopted involves an analysis of the sources of law, case-law and literature.

Conclusions: (1) The problem of regional investment aid should be considered in terms of the Treaty definition of public aid. At the same time, one has to take into account the legal regime set by the TFEU on state aid. As a rule, this aid is prohibited; still, the EU legislator allows for a number of exemptions. (2) This, in turn, means that it is necessary to develop, by issuing other normative acts (but also soft-law regulations), the Treaty provisions which allow for providing legally benefits covered by state aid. (3) The legal form at issue here should be considered in the context of the need to ensure that beneficiaries will be implementing projects in accordance with the rules of EU law, domestic law, relevant guidelines, programming documents and the content of an agreement on co-financing a project.

Value of the paper: The set of issues examined is the subject addressed by case-law and literature. The value of the paper is that it systematizes all the elements discussed. The paper is addressed to the beneficiaries of EU projects, institutions participating in the system for managing and controlling EU resources and to administrative courts.

Keywords: *EU funds, programming period 2014-2020, regional operational programs, projects, public aid, public aid schemes, regional investment aid, incentive effect*

JEL: K23

Correspondence address: Jarosław ODachowski, WSB University in Wrocław, ul. Fabryczna 29-31, 53-609 Wrocław, Poland E-mail: jaroslaw.odachowski@wsb.wroclaw.pl.

Received: 06.04.2017, Revised: 14.02.2018, Accepted: 06.03.2018

doi: <http://dx.doi.org/10.29015/cerem.488>

1. Introduction

During the financial perspective 2014-2020, numerous projects are being implemented which are co-financed from EU funds (more on the issue of EU funds, see: Bajko et al. 2008; Begg 1996; Błasiak-Nowak, Rajczewska 2013; Burnat-Mikosz et al. 2007; Cieślak et al. 2008; Czempas, Smykała 2012; Dzierżanowski 2011; Gwizda et al. 2014; Jaśkiewicz 2014; Jóźwik et al. 2012; Karwatowicz, Odachowski 2009a, 2009b, 2009c; Krzykowski 2012; Odachowski 2010, 2012b; Odachowski, Karwatowicz 2009, 2011; Pawlicki 2014; Poździk, Lejczyk 2009; Tkaczyński et al. 2008, 2011; Tkaczyński, Świstak 2013). The projects are concerned with the most diverse areas of economic, social and cultural life. Their implementation by beneficiaries requires that they are compliant with EU law, domestic law, relevant guidelines, programming documents (see more in Odachowski 2012c), and ultimately with the content of an agreement on co-financing a project (decision on co-financing the project, other act).

It is in this context that the issue of public aid should be considered (see more on this legal form in: Ballarino, Bellodi 2010: 343cff; Barcz et al. 2006; Benacchio 2016: 399cff; Cavallari 2016: 273cff; Dudzik 2002; Herdegen 2006; Kuś et al. 2010; Lasok 1998; Marquardt 2007; Mik 2000; Nykiel-Mateo 2009; Postuła, Werner 2006; Santa Maria 2008: 606cff; Sobczak et al. 2002; Tesauro 2012: 812cff; Wróbel et al. 2008; Skowron 2007). On the grounds that some EU projects are subject to the mentioned regime¹, the issue of compliance with all binding regulations in this respect is vital. In particular, the obligation of the national legislator is to establish corresponding legal regulations which, together with the rules of the EU law² will create the normative fundamentals for providing beneficiaries legally and effectively with benefits which have public aid (*de minimis*) attributes. It is in thus delineated context that one should examine the legal form of investment aid.

Under the financial perspective in place, critical importance should first and foremost be attributed to all provisions of the Treaty on the Functioning of the European Union as regards public aid, the Guidelines on public aid for the period

¹ Also referring to *de minimis* aid.

² Including the soft law scope.

2014-2020, Regulation 651/2014 and the Regulation of the Minister of Infrastructure and Development on granting regional investment aid under the regional operational programs for the years 2014-2020. The aim of this paper is to examine individual content elements of which the entirety of the legal construction of regional investment aid is composed.

2. Treaty on the Functioning of the European Union

The main legal act that regulates public aid is the Treaty of 25 March 1957 on the Functioning of the European Union (hereafter „TFEU”)³. According to Article 107 (1), „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”.

The provision cited lays down the definition of public aid which applies to all Member States of the European Union⁴. Moreover, the article imposes a general ban on granting public aid while taking into account exemptions permitted within this scope. Thus, the issue of regional investment aid should – firstly – be accounted for at the level of the definition of this concept (including its individual components), and on the other hand, to see in this aid the exemption, provided for by the EU legislator, from the ban on granting state aid to individual entities.

The sources sanctioning the legal possibility of awarding beneficiaries various benefits – recognized as regional investment aid – can be found largely in the subsequent provisions of Article 107 of TFEU. In the light of paragraph 3 (a), the following aid may be considered to be compatible with the internal market: “aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation”.

³ OJ EU 2016, no. 200, p. 137.

⁴ More broadly: in the context of the European Economic Area (EEA).

Moreover, paragraph 3 (c) allows for “aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest”.

In the view of the European Court of Justice, using such words as „abnormally” and „serious” in Article 107(3)(a) demonstrates that the exemption „concerns only areas where the economic situation is extremely unfavourable in relation to the Community as a whole” (Judgment of the Court of 14 October 1987 in Case 248/84 *Germany v Commission*, ECR p. 4036, point 19; Judgment of 14 January 1997 in Case C-169/96 *Spain v Commission* ECR I-148, point 15, and Judgment of 7 March 2002 in Case C-310/99 *Italy v Commission* ECR p. I-2289, point 77 [as cited in the Guidelines – see below]; C-114/00 *Kingdom of Spain v Commission of the European Communities* – Judgment of the Court of Justice of 19 September 2002). According to the Commission, the conditions laid down in the provision discussed „are met for NUTS II regions⁵, where the gross domestic product (GDP) per capita is at 75% of the EU average or less”⁶.

Moreover, in the case of the exemption laid down in Article 107(3) (c) the Court permits the development of certain areas without being restricted by the economic conditions laid down in Article 107 (3) (a), „where such aid does not adversely affect trading conditions to an extent contrary to the common interest”. This provision gives the Commission power „to authorize aid intended to further the economic development of areas of a Member State which are disadvantaged in relation to the national average” (Judgment of 14 October 1987 in Case 248/84 *Germany v Commission* REC p. 4036, point 19 [as cited in the Guidelines]; C-114/00, *Kingdom of Spain v Commission of European Communities* – Judgment of the Court of Justice of 19 September 2002). In addition, „Article 87 (3) (c) EC [Article 107 (3) (c) TFEU – J.O.] should be interpreted in the context of objectives of economic and social cohesion to which Article 2 EC⁷ is dedicated and which are implemented in particular through Article 158 EC et seq. The fulfilment of the single market and protection of competition are not just ends in themselves but they

⁵ It pertains to voivodships.

⁶ See the Guidelines.

⁷ The Treaty of 25 March 1957 establishing the European Community (later renamed TFEU).

aim at attaining the fundamental objectives of the Treaty” (T-254/00, *Hôtel Cipriani SpA and Others v the Commission of European Communities* – Judgment of the General Court (the former Court of First Instance) of 28 November 2008). Both cases of legal state aid – points a) and c) – are referred to as regional aid⁸.

The EU case-law – with regard to comparing the above regulations – states that:

*The difference in wording between Article 87(3)(a) EC and Article 87(3)(c) EC [Article 107(3)(a) TFEU and Article 107(3)(c) TFEU – J.O.] cannot lead to the conclusion that the Commission should take no account of the Community interest when applying Article 87(3)(a) [Article 107(3)(a) – J.O.], and that it must confine itself to verifying the specifically regional impact of the measures involved, without assessing their impact on the relevant market or markets in the Community [EU – J.O.] as a whole. In such cases the Commission is bound to not only to verify that the measures are such as to contribute effectively to the economic development of the regions concerned, but also to evaluate the impact of the aid on trade between Member States. (C-114/00, *Kingdom of Spain v the Commission of European Communities* – Judgment of the General Court (the former Court of First Instance) of 15 September 1998).*

In its comments to the Treaty provisions discussed, the case-law additionally states that they introduce „two derogations from free competition in favor of regional aid based on the aim of Community [the EU – J.O.] solidarity. In exercising its discretion, the Commission has to ensure that the aims of free competition and Community [the EU – J.O.] solidarity are reconciled, while complying with the principle of proportionality” (T-126/96, *Breda Fucine Meridionali SpA (BFM) and Ente Partecipazioni e Finanziamento Industria Manifatturiera (EFIM) v the Commission of European Communities* – Judgment of the General Court (the former Court of First Instance) of 15 September 1998). “The regional derogations provided for in Article 87(3)(a) and (c) EC [Article 107 (3) (a) and (c) come under

⁸ The areas qualified as eligible for regional aid pursuant to Article 107 (3) (a) of the Treaty, commonly referred to as „a” areas, are usually those which are the most disadvantaged in the EU in terms of economic development. The areas qualifying as eligible for regional aid pursuant to Article 107 (3) (c) of the Treaty, commonly referred to as “c” areas are also disadvantaged, but to a lesser degree. See the Guidelines.

Community [the EU – J.O.] competition policy and are limited to the need to avoid any undue distortion which would be contrary to the common interest” (T-254/00, *Hôtel Cipriani SpA and Others v the Commission of European Communities* – Judgment of the General Court (the former Court of First Instance) of 28 November 2008).

The case-law also stresses that „there is sufficient contribution to the objective of regional development” (T-304/08, *Smurfit Kappa Group plc v the Commission of European Communities* – Judgment of the General Court (the former Court of First Instance) of 10 July 2012). Moreover, what is further emphasized is the aspect of “direct and lasting effect on regional development (T-357/02 RENV, *Freistaat Sachsen (Germany) v the Commission of European Communities* – Judgment of the General Court (the former Court of First Instance) of 14 July 2011). In terms of assessing the regional aid compatibility, apart from the positive effects for the development of a region, the Commission „also has to take into account the consequences this aid may have on the economic situation of certain sectors” (C-75/05 P, *Federal Republic of Germany and Others v Kronofrance SA* – Judgment of the Court of Justice of 11 September 2008; see also point 6 of the Resolution of 20 October 1971 of the representatives of the governments of the Member States, meeting within the Council on the overall regional aid schemes (OJ C 111, p. 1); points 10-12 of the Commission Communication on regional aid schemes (OJ 1079, C 31, p. 9), as well as point I, 6, the first and third indent of the Commission Communication on the application of the Article [87 (3) (a) and (c) EC] in relation to regional aid (OJ 1988 C 212, p. 2)). What is, however, noted is that „relying on the regional development policy or social cohesion policy is in itself insufficient for the measure adopted under this policy to be considered justified” (here – in the context of tax regulations: C-6/12, *Proceedings brought by P Oy.* – Judgment of the Court of Justice of 18 July 2013; likewise, Judgment of 6 September 2006, in Case C-88/03 *Portugal v Commission* ECR p. I-7115, point 82).

The issue of regional investment aid should be considered as regards the Treaty definition of public aid. At the same it is necessary to account for the legal regime pertaining to state aid laid down by TFEU. Although this aid is as a rule prohibited, the EU legislator permits numerous exemptions. This, in turn, means that the Treaty

provisions have to be developed by issuing other normative acts (including also soft law regulations) which will render legitimate the delivery of benefits falling within state aid. Using exclusively the form of individual aid – which involves making notification of aid to the European Commission – fails to be effective, for it is time consuming (lengthy procedure) and refers only to a specific project. In this sense, normative acts – under the EU subsidy law, referred to as aid programs or public aid schemes – allow for providing various entities with benefits efficiently, provided the conditions set forth in those acts are met.

The development of the Treaty provisions should lead to defining precisely the individual content elements of which public aid is comprised (perceived as the conditions mentioned), including: the aim of aid, entities that may receive aid, the list of eligible expenditures, the forms of aid, or maximum aid intensity⁹.

The content of such regulations has a twofold nature. On the one hand, the fulfilment of the conditions set should ensure that state aid is granted legally. On the other hand, failing to fulfil even one of the requirements (not to mention failing to fulfil most of them or in their entirety) renders a legal benefit under a given aid scheme impossible (which in itself does not yet mean that granting aid under another aid scheme¹⁰ or within the framework of individual aid is prohibited).

Treating regional investment aid as an exemption from the overall ban on providing benefits which meet the conditions placed in Article 107(1) compels one to see in this aid – as in the case of all exemptions – the problem of a specific compromise between advantages derived from it and negative effects arising from granting the aid. The latter one refers to the impact of aid on competition and trade between Member States. Moreover, the advantages were specified under the arrangements included in paragraph 3. Thus, there should be no doubt that defining the advantages was entrusted to the EU legislator.

However, the legal construction of regional aid cannot be considered in relation to any positive effects attributable to the benefits which are subject to Article 107 (1) TFEU. The specificity of this construction can only be inscribed in the provisions of paragraph 3(a) and (c) on supporting regions which particularly need aid provided

⁹ Aid intensity: the ratio of public aid value to costs eligible for aid.

¹⁰ After having met all the conditions included in it.

through public resources. It is also in those cases that – according to the legislator’s vision – advantages are supposed to outweigh negative effects.

3. Regional aid guidelines for 2014-2020 (specifying the conditions for regional aid to be considered as compatible with the internal market, and specifying the criteria for defining areas which meet the conditions referred to in Article 107 (3) (a) and (c) TFEU)

In the context of regional aid, an important role is played by „regional aid guidelines for 2014-2020” (hereafter: the Guidelines)¹¹. The author of the Guidelines is the European Commission. They belong to the soft law category, that is, acts and documents of various types, which, although not binding formally, tend in practice to become the source of binding regulations. On the one hand, they have bearing on the content of – binding – normative acts, such as EU regulations or national regulations implementing legal acts. On the other hand, in granting individual aid, the EC follows, in its decisions, not only the formally binding sources of law, but also soft law. This clearly leads to the conclusion that there is a practice in place under which the beneficiary of EU funds should, while seeking public aid, meet all the relevant rules and conditions – including also those arising from guidelines, communications etc.¹²

¹¹ OJ EU C of 23 July 2013, no. 209, p. 1.

¹² The EU case-law emphasizes that in the application of Article 107 (3) TFEU, the Commission enjoys a wide discretion which involves making complex economic and social assessments in the light of the EU context. For the purpose of exercising the above supervision, the Commission may establish guidance for itself – using such acts as communications and guidelines – provided that this guidance is not contrary to the provisions of the Treaty. In this respect, the Commission, by adopting such standards for using state aid resources and by making public the fact that it will apply them henceforward in cases provided for in this guidance, sets limits to its discretion and may not depart from those standards without exposing itself, in the relevant case, to the threat of sanctions for violating the general principles of law, such as equal treatment or the principle of protection of legitimate expectations. Thus, in the specific field of state aid, the Commission is bound by the guidelines and communications which it issues, inasmuch as they do not depart from the provisions of the Treaty and are accepted by Member States. See: T-319/11, *ABN Amro Group NV v European Commission* – Judgment of the General Court (the former Court of

Firstly, the Guidelines define the aim, object and nature of regional aid. In them, it is stated that, „The primary objective of regional aid is to reduce the development gap between the different regions in the European Union. Through its equity or cohesion objective, regional aid may contribute to the achievement of the Europe 202 strategy delivering an inclusive and sustainable growth”.

What is also rightly emphasized is that „geographic specificity distinguishes regional aid from other forms of horizontal aid. It is a particular characteristic of regional aid that it is intended to influence the choice made by investors where to locate investment projects”. It would, however, be erroneous to confine the positive effects of the EU benefits solely to a given region (regions). The Guidelines note that „When regional aid off-sets the additional costs stemming from the regional handicaps and supports additional investment in assisted areas without attracting it away from other assisted areas, it contributes not only to the development of the region, but also to cohesion and ultimately benefits the whole Union”.

In their content, the Guidelines correspond first and foremost to the TFEU provisions. In addressing the issues of regional aid, they are part of the exemptions from the ban on State aid which are permitted by the EU legislator. Thus, the content of the Guidelines is to define and specify the conditions to be fulfilled in order to grant legal benefits to beneficiaries. The source of these conditions are the provisions laid down in Article 107 (3) (a) and (c).

The rules set forth in the Guidelines should be seen as the result of comparing the positive effects of public aid with the negative ones in terms of the impact of aid on competition and trade between Member States of the European Union. It should be pointed out that the Guidelines place the former in the context of not only

First Instance), ZOTSiS [Reports of Cases before the Court of Justice and the Court of First Instance] 2014/4/186 – Judgment of 8 April 2014; T-267/08, *Région Nord-Pas-de-Calais and Communauté d’agglomération du Douaisis v European Commission* – Judgment of the General Court (the former Court of First Instance), ZOTSiS 2011/5-6A/II-1999-2068 – Judgment of 12 May 2012; T-253/12, *Hammar Nordic Plugg AB v European Commission* – Judgment of the General Court (the former Court of First Instance), ZOTSiS 2015/10/II-811 – Judgment of 28 October 2015; T-115/09, *Electrolux AB and Whirlpool Europe BV v European Commission* – Judgment of the General Court (the former Court of First Instance), ZOTSiS 2012/2/II-76 – Judgment of 14 February 2012; C-464/09 P, *Holland Malt BV v. European Commission* – Judgment of the Court of Justice, ZOTSiS 2010/12A/I-12443-12470 – Judgment of 2 December 2010.

improved economic and social situation of the assisted regions, but also of the entire economic area covered by the EU structure (the internal market).

The Guidelines thus play two key roles. The Commission specifies in them „the conditions under which regional aid may be considered to be compatible with the internal market and establishes the criteria for identifying the areas that fulfill the conditions of Article 107 (3) (a) and (c) of the Treaty”.

Another issue affecting the legal form of regional aid is an incentive effect. The Guidelines highlight that „regional aid can support effectively the economic development of regions only when it is granted with a view to encourage further investments or economic activities across those areas”. It is further stated that

Regional aid can only be found compatible with the internal market if it has an incentive effect. An incentive effect is present when the aid changes the behaviour of an undertaking in a way it engages in additional activity contributing to the development of an area which it would not have engaged in without the aid or would only have engaged in such activity in a restricted or different manner or in another location. The aid must not subsidise the costs of an activity that an undertaking would have incurred in any event and must not compensate for the normal business risk of an economic activity.

Hence, „if the aid does not change the behaviour of the beneficiary by stimulating (additional) investment in the area concerned, it can be considered that the same investment would take place in the region even without the aid. Such aid lacks incentive effect to achieve the regional objective and cannot be approved as compatible with the internal market”.

In the case-law, it is further stated that „the Commission is entitled to refuse aid on the grounds that the aid does not encourage undertakings which are its beneficiaries to behave in a way which contributes to one of the objectives set in Article 107(3) TFEU. The aid that improves the financial situation of the undertaking benefitting from it yet is not necessary for the objectives provided for in Article 107(3) TFEU to be attained may not be declared as compatible with the internal market” (C-630/11 P, *HGA srl and Others v European Commission* – Judgment of the Court of Justice of 13 June 2013; also see T-304/08, *Smurfit Kappa*

Group plc v European Commission – Judgment of the General Court (the former Court of First Instance) of 10 July 2012), as well as that:

The requirement for aid to precede the commencement of the subsidized project allows for ensuring that the undertaking concerned will expressly show its willingness to use a particular aid scheme before beginning the implementation of the said project. This, in turn, allows for avoiding ex post applications for projects whose implementation began irrespective of the aid scheme. In the light of these considerations, the mere pointing out that the application for aid was made before the implementation of the investment project provides a simple, accurate and relevant criterion for the Commission to be able to presume that there is an incentive effect. (T-394/08, State aid in favour of the hotel industry. The right of the intervener to raise arguments different from the party supported in the judicial proceedings before the Court (First Instance). Application for annulment. Stating reasons for the European Commission’s decision on State aid – *Regione autonoma della Sardegna (Italy) and Others v European Commission* – Judgment of the General Court (the former Court of First Instance) of 20 September 2011).

One can further mention that „the essential character of the aid for the development of disadvantaged regions may be deduced from the application for aid submitted before the implementation of the investment project, as well as on the basis of other assessment criteria” (C-630/11 P, *HGA srl and Others v European Commission* – Judgment of the Court of Justice of 13 June 2013).

The legal form under discussion shapes significantly the way how the role and importance of state aid granted to support individual regions is perceived. It cannot be examined solely as the sum of positive and negative effects compared with one another. Even if the former outweighs the latter – formally justifying the possibility of delivering a legal benefit – is not sufficient. In the soft law context and the EU case-law, what is further specified is the question of the positive effects being appropriately presented. The incentive effect does not change the objective of the aid to be granted – the objective is to improve the situation, in its broad sense, of a given region. The effect, however, is concerned with the manner of attaining the objective mentioned, the essential feature of the benefit, the specificity of

obligations to be fulfilled by the beneficiaries of the aid measures, as well as the cooperation between the beneficiaries and entities delivering aid.

According to the effect analyzed, the objective of the benefit is to be attained with the participation of both categories of entities. While the engagement of the entity providing support (here, through granting a specific amount of funds) does not raise any doubts in itself, the effect of incentive, on the other hand, places the structure of the beneficiaries' behaviours entirely differently. Their obligation should not merely involve making their own financial contribution – which is specific for the Union programs, where co-financing from the EU does not amount to 100% of the value of the project concerned (for programs covered by State aid, this percentage is accordingly smaller). Nor can the beneficiary confine himself exclusively to a „normal” use of the funds granted for the project implementation – it is about his active participation which entails, e.g. raising investments.

Thus, the role of subsidies is to stimulate this activity – these measures become a sort of an impulse and catalyst. As such, one can assume that the purpose of delivering EU benefits will not only be – viewed from a short-term perspective – to grant beneficiaries resources enabling them to act, but it is also – in the long-run – to ensure that they will be able to function in their field independently (with no need of further support). With respect to the latter perspective, it should be necessary not only to verify that there has been a significant change as regards the existence of the entity (raising investments, extending the entity's activity, and the likes), but also to ensure the situation where the entity subsidized will be able to conduct its activity with no need of further support. Thus, the aid granted is assumed to be used effectively – through activating the beneficiary – as well as economically, since no need shall arise to grant yet further aid.

An incentive effect – without changing the objective of the development of a region – changes the proportion of behaviours between the entities. It transforms the situation in which there exists an active entity (granting aid) and passive (the beneficiary of the EU measures) into a state in which both entities display (each in its own way) activity. Both categories of entities become really engaged in the development of the region.

What needs to be stressed is the relationship between granting aid and the beneficiary's increased activity (as demonstrated). Increased activity is considered here to be the consequence of the aid granted; this, in turn, should stimulate the beneficiary's activities. A lack of this relationship could be manifested if the beneficiary appeared to be capable of raising his activity independently within the framework of the project implemented. In this case – taking into account the nature of an incentive effect – it is not possible to grant aid. In the situation discussed, it is not only about the aspect of spending those aid measures sparingly (which means reducing public aid to minimum), but also about the premise of the objective – which is to encourage beneficiaries to greater activity, and not merely to subsidize them.

The formal fulfilment of this premise is to submit an application for granting a subsidy before starting the project implementation. The contrary would mean that the beneficiary is capable of realizing his plans independently and efficiently – which constitutes a legal obstacle to granting a legal benefit. The moment of submitting the application becomes thus a legal construct in which the theoretical approach to the objective, the nature and role of the beneficiary in the context of State aid is combined with the practical way of verifying quickly and efficiently whether there is an incentive effect.

Granting regional aid may, however, involve negative effects. In the Guidelines, the Commission speaks about limiting „the effects of regional aid on trade and competition to the minimum necessary”. It is further elaborated by stating that at the same time it is to „ensure a level playing field between Member States, in particular by preventing subsidy races that may occur when they try to attract or retain business in disadvantaged areas of the Union”. This is why the Commission notes that „regional aid can only play an effective role if it is used sparingly and proportionately and is concentrated on the most disadvantaged regions of the European Union”. Thus, a reference is made to the general objectives with respect to admissibility of public aid (taking into account Article 107 TFEU), which involve the trade-off between the positive effects of benefits from the Union funds and the negative impact on competition and trade („the advantages of the aid in terms of the

development of a less-favoured region must outweigh the resulting distortions of competition”¹³).

An important role in the context of the legal structure of regional aid is played by regional aid maps (here for the period from 1 July 2014 to 31 December 2020). According to the definition included in the Guidelines, regional aid maps mean „the list of areas designated by a Member State in accordance with the conditions laid down in these guidelines and approved by the Commission”.

The role of the Guidelines is for the European Commission to establish criteria to identify areas fulfilling the conditions laid down in Article 107(3)(a) and (c) of the Treaty. The areas which fulfill these conditions and which a Member State wishes to designate as „a” or „c” areas must be identified on a regional aid map. What is more, these maps must also specify the maximum aid intensities applicable in these areas. They must be notified to the Commission which the Commission approves to a further extent¹⁴. Next, the EC analyzes every regional aid map on the basis of the Guidelines and adopts a decision approving the map for the Member State concerned. All maps are published in the Official Journal of the European Union becoming an integral part of the Guidelines.

It is worth noting that the legal form of the regional maps on the one hand combines the theoretical construction of the juxtaposition between the positive and negative effects of granting aid with a practical way – based on mathematical values – of setting the maximum intensity of State aid (see, e.g. T-304/08, *Smurfit Kappa Group plc v European Commission* – Judgment of the General Court (the former Court of First Instance) of 10 July 2012).

The Guidelines meanwhile formulate two other important conditions. Firstly, they state that „to ensure that the investment makes a real and sustained contribution to the development of the area concerned, the investment must be maintained in the

¹³ „To assess whether a notified aid measure can be considered compatible with the internal market, the Commission generally analyses whether the design of the aid measure ensures that the positive impact of the aid towards an objective of common interest exceeds its potential negative effects on trade and competition”. See also T-304/08, *Smurfit Kappa Group plc v European Commission* – Judgment of the General Court (the former Court of First Instance) of 10 July 2012.

¹⁴ Every notification should include information set forth in the form included in Annex III of the Guidelines: „Regional aid map information form”.

area concerned for at least five years, or three years for SMEs, after its completion” (see also T-304/08, *Smurfit Kappa Group plc v European Commission* – Judgment of the General Court (the former Court of First Instance) of 10 July 2012).

Next, it is also emphasised that „to ensure that the investment is viable, the Member State must ensure that the beneficiary provides a financial contribution of at least 25 % of the eligible costs, through its own resources or by external financing, in a form that is exempted of any public financial support”.

4. Commission Regulation (EU) No 651/2014 on declaring certain categories of aid as compatible with the internal market

The legal form of regional aid is also the subject of the Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain types of aid as compatible with the internal market in application of Articles 107 and 108 of the Treaty¹⁵ (in connection with Article 108(4) TFEU). The regulation came in force on 1 July 2014 and will be applicable until 31 December 2020.

The text of the regulation (recital 5), sets forth that „The general conditions for the application of this Regulation should be defined on the basis of a set of common principles that ensure the aid serves a purpose of common interest, has a clear incentive effect, is appropriate and proportionate, is granted in full transparency and subject to a control mechanism and regular evaluation, and does not adversely affect trading conditions to an extent that is contrary to the common interest”. Recital 31, on the other hand, states that „By addressing the handicaps of disadvantaged regions, regional aid promotes the economic, social and territorial cohesion of Member States and the Union as a whole. Regional aid is designed to assist the development of the most disadvantaged areas by supporting investment and job creation in a sustainable context”.

It is worth highlighting the content of Annex 1 „Definition of SME”. Article 1 defines the term „enterprise” for the purpose of the regulation. According to it, „an

¹⁵ OJ EU L 2017.156.1.

enterprise is considered to be any entity engaged in an economic activity, irrespective of its legal form. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity”.

The case-law rightly points out that the term, „in its broad sense, should be understood as covering all categories of entities engaged in an economic activity, whatever their organizational and legal form and the form of financing involved” (III SA/Wa 1410/06 – Judgment of the Voivodship Administrative Court of Warsaw)¹⁶. It ought to be added that „an economic activity should be understood as providing goods and services on the market and whether or not it is for profit is of no relevance” (III SA/Wa 1410/06 Judgment of the Voivodship Administrative Court of Warsaw).

The provisions of the Regulation – while referring to the Guidelines – include regulations on an incentive effect. Recital 18 states:

In order that the aid is necessary and acts as an incentive to further development activities or projects, this Regulation should not apply to aid for activities in which the beneficiary would in any case engage even in the absence of the aid. Aid should be exempted from notification under this Regulation if the work on the aided project or activity starts after the beneficiary has submitted a written application for the aid. Moreover, pursuant to Article 6(1), This regulation shall apply only to aid which has an incentive effect.

Paragraph 2 indicates that „Aid shall be considered to have an incentive effect if the beneficiary has submitted a written application for the aid to the Member State concerned before work on the project or activity starts”¹⁷.

Moreover, in recital 22, the normative act at issue here holds:

With a view to ensuring that aid is proportionate and limited to the amount necessary, maximum aid amounts should, whenever possible, be defined in terms of

¹⁶ In the light of Article 2 point 16 of the Act of 30 April 2004 on the procedural issues concerning public aid (OJ 2016, item 1948) „beneficiary of aid” is to be understood as an entity engaged in economic activity, including entities engaged in agriculture or fishery, irrespective of the organizational-legal form and the form of financing, which received public aid. See also Chudowski, Werner (2009).

¹⁷ Paragraph 2 specifies content-based elements of the application for aid – among other things, description of the project, including the commencement and completion date.

aid intensities in relation to a set of eligible costs. Where the maximum aid intensity cannot be set, because eligible costs cannot be identified or in order to provide simpler instruments for small amounts, maximum aid amounts defined in nominal terms should be set out in order to ensure proportionality of aid measures. The aid intensity and the maximum aid amounts should be fixed, in the light of the Commission's experience, at a level that minimizes distortions of competition in the aided sector while appropriately addressing the market failure or cohesion issue. For regional investment aid, the aid intensity should comply with the allowable aid intensities under the regional aid maps.

While calculating aid intensity only eligible costs should be taken into account.

5. Regulation of the Minister for Infrastructure and Development (awarding regional investment aid under regional operational programs)

A legal act forming a direct basis for awarding beneficiaries union funds, having attributes of state aid, is the Regulation of the Minister for Infrastructure and Development of 3 September 2015 on granting regional investment aid under regional operational programs for 2014-2020¹⁸. There is no doubt that in the hierarchy of the sources of law national legislation carries smaller legal weight than TFEU or Regulation 651/2014. In the case of the relationship with the first of the legal acts cited, it has to be stated clearly that the fact itself of applicability of the national act comes as a consequence of the possibility – included in the provisions of Articles 107 and 108 of the Treaty – to grant public aid in exceptional situations. One of the ways to legalize aid are aid programs of which the regulation in question is part. Secondly, the relationship between Regulation 651/2014 and the national legislation is related to the fact in the light of which the latter was issued based (in its formal/content sense¹⁹) on the Union regulation. At the same time, one cannot fail

¹⁸ OJ 2018.53.

¹⁹ In the formal sense – the existence of Regulation 651/2014 is a precondition for issuing the national regulation; in the material sense – the national regulation develops the provisions of the Union regulation.

to recognize that it is necessary for the national legislative texts in the field of subsidy law to be compliant with the content of soft law.

Finally, what also needs to be stressed is that the underlying basis for issuing the regulation discussed was Article 27(4) (see more on Article 27 in Odachowski 2016) of the Act of 11 July 2014 on the principles of the implementation of the cohesion policy programs financed under financial perspective 2014-2020²⁰ (formal legal basis)²¹.

It pertains exclusively to regional operational programs since their legal construction – where the territorial aspect is present in that activities are confined to the voivodship area concerned – corresponds to the specificity of regional aid (this is why this kind of aid is not present in national operational programs).

The regulation refers to entrepreneurs in the context of the aforementioned Article 1, Annex 1 of Regulation 651/2014, which, for the purpose of the issues surrounding Union funds, defines the term „enterprise” (§ 3 (5)).

Provision § 6 (1) contains two significant content elements: „Aid is intended to support economic and social development of the voivodship covered by the regional operational program for 2014-2020 and it is granted for an initial investment”. Firstly, it indicates the objective to be pursued by the legal form of regional investment aid. Here the reference is mainly made to the provisions of Article 107 (3) (a) and (c) TFEU, which are concerned with the question of raising the potential of disadvantaged regions. What should also be mentioned are the provisions discussed above of the Guidelines and Regulation 651/2014 as they, too, contain regulations referring to the objective of regional aid. In this sense, the implementation regulation follows the above provisions. Moreover, there could be no doubt that benefits, associated with the type of aid discussed, should be granted

²⁰ OJ 2017.2433.

²¹ The regulation at issue also refers – in terms of thematic objectives within which regional investment aid is granted – to Article 9 points 1,2 and 4-11 of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down the common rules on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and setting forth the general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, and the European Maritime and Fisheries Fund and repealing Regulation of the Council (EC) No 1083/2006 (OJ L.2017.335.1).

in the context of the voivodship covered by the regional operational program concerned (e.g. Lower Silesian Voivodship and Regional Operation Program for Lower Silesian Voivodship for 2014-2020).

Secondly, strengthening the potential of the region concerned should not involve carrying out any activities, but solely an initial investment.²² The content of § 3 (3) makes a reference to the provision of Article 2 (49) of Regulation 651/2014²³.

Provision § 6(4) of the national aid scheme states that „The condition for granting aid is for the entrepreneur to commit to maintaining initial investment in accordance with Article 14(5) of Regulation No 651/2014”²⁴. The obligation of maintaining the investment within the recipient region is laid down not only in both regulations but also in the Guidelines²⁵.

Other conditions for granting legal public aid is laid down in § 7 of Regulation of the Minister of Infrastructure and Development. Paragraph 1 refers to transparency of public aid. Point 1 states that „aid is granted pursuant to Article 5(1) of Regulation No 651/2014”. Making a reference to the provision of a normative Union act shows that this act „applies only to aid for which it is possible to calculate precisely the gross grant equivalent *ex ante* without a need precisely the gross grant equivalent of the aid *ex ante* without the need to undertake a risk assessment

²² § 6 (2): „In the Mazowieckie Voivodship, a major entrepreneur may be granted aid solely for initial investment constituting an initial investment for a new economic activity within the meaning of Article 2(5) of Regulation No 651/2014”. Paragraph 3: „No aid may be granted for an investment leading only to recreating manufacturing capacity”.

²³ Article 2(49) „initial investment” means:

(a) *an investment in tangible and intangible assets related to the setting-up of a new establishment, extension of the capacity of an existing establishment, diversification of the output of an establishment into products not previously produced in the establishment or a fundamental change in the overall production process of an existing establishment; or*

(b) *an acquisition of assets belonging to an establishment that has closed or would have closed had it not been purchased, and is bought by an investor unrelated to the seller and excludes sole acquisition of the shares of an undertaking.*

²⁴ Article 14(5) „The investment shall be maintained in the recipient area for at least five years or at least three years in the case of SMEs, after completion of the investment. This shall not prevent the replacement of plant or equipment that has become outdated or broken within this period, provided that the economic activity is retained in the area concerned for the relevant minimum period”.

²⁵ Ditto.

(„transparent aid”)²⁶. Moreover, § 7 (1) (2) of the Regulation of the Minister for Infrastructure and Development mentions that what is meant here are the forms indicated in Article 5 (2) (a) of Regulation 651/2014. Thus, they refer only to „aid in the form of a grant and interest rate subsidy”²⁶.

There is no doubt that public aid may be granted solely to cover eligible costs in the Union project concerned. The content of § 7 (2) provides for that „Aid is granted for covering eligible costs, referred to in Article 14 (4) of Regulation No 651/2014, if the conditions laid down in Article 14 (6-9) of Regulation No 651/2014 are met”.

An important requirement, affecting the aspect of legality of public aid granted (here: in the form of regional investment aid) is the maximum intensity of aid. To this extent, the content of § 8 (1) of the national Regulation refers to „the provisions issued based on Article 10 (2) of the Act of 30 April 2004 on the procedural issues concerning public aid (OJ 2007, No 59 item 404, as amended)”. So far as this aspect is concerned, the reference is to Ordinance of the Council of Ministers of 30 June 2014 on regional aid maps for 2014-2020²⁷.

The release of aid (§ 11 of Regulation of the Minister for Infrastructure and Development) involves not only the submission of application by the beneficiary, but also the fulfilment of requirements pertaining to incentive effect. In this respect, § 11 makes a reference to Article 6 (2), the first sentence of Regulation 651/2014. Satisfying the request by the national authority awarding aid leads to concluding a contract or to issuing a decision on co-financing the project (§ 12 (4)). The content of § 10 provides for a case (Article 4 (1) (a) of Regulation 651/2014) when aid constitutes individual aid subject to notification to the European Commission which may be granted after being approved by the Commission. It is worth noting that the Regulation will expire on 31 December 2020.

²⁶ Recital 17: *For the purpose of transparency, equal treatment and effective monitoring, this Regulation should apply only to aid in respect of which it is possible to calculate precisely the gross grant equivalent ex ante without the need to undertake a risk assessment („transparent aid”). For certain specific aid instruments, such as loans, guarantees, tax measures, risk finance measures and, in particular, repayable advances, this Regulation should define the conditions under which they can be considered transparent.*

²⁷ OJ 2014, item 878.

6. Concluding remarks

The issue of regional investment aid should be considered as regards the Treaty definition of public aid. At the same time, it is necessary to account for the legal regime pertaining to state aid laid down by TFEU. Although this aid is, as a rule, prohibited, the EU legislator permits numerous exemptions. This, in turn, means that the Treaty provisions have to be developed by issuing other normative acts (including also soft law regulations) which will render the delivery of benefits falling within state aid legitimate. Using exclusively the form of individual aid – which involves making notification of aid to the European Commission – fails to be effective, for it is time consuming (lengthy procedure) and refers only to a specific project. In this sense, normative acts – under the EU subsidy law, referred to as aid programs or public aid schemes – allow for providing various entities with benefits efficiently, provided the conditions set forth in those acts are met.

Nor could there be any doubt that the legal form of regional investment aid should be considered in the context of having to ensure that beneficiaries will implement projects in accordance with the EU regulations, national legislation, relevant guidelines, programming documents, as well as the content of an agreement for project-co-financing (decision on project co-financing, other act).

From a formal point of view, the obligation mentioned refers to various legal acts. One can distinguish here the source of EU primary law (TFEU) as well as the secondary law (Regulation 651/2014); attention should be paid to the Union legislation (both of the sources mentioned) and national normative acts (Regulation of the Minister for Infrastructure and Development). Finally, one should also note the existence of formally binding regulations, as well as soft law provisions.

The material point of view comprises the need to fulfil all the conditions under which legal benefits referring to regional aid may be granted and received. The obligation of the institutions participating in the system of management and control, as well as that of beneficiaries, is to pay attention to such issues as the objective of the benefit, personal scope (beneficiaries), eligible expenditure list, forms of aid, maximum aid intensity, and finally, an incentive effect.

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