

POLAND: STATE AID IN THE SHADOW OF RETAIL SALES TAX



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Abstract

The issue of admissibility of state aid and the rules of its application by Member States of the European Union has become, in recent years, an issue of particular importance in preventing distortion of competition in the internal market, especially in the context of the COVID-19 pandemic and the ongoing economic crisis. Regulating this issue has proved inadequate both at the level of the EU and at the level of national legislation, thus requiring analyses under new conditions and considering completely different needs of practice. The need to mitigate the negative effects of the economic crisis and to cater to a greater demand for various forms of public support, individual states demonstrated considerable legislative activity in this area and applied various solutions. In Poland, differentiated measures of state aid provided for in the scope of individual sections of the Temporary Framework were used in practice considering the size of the economic activity and its specificity. Although Poland encountered some problems in the performance of tasks in this area under the conditions of the COVID-19 pandemic, for example, in interpreting provisions concerning fundamental issues in the application of the Temporary Framework and EU regulations, it should be noted that both in terms of the amounts allocated to public aid, the number of its beneficiaries, and the variety of solutions and benefits introduced, the activity of the state, also in terms of notifying the European Commission of its own aid programmes, was significant.

Keywords: *state aid, aid programme, entrepreneur, competition rules, internal market*

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1. Legal bases

The principles of admissibility of public aid and, simultaneously, its regulation have been specified in the provisions of many normative acts, including in the EU treaty law, regulations at the level of ordinances, and in the provisions of Polish law. Discussing the issue of state aid in Poland requires referring to the basic regulations applicable in this area in EU law. These are included primarily in Arts. 107, 108, and 109 of the Treaty on the Functioning of the European Union (TFEU), which define the EU rules on the admissibility of Member States to use solutions constituting state aid. However, a special starting point in this case is Art. 3 para. 1 point (b) of the TFEU, according to which the EU has exclusive competence to establish the competition rules necessary for the functioning of the internal market; this, therefore, means that legal regulations defining the principles of operation of the competitive mechanism, also in the field of state aid, fall within the competence of the EU.

Provisions of Art. 107 para. 1 of the TFEU introduce a general prohibition on granting state aid: they do not define it, but list the elements based on which this definition was developed in the literature on the subject. Pursuant to the above-mentioned provision, the criteria determining the institution of state aid include all aid granted by a Member State using state resources in any form.¹ Art. 107 para. 1 of the TFEU also includes the premise of distortion or threat of distortion of competition by favouring certain undertakings or the production of certain goods and incompatibility with the internal market to the extent that state aid affects trade between Member States.² The practical importance of the above-mentioned premises is because their analysis in a specific case determines the recognition of certain forms of aid as inconsistent with the principles of the functioning of the internal market. Further, in Art. 107 para. (2) of the TFEU, establishing exceptions to the prohibition set out in Section 1, categories of aid that are considered compatible with the internal market (primarily aid of a social nature granted to individual consumers, considering the issue of discrimination related to the origin of products, and aid to repair damage caused by natural disasters or other exceptional events) are defined. In Section 3, categories of state aid that may be considered compatible with the internal market (e.g. aid intended to promote the economic development of regions, aid intended to promote culture and the preservation of cultural heritage, and aid intended to remedy a serious disturbance in the economy of a Member State) are listed. Other categories of aid are also permitted, as the Council may determine, in such a case acting on a request from the European Commission (Art. 107 para. (3) point c of the TFEU).

Art. 108 of the TFEU establishes the rules of the notification procedure and proceedings before the Commission, as well as the powers of the Council and the

1 Szydło, 2002, p. 34.

2 Götz, 1999, pp. 957–962; Jaźwiński, 2007, pp. 85–86; Postuła, 2005, p. 41.

European Commission to shape the rules for granting state aid by Member States in accordance with Art. 107 of the TFEU.

However, Art. 109 of the TFEU gives the Council competence to adopt regulations on the application of Arts. 107 and 108 of the TFEU. The TFEU also regulates issues relating to granting of state aid in agriculture (Art. 42), transport (Arts. 93, 96, and 98), public enterprises (Art. 106 para. (2)), and the arms industry (Art. 346 para. (1) point (b)).

The EU regulations defining the rules of conduct in the case of granting state aid by Member States include, first, Council Regulation (EU) No. 2015/1589 of 13 July 2015, which prescribes detailed rules for the application of Art. 108 of the TFEU Commission Implementing Regulation (EC) No. 794/2004.³ The first of the above-mentioned regulations defines the system of rules applicable to state aid. The Implementing Regulation applies to aid in all sectors, with explicit rules laid down on the form, content, and details of notifications and annual reports, apart from rules on the calculation of deadlines for all state aid procedures and the interest rate for the reimbursement of unlawful aid (Art. 1 of Regulation No. 794/2004).

In the Polish legal system, state aid issues are regulated by the Act of 30 April 2004 on proceedings in matters relating to state aid.⁴ This Act constitutes the basis for the implementation of the provisions of the TFEU and EU regulations specifying the conditions for the prohibition of state aid and applicable exceptions. The subject of the regulations of the Act are the rules of procedure in matters relating to state aid that meet the conditions set out in Art. 107 para. 1 of the TFEU, including, in particular, proceedings regarding the preparation for notification of draft aid programmes, individual aid projects, and individual aid projects for restructuring, as well as the principles and procedure for the return of public aid and its monitoring (Art. 1 of the Act).⁵ Many implementing acts have been issued for the Act in question, which particularly concern the issue of *de minimis* aid,⁶ regional aid,⁷ rules for calculating the value of various forms of public aid,⁸ and providing information and reports on public aid granted.⁹

3 See: Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Art. 108 of the Treaty on the Functioning of the European Union, OJ L 140, 30.4.2004, 1–134.

4 Consolidated text: Journal of Laws of 2023, item 702.

5 Juryk, 2023, commentary to Art. 1; Podsiadło, 2016, pp. 173–174.

6 Regulation of the Council of Ministers of 29 March 2010 on the scope of information presented by an entity applying for *de minimis* aid (Journal of Laws No. 53, item 311, as amended).

7 Regulation of the Council of Ministers of 29 March 2010 on the scope of information presented by an entity applying for *de minimis* aid (Journal of Laws No. 53, item 311, as amended).

8 Regulation of the Council of Ministers of 11 August 2004 on the detailed method of calculating the value of public aid granted in various forms (consolidated text: Journal of Laws of 2018, item 461).

9 Regulation of the Council of Ministers of 7 August 2008 on reports on public aid granted, information on failure to grant such aid, and reports on entrepreneurs' arrears in payments of benefits due to the public finance sector (consolidated text: Journal of Laws of 2016, item 1871, as amended).

In accordance with the provisions of the Polish Act on proceedings in matters relating to state aid, the beneficiary of this aid is an entity conducting a business activity – an entrepreneur (Art. 2 point 16). The statutory definition of such an entity is covered by the provisions of the Act of 6 March 2018 – Entrepreneurs’ Law.¹⁰ Pursuant to Art. 4 para. 1 of the above-mentioned Act, an entrepreneur is a natural person, a legal person, and an organisational unit that is not a legal person, which is granted legal capacity by a separate act and conducts a business activity. The Act also treats partners in a civil partnership as entrepreneurs in the scope of their business activities (Art. 4 para. 2).¹¹

From the point of view of the application of EU regulations, focus must also be on the regulations in force in the Polish legal system determining the size of an enterprise. Pursuant to Art. 7 para. 1 point 1 of the Entrepreneurs’ Law, a micro-entrepreneur refers to an entrepreneur who, in at least one of the last two financial years, has met two conditions in total: first, considered the annual average employment of less than 10 employees, and second, has achieved an annual net turnover from the sale of goods, products, and services and financial operations, not exceeding the PLN equivalent of EUR 2 million, or the total assets of its balance sheet prepared at the end of one of these years not exceeding the PLN equivalent of EUR 2 million.

A small entrepreneur is an entity that, in at least one of the last two financial years, has jointly met the condition related to employing an average of less than 50 employees per year and achieved an annual net turnover from the sale of goods, products, and services and from financial operations not exceeding the equivalent in PLN 10 million, or the total assets of its balance sheet prepared at the end of one of these years has not exceeded the PLN equivalent of EUR 10 million, and provided that the entity is not a micro-entrepreneur (Art. 7 para. 1 point 2 of the Entrepreneurs’ Law).

The Entrepreneurs’ Law defines a medium-sized entrepreneur as an entity that has, in at least one of the last two financial years, met the requirement of employing, annually, less than 250 employees on an average and achieved an annual net turnover from the sale of goods, products, and services and from financial operations not exceeding the PLN equivalent of EUR 50 million, or the total assets of its balance sheet prepared at the end of one of these years not exceeding the PLN equivalent of EUR 43 million; additionally, is not a micro-entrepreneur or a small entrepreneur (Art. 7 para. 1 point 2 of the Entrepreneurs’ Law).

Of key importance here is the Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain types of aid compatible with the internal market in applying Arts. 107 and 108 of the TFEU.¹² This regulation defines a micro-enterprise

¹⁰ Consolidated text: Journal of Laws of 2023, item 221, as amended.

¹¹ Lubeńczuk, 2019, commentary to Art. 4; Kozieł, 2019, commentary to Art. 4; Sieradzka, 2018, pp. 36–37; Powalowski, 2018, pp. 1–4.

¹² OJ L 187, 26.6.2014, 1–78.

and a small- and medium-sized enterprise;¹³ it also indicates the types of aid that they can benefit from without the notification procedure. Regulation No. 651/2014 refers to the definition contained in Commission Recommendation 2003/361/EC of 6 May 2003 of micro-, small-, and medium-sized enterprises,¹⁴ which is intended to facilitate the coordination of national and EU initiatives regarding small- and medium-sized enterprises, ensure administrative transparency and legal certainty, and eliminate differences in interpretation that may distort competition.

However, the provisions of Recommendation 2003/361/EC do not provide – as is the case with the above-mentioned provisions of the Entrepreneurs' Law – an exclusion, which means that the category of small enterprises cannot include those that are micro-enterprises, while the category of medium-sized enterprises cannot include those that are small- or micro-enterprises. Therefore, the structure adopted in Art. 7 para. 1 points 1–3 Entrepreneurs' Law, differs from the standards set out in the provisions of Recommendation 2003/361/EC in terms of the separate definitions of small-, medium-sized and micro-entrepreneurs.¹⁵

The regulations in force within the Polish legal system regarding state aid – apart from those mentioned above – also include numerous acts regulating specific cases of granting it (e.g. to entities in a special economic zone,¹⁶ for entrepreneurs of particular importance for the labour market,¹⁷ and support for the implementation of new investments¹⁸), and special situations (an emergency state,¹⁹ including in the event of a natural disaster²⁰) for granting it.

2. Purpose and forms of public aid

As already noted above, the provisions of the TFEU introduce a general prohibition on granting state aid, while establishing exceptions to this prohibition in the form of specific categories of aid considered compatible with the internal market, as well as categories of state aid that may be considered as such. Other categories of

13 See: Arts. 1 and 2 of Annex I.

14 OJ L 124, 20.5.2003, 36–41.

15 Lubeńczuk, 2019, commentary to Art. 7.

16 See: Act of 20 October 1994 on special economic zones (consolidated text: Journal of Laws of 2023, item 1604).

17 See: Act of 30 October 2002 on state aid for entrepreneurs of particular importance for the labour market (consolidated text: Journal of Laws of 2021, item 239, as amended).

18 See: Act of 10 May 2018 on supporting new investments (consolidated text: Journal of Laws of 2023, item 74, as amended).

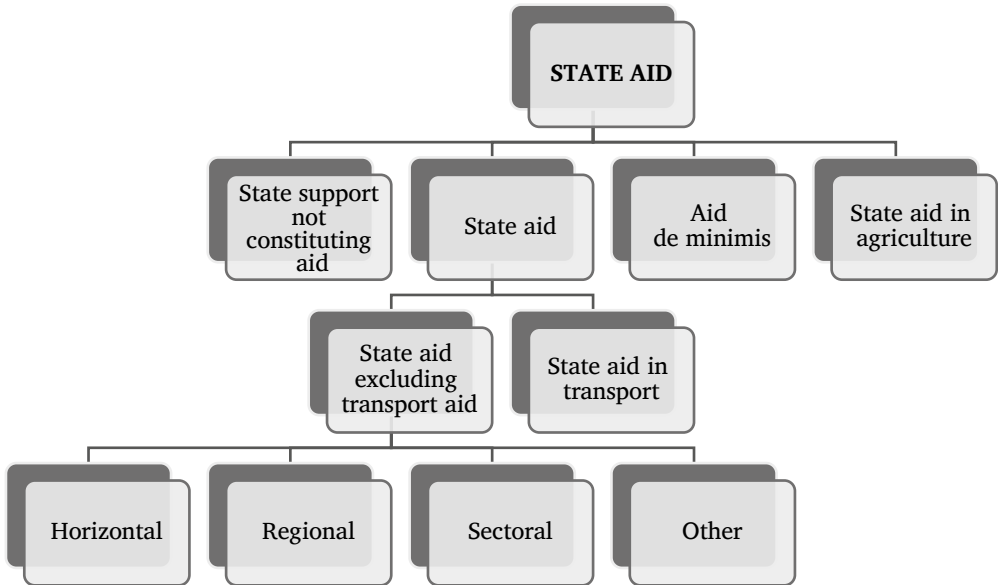
19 See: Art. 228 of the Constitution of the Republic of Poland. See also: Banaszak, 2009, pp. 968–975; Bosek, 2022, pp. 133–134.

20 See: Act of 18 April 2002 on the state of natural disaster (consolidated text: Journal of Laws of 2017, item 1897).

state aid, which are determined by a decision of the Council, and are offered at the request of the European Commission (Art. 107 of the TFEU) are also permissible.

However, public support implemented in Poland has a broader scope, and public aid is one of its elements. In accordance with the applicable state aid regulations, Figure 1 presents the different categories of state aid that can be adopted.

Figure 1: Individual categories of state aid²¹



In keeping with the generally accepted division, state aid granted in Poland – considering its purpose – can be grouped into horizontal, regional, and sectoral, with the reservation, however, that in the case of sectoral aid, specific rules exist in granting it for a given economic sector. In recent years, this aid has been provided in similar categories – in the case of horizontal aid granted in 2021, 15 items are in this category (as in 2020); in the case of regional aid, three items are in this category (in 2020, two categories of public aid, creation of new jobs and large investment projects, were added), and six items are under sectoral aid (in 2020).

21 Source: Own study based on data included in the report on sector aid in Poland granted to entrepreneurs in 2021 by the Office of Competition and Consumer Protection. Urząd Ochrony Konkurencji i Konsumentów, 2022, p. 6.

Table 1: Purpose and types of state aid (excluding aid granted in the transport sector and emergency aid) in 2021²²

No.	Horizontal aid
1	Research, development and innovation
2	Environmental protection and energy objectives
3	Small and medium-sized enterprises
4	Employment
5	Training
6	Rescue
7	Restructuring, including temporary restructuring aid
8	Support for domestic entrepreneurs operating as part of a business venture undertaken in the European interest
9	Supporting culture and preserving cultural heritage
10	Social assistance for individual consumers
11	High risk capital
12	Access of small- and medium-sized enterprises to financing
13	Facilitating development of certain economic activities or certain economic regions
14	Local infrastructure
15	Sports and recreational activities
Sectoral aid	
1	Coal mining sector
2	Energy sector
3	Cinematography sector
4	Natural gas sector
5	Telecommunications sector
6	Banking sector

²² Source: Own study based on data included in the report on sector aid in Poland granted to entrepreneurs in 2021 by the Office of Competition and Consumer Protection. Urząd Ochrony Konkurencji i Konsumentów, 2022, pp. 11–12.

Regional aid	
1	Supporting new investments
2	Operational aid
3	Aid for urban development
Other	
1	Compensation for the provision of services of general economic interest

According to the guidelines of the European Commission, forms of assistance are grouped into four and marked with letters: A (subsidies and tax reliefs), B (capital and investment subsidies), C (so-called ‘soft lending’) and D (sureties and guarantees). Additionally, depending on the source of the aid, subsequent letters are assigned the number 1 (budget expenditure) or 2 (decrease in budget inflow).

Table 2: Forms of state aid in 2021²³

Group	Sub-group	Form of aid
Group A subsidies and tax reliefs	A1 subsidies	subsidy and other non-refundable benefits
		interest subsidies on bank loans (directly for entrepreneurs)
		other expenses related to the operation of budgetary units or the implementation of their statutory tasks
		refund
		compensation
	A2 tax reliefs	tax exemption
		tax deduction
		a reduction or reduction resulting in a reduction of the tax base or the tax amount
		fee lowering
		fee exemption
		abandonment of tax collection

²³ Source: Own study based on data included in the report on sector aid in Poland granted to entrepreneurs in 2021 by the Office of Competition and Consumer Protection. Urząd Ochrony Konkurencji i Konsumentów, 2022, pp. 9–10.

POLAND: STATE AID IN THE SHADOW OF RETAIL SALES TAX

Group	Sub-group	Form of aid
Group A subsidies and tax reliefs	A2 tax reliefs	abandonment of fee collection
		write-off of all or part of tax arrears together with interest
		waiving all or part of interest on tax arrears
		waiving all or part of interest for late payment (contributions, payments, penalties)
		remission of penalties or waiving the imposition of a penalty
		putting into use property owned by the State Treasury or local government units and their associations on terms that are more favourable to the entrepreneur than those offered on the market
		sale of property owned by the State Treasury or local government units and their associations on more favourable terms than those offered on the market
		write-off of enforcement costs
		one-time depreciation
		write-off of court proceedings costs
Group B capital and investment subsidies	B1	contribution of capital
	B2	conversion of receivables into capital
Group C so-called 'soft lending'	C1 preferential and con- ditionally written-off loans	preferential loans
		preferential credits
		interest subsidies on bank loans (for banks)
		loans conditionally written off
		refundable advance payment
Group C so-called 'soft lending'	C2 deferral and payment in instalments	deferral or instalment of payment of tax or tax arrears together with interest for late payment
		deferral or instalment of payment of a fee (contributions, payments), overdue fee (premiums, payments) or overdue fee (premiums, payments) along with interest
		deferral or instalment payment of overdue fees (contributions, payments, penalties)

Group	Sub-group	Form of aid
Group C so-called 'soft lending'	C2 deferral and payment in instalments	deferral or instalment of enforcement costs into instalments
		deferral or payment of interest into instalments
		deferral or spreading the costs of the court proceedings into instalments
Group D sureties and guarantees	D1	sureties and guarantees

In accordance with the data presented by the Office of Competition and Consumer Protection in the report on public aid in Poland granted to entrepreneurs in 2021, in general terms the following data are indicated: (i) number of entities that provided aid – 481; (ii) number of beneficiaries – 45.8 thousand; (iii) number of acts of aid (usually an agreement or decision) – 50.2 thousand; (iv) number of aid acts per one beneficiary on average – 1.1; (v) number of aid cases – 408.7 thousand; (vi) number of aid cases per beneficiary on average – 8.9; (vii) value of aid per beneficiary on average – PLN 1,046.9 thousand.²⁴

The total value of state aid granted to entrepreneurs in 2021 was set at PLN 47,942.2 million (equivalent to EUR 10,496.6 million²⁵). State aid granted in 2021 amounted to 1.83% of the GDP (equal to PLN 2,622,184 million). The value of state aid granted, excluding aid in transport, amounted to PLN 42,030.5 million (1.60% of GDP), while the value of public aid granted in the transport sector amounted to PLN 5,911.7 million (0.23% of GDP).²⁶

When assessing the trends in the volume of public aid in Poland in 2017–2021, it can be noted that after a significant increase in the value of aid granted in 2017 (resulting primarily from the implementation of operational programmes co-financed from EU funds in 2014–2020, financial value of aid granted in the transport sector and aid constituting compensation for the provision of services of general economic interest), a significant decrease was observed in 2018. Starting from 2019, the total value of state aid increased again, and in 2021 its value (excluding transport) increased by almost 30% compared to 2020. The main reason for this increase is the aid granted in the banking sector under the compulsory bank restructuring.²⁷

24 See: Urząd Ochrony Konkurencji i Konsumentów, 2022, p. 14.

25 Considering the average exchange rate from 2021, EUR 1 = PLN 4.5674.

26 See: Urząd Ochrony Konkurencji i Konsumentów, 2022, p. 14.

27 Urząd Ochrony Konkurencji i Konsumentów, 2022, p. 15.

Table 3: Amount of state aid in 2017–2021²⁸

year	2017	2018	2019	2020	2021
Total value of aid granted [PLN million], including:	42,251.9	26,972.0	36,763.2	37,832.0	47,942.2
– value of the aid excluding transport [PLN million]	30,572.8	22,116.9	24,382.5	26,047.5	42,030.5
– value of aid granted in the transport sector [PLN million]	11,679.1	4,855.1	12,380.7	11,784.5	5,911.7
– share of the value of aid granted in the transport sector in the total value of aid	27.6%	18.0%	33.7%	31.1%	12.3%
Share of the total value of aid in GDP, including:	2.12%	1.27%	1.60%	1.62%	1.83%
– share of the aid value excluding transport in GDP	1.54%	1.04%	1.06%	1.11%	1.60%
– share of the value of aid granted in the transport sector in GDP	0.59%	0.23%	0.54%	0.50%	0.23%

3. Tax relief and state aid

Polish tax law also provides for special solutions specifying the rules for granting relief to taxpayers running a business. Art. 67b of the Act of 29 August 1997 – Tax Ordinance²⁹, which regulates this issue, was included in the provisions of the Act after Poland’s accession to the EU and has been in force since 1 September 2005.³⁰ As in other cases, granting a specific relief to a taxpayer qualifies as public aid if it meets the conditions specified in Art. 107 of the TFEU. Therefore, tax relief that may

28 Source: Own study based on data included in the report on sector aid in Poland granted to entrepreneurs in 2021 by the Office of Competition and Consumer Protection. Urząd Ochrony Konkurencji i Konsumentów, 2022, p. 15.

29 Consolidated text: Journal of Laws of 2022, item 2651 as amended.

30 See: Act of 30 June 2005 amending the Tax Ordinance Act and amending certain other acts (Journal of Laws No. 143, item 1199, as amended).

lead or does lead to disruptions in trade between EU Member States should be considered as prohibited state aid. Hence, granting the above-mentioned aid in a case where such a disruption cannot be identified will not be classified as prohibited state aid, and the tax authorities must determine this circumstance in each individual case. The interpretative procedure is recognising that each tax relief referred to in Art. 67b para. 1 of the Tax Ordinance, is, in principle, prohibited state aid.³¹ It also depends largely on the scale of the entrepreneur's business and cooperation and connections with foreign entrepreneurs.³²

In the case of taxpayers running a business, relief in the repayment of tax liabilities is granted at the taxpayer's request (as is the case with other taxpayers applying for such relief under Art. 67a of the Tax Ordinance). The premises that justify the possibility of using the relief by a specific entrepreneur are 'important interest of the taxpayer' or 'public interest', and the decision is made within the scope of administrative discretion.³³ Reliefs in the repayment of tax liabilities in the case of taxpayers running a business are, however, granted subject to the limitations set out in Art. 67b para. 1 of the Tax Ordinance. Pursuant to the above-mentioned provision, the tax authority may, in such a case, grant reliefs specified in Art. 67a of the Tax Ordinance (postponing the deadline for tax payment, spreading the tax payment into instalments, deferring or spreading the payment of tax arrears into instalments together with interest for late payment or interest on unpaid tax advances, write-off of tax arrears in whole or in part, and determine interest for late payment or extension fee) which (i) do not constitute state aid; (ii) constitute *de minimis* aid – to the extent and under the terms provided for in directly applicable acts of Community law regarding *de minimis* aid; (iii) constitute state aid: (iiia) granted to repair damage caused by natural disasters or other extraordinary events, (iiib) granted to prevent or eliminate serious disruptions in the economy of a cross-sectoral nature, (iiic) granted to support national entrepreneurs operating as part of an economic project undertaken in the European interest, (iiid) granted to promote and support culture, national heritage, science, and education, (iiie) granted as compensation for the provision of services of general economic interest entrusted on the basis of separate regulations, (iiif) granted for training, (iiig) granted for employment, (iiih) granted for the development of small- and medium-sized enterprises, (iiij) granted for restructuring, (iiik) granted for environmental protection, (iiil) granted for research and development work, (iiim) granted

31 Judgement of the Supreme Administrative Court of 27 August 2014, II FSK 2067/12, Legalis; Tezcan, 2018, pp. 31–32. See also: judgements of the Supreme Administrative Court: judgement of 20 August 2010, II FSK 610/09, Legalis; judgement of 23 January 2014, II FSK 532/12, Legalis; judgement of 10 March 2016, II FSK 75/14, Legalis; judgement of 14 March 2017, II FSK 3249/16, Legalis; and judgement of the Provincial Administrative Court in Poznań of 21 February 2019, I SA/Po 693/18, Legalis; judgement of the Provincial Administrative Court in Łódź of 26 April 2019, I SA/Łd 38/19, Legalis.

32 See: Dzwonkowski and Kurzac, 2020, commentary to Art. 67b and the literature cited there.

33 Derach, 2023, commentary to Art. 67b.

for regional development, (iiim) granted for other purposes specified pursuant to para. 6 by the Council of Ministers.

Therefore, in granting a relief constituting state aid, the provisions of the Tax Ordinance indicate specific objectives whose implementation is its concern. In addition, a delegation is envisaged for the Council of Ministers, which may, by way of regulations, specify the purposes of aid granted in the form of relief in the repayment of tax liabilities other than those mentioned above, as well as the detailed conditions for granting these reliefs for specific purposes, together with an indication of the cases in which the relief is granted as individual aid, considering the admissibility and conditions of granting state aid specified in the provisions of Community law (Art. 67b para. 6 of the Tax Ordinance).

Art. 67b para. 2 of the Tax Ordinance specifies that relief in the repayment of tax liabilities granted to compensate for damage caused by natural disasters or other extraordinary events (Art. 67b para 1 point 3 letter a) may be granted as individual aid or as part of aid programmes. However, in accordance with point 3, in other cases (defined in Art. 67b para. 1 point 3 letters b–l), relief may be granted as individual aid in accordance with government or local government programmes or as part of aid programmes specified in separate regulations.

4. Retail sales tax

An example of the problems in interpreting Polish regulations and their compatibility with EU law is the judgement of the Court of Justice of the European Union of 16 March 2021 regarding the introduction of a retail sales tax.³⁴ On 1 January 2021, the provisions of the Act of 6 July 2016 on retail sales tax³⁵ became effective in Poland, but its enforcement was significantly postponed in waiting for the aforementioned judgement, which finally confirmed that the Polish retail sales tax (trade tax) does not violate EU law.

The retail sales tax act in force in Poland imposes on retailers a tax levied on sales revenue (Art. 5). The taxable base in this case is the excess of retail sales revenue achieved in a given month over the amount of PLN 17 million. On the contrary, revenue from retail sales is constituted by amounts received by the taxpayer on account of sales, including advance payments, instalments, prepayments, and deposits, also in the event of such amounts being received by the taxpayer before goods were supplied. The provisions of the Act specify that the revenue earned in a given month shall be reduced by the amounts paid in that month for the return of goods after deduction of the goods and services tax (Art. 6). The tax rates are,

34 CJEU, 16 March 2021, C-562/19 P, *European Commission v. Republic of Poland*, ECLI:EU:C:2021:201.
35 Consolidated text: Journal of Laws of 2023, item 148.

respectively, 0.8% of the tax base – when it does not exceed the amount of PLN 170 million, and 1.4% of the tax base when it exceeds the amount of PLN 170 million (Art. 9).³⁶

The tax was originally introduced in Poland in July 2016, despite objections raised by the European Commission. In November 2016, it issued the first of the decisions later challenged by Poland, under which it opened a formal investigation and – in accordance with its powers – applied an interim measure in the form of an order to suspend tax collection until the matter was clarified. The investigation resulted in a second decision by the EC, which found the Polish legislation incompatible with EU law because the progressive construction of commercial tax leads to a much lower taxation of smaller companies compared to other taxpayers, giving grounds to consider it as unlawful state aid. The European Commission’s position was based on the claim that the introduction of a trade tax would hit large retail chains and therefore affect the market structure of retailers. The EC stated that this would lead to a distortion of competition in the EU market.

Poland suspended tax collection, but appealed the European Commission’s decision to the General Court of the European Union, which, in the judgement of 16 May 2019,³⁷ upheld the complaint and annulled the Commission’s decision. Following the European Commission’s appeal to the Court of Justice of the European Union, in October 2020, the Advocate General of the CJEU decreed that the appeal should be dismissed by the Court and the judgement of the EU General Court should be upheld. Then, the Polish government waived the suspension of tax collection, with the result that the retail sales tax legislation became effective in Poland on 1 January 2021.

In the judgement of 16 March 2021 referred to above, the CJEU – confirming the judgement of the General Court of the EU – pointed out, first, that ‘outside the areas in which Union tax law is subject to harmonisation, the determination of the constitutive features of any tax is a matter for the discretion of the Member States, respecting their fiscal autonomy, a power which must in any event be exercised in compliance with Union law. That applies in particular to the choice of the rate of tax, which may be proportional or progressive, but also to the determination of the tax base and the chargeable event’. The Court of Justice of the European Union thus held that the determination of the design of a tax system – to the extent that it is not subject to harmonisation at EU level – is an autonomous power of the Member States, and that the mere setting of a progressive rate of a given tax need not be considered to infringe the EU rules on state aid, since it does not in itself constitute a selective advantage granted to certain undertakings.³⁸

36 See: Maruchin, 2021, p. 26.

37 CJEU, 16 May 2019, T-836/16 and T-624/17, *European Commission v. Republic of Poland*, ECLI:EU:T:2019:338 (the second case concerned Hungary).

38 See also: Stępkowski, 2021, pp. 12–13.

5. State aid during the COVID-19 pandemic

The period of the COVID-19 epidemic and the experience it brought in many aspects of the functioning of EU Member States have shown the importance of state aid regulations in not only preventing distortions of competition in the internal market, in circumstances of greater demand for various forms of public support, but also possibly mitigating the negative effects of the economic crisis.

In circumstances where the EU rules for granting state aid became insufficient, the European Commission issued the Communication called ‘Coordinated economic response to the COVID-19 epidemic’,³⁹ which emphasised that although the situation has a serious impact on the state of the European economy, the limited size of the EU budget would entail that most of the funds to fight the crisis will have to come from the budgets of EU Member States. The European Commission’s Communication also defined the principles according to which Member States may develop their own support measures. Subsequently, the European Commission issued a Communication on 20 March 2020 ‘Temporary framework for state aid measures to support the economy in the context of the ongoing COVID-19 epidemic’,⁴⁰ which specified the conditions for granting state aid and the conditions for recognising it as admissible.⁴¹

In Poland, one of the first legal regulations relating to the situation caused by COVID-19 and of key importance in this respect was the Act of 2 March 2020 on special solutions related to the prevention, counteracting, and combating of COVID-19, other infectious diseases, and the crisis situations caused by them.⁴² This Act was subject to numerous changes that were a consequence of the changing situation in Poland. Most aid programmes aimed at mitigating the negative economic consequences caused by COVID-19 have been developed based on this Act, in line with the state aid rules set out in the Temporary Framework.⁴³

In the case of Poland, various public aid measures provided for in individual sections of the Temporary Framework have been applied in practice, including, for example, redeemable loans, interest subsidies on loans granted by banks, support provided by the Polish Development Fund for small- and medium-sized enterprises, loan guarantees, tax facilitations (e.g. regarding real estate tax, relief in repayment

39 Communication from the Commission to the European Parliament, the European Council, the European Central Bank, the European Investment Bank Eurogroup, 13 March 2020. A coordinated economic response to the epidemic, COM(2020) 112 final.

40 Commission Communication ‘Temporary framework for state aid measures to support the economy in the context of the ongoing COVID-19 epidemic’, OJ C 91I, 20.3.2020, 1–9.

41 See also: Mazur, 2023, pp. 62–64.

42 Consolidated text: Journal of Laws of 2023, item 1327, as amended.

43 See also: for example, the Act of 19 June 2020 on interest subsidies on bank loans granted to entrepreneurs affected by COVID-19 and on simplified proceedings for the approval of an arrangement in connection with the occurrence of COVID-19 (consolidated text: Journal of Laws of 2022 item 2141) and the Act of 16 July 2020 on support for the trade receivables insurance market in connection with counteracting the economic effects of COVID-19 (Journal of Laws of 2020, item 1422, as amended).

of tax liabilities⁴⁴), co-financing of part of employee remuneration costs, co-financing of social security contributions for small- and medium-sized enterprises, and co-financing of business costs for entrepreneurs who are natural persons and do not employ employees. In 2021, Poland obtained consent from the European Commission for the implementation of the government programme 'Financial Shield for SMEs 2.0', through the Polish Development Fund addressing small- and medium-sized enterprises and providing for subsidies to co-finance the uncovered fixed costs of these enterprises, in accordance with the conditions set out in Section 3.12 of Temporary Framework. Additional aid programmes have also been approved, providing, for example, aid for Polish airports as compensation for damage resulting directly from air traffic restrictions due to the COVID-19 pandemic and the cancellation of preferential loans granted by the Polish Development Fund to large entrepreneurs.⁴⁵

Activities related to state aid in Poland were encumbered by certain problems, such as the rules for cumulating aid, limits in aid granted as specific amounts, as well as the interpretation of regulations regarding often basic issues in the context of the application of the Temporary Framework and EU regulations during the conditions of the COVID-19 pandemic, for instance, recognising the status of small- and medium-sized enterprises in certain circumstances.⁴⁶

6. Conclusions

According to the data presented by the Office of Competition and Consumer Protection in the report on state aid in Poland granted to entrepreneurs in 2020, support was provided to 2.3 million beneficiaries in 2020, among which the largest group was micro-enterprises (number of entities that granted aid – 1,002). The average value of aid granted per beneficiary was determined at PLN 41.5 thousand, and each beneficiary on average benefited from aid three times. Overall, the number of aid cases was determined at 7.6 million.

In 2020, owing to the crisis caused by the COVID-19 pandemic, Poland notified the European Commission of 22 aid programmes under which aid worth PLN 93,959.5 million was granted; it should be emphasised that the amount of funds from the state budget allocated to the fight against COVID-19 and eliminating the negative consequences of the pandemic were much greater because not all solutions used constituted public aid (e.g. benefits for the protection of jobs from the Guaranteed Employee Benefits Fund, standstill benefits).⁴⁷

44 Linka, 2020, pp. 31–32; Olczyk, 2021, pp. 14–15.

45 Kopeć, 2021, pp. 89–90.

46 Kopeć, 2021, pp. 91–97.

47 Urząd Ochrony Konkurencji i Konsumentów, 2021, pp. 83–84.

In 2021, 369,000 beneficiaries received crisis aid, among which (as in 2020) the largest group was that of micro-enterprises (number of entities that provided assistance – 1,307). The average value of crisis assistance provided per beneficiary was determined at PLN 51.2 thousand and was higher by approximately PLN 10,000 than the average value of assistance provided within the same scope in 2020. On average, the assistance received by each beneficiary was five-fold. Overall, the number of cases of assistance was determined at 1.98 million.

The situation caused by the COVID-19 pandemic led the European Commission to issue over 50 decisions for Poland as crisis aid support by the end of 2021, 39 of which were approvals for crisis aid programmes for entrepreneurs and entities operating outside the agriculture and fisheries sectors. According to data from the Office of Competition and Consumer Protection, in 2021, aid was granted under 28 aid programmes, and its value was estimated at PLN 18,902.9 million. However, from December 2020, it was also possible to grant *de minimis aid* to offset the effects of the COVID-19 pandemic, which in 2021 was set at PLN 9,500.6 million.⁴⁸

48 Urząd Ochrony Konkurencji i Konsumentów, 2022, pp. 81–82.

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