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Illegal tax state aid and law-making process – Polish perspective on the illegal tax state aid and its refund

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ABSTRACT

The admissibility of state aid has been strongly limited both by the European Union and the World Trade Organization, as a particular threat for the development of the free market. A legal basis for restriction of the state aid in the European Union is art. 107 Treaty of Functioning of the European Union, which includes also a prohibition of the state aid sourced in the tax regulations. Advanced regulations in the phase of making the law have been established in Poland to avoid inconformity between bills and European Union law, including granting illegal state aid. Although every bill is subject to the precise examination under the criterion of the conformity with the European Union law – Retail Sales Tax, introduced in 2016, had been recognized by the European Commission as the illegal state aid for the domestic enterprises, excluded from a scope of the new tax. In the Article the Author describes Polish regulations, adopted in order to avoid the inconformity between European and domestic law, as well as with domestic administrative practice. The Author indicates also rules concerning a refund of the illegal state aid, which are in contrary to the European Union law, but which make it more difficult to execute the European Commission decision, especially having regard the time of execution. The adopted methodology consists of the analysis of the international and domestic doctrine, European and domestic legal acts, judgments of the European and domestic courts, as well as decisions of the European Commission.

Keywords: State aid, European Union Law, Polish lawmaking process, refund of state aid, tax state aid, Poland, Polish retail sales tax

1. INTRODUCTION

Granting an illegal aid by states is a global phenomenon, which creates a serious threat for development of the free market, in which the modern international economy has been grounded. Therefore, the possibility to grant a state aid is strongly limited both by the European Union and the World Trade Organization. In addition, to achieve efficiency of these regulations, besides the simple limitation, also proper rules of reaction on the depicted allegations have been established in European and world-wide legal order. For the reason of the limited scope of the article, the latter perspective will not be described. One of the existing forms, in which the illegal state aid may be granted, are tax incentives. The protectionism in that scope may be either very easy to depict (such as introducing customs on foreign products) or more hidden (such as e.g. special depreciations rules for foreign companies¹). In 2017 a new tax was introduced in Poland (Retail Sales Tax)². The tax was deemed to create preferences for smaller and mainly domestic enterprises, what resulted in the decision of the European Commission determining the new tax as an illegal state aid for domestic entrepreneurs³. Poland suspended application of these rules, considered to be unlawful, but at the same time filed a complaint against the decision and the case is still pending before the Court of Justice of the European Union.

The purpose of the Article is to answer to the question, if the Polish regulations include proper means of avoidance of granting the illegal state aid, together with the assessment of the effectiveness of the refund process in case of an allegation. In the article essence of state aid rules in the European Union is presented, together with the description of means adopted in Poland to avoid granting the illegal state aid both in the phase of making and applying the law. For the reason of a limited length of the Article, the Retail Sales Tax and the issue of its conformity with the European Union state aid rules will not be wider presented. The adopted methodology consists of the analysis of the international and domestic doctrine, European and domestic legal acts, judgments of the European and domestic courts, as well as decisions of the European Commission. It should be also noted that the process of assessment the conformity of the bills with European law in Poland could be interesting for researchers from other jurisdictions - as an example of regulations, which might be established to minimize the possibility of granting the illegal state aid. The Author would like to stress that for the reason of the limited length of the Article, the issue of the state aid granted by the local self-government would be intentionally omitted.

2. ILLEGAL STATE AID AND TAX CASES – GENERAL REMARKS FROM THE EUROPEAN AND POLISH PERSPECTIVE

To avoid protectionist policies of Member States and resulting from that distortions for the free movements and the common market, the European Union was grounded in the common rules on state aid (German Federal Ministry of Finance 2017, p. 20). As it is stressed

¹ See: Judgment of the European Court of Justice, C-20/15 P, C-21/15 P, Commission v World Duty Free Group.

² Act on Retail Sales Tax of 06.07.2016, Official Journal of Laws 2016 heading 1155.

³ Commission Decision 2018/160 of 30.06.2017 on the State Aid SA.44351 (2016/C) (ex 2016/NN), implemented by Poland for the retail sector, Brussels 30.06.2017, C(2017) 4449, hereinafter: EC Decision 2018/160.

in the legal writing, the goal of the common state aid rules was to prevent a “subsidy race” between Member States. Subsidies for local companies can have the same detrimental effect on common market as means imposed on the foreign goods and services (e.g. custom duties, but also special requirements) (Papp 2015, p. 5). The state aid in the European Union is strongly limited by art. 107 TFEU⁴. Art. 107 par. 1 TFEU has established so called “general prohibition on state aid”, what is an embodiment of the policy adopted over 60 years ago in the Treaty Establishing the European Economic Community (Power 2016, p. 182). As a result of the nature of that provision, in the doctrine it is stressed that European competition policy is aimed rather at the negative integration, than at harmonization the national policies (Blauberger 2008, p. 5). Hence, the proper application of these rules is particularly complicated. Art. 107 par. 2 and par. 3 TFEU consist of permissible forms of state aid, being exceptions from the general rule. Art. 108 TFEU includes to the legal order a procedural regime. The detailed description of these rules will be omitted in the Article. It should be also concluded that a big significance of the state aid rules in the EU is being brilliantly described as an “enshrinement” of these rules in law (German Federal Ministry of Finance 2017, p. 21). General conditions, identified by the case law, are: (1) transfer of state resources, (2) economic advantage (3) distortion of competition (4) effect on trade (*See gen.* - Friederiszick et al. 2006, p. 4).

The last two conditions are fulfilled if the measure is “selective”. The European state aid provisions are applicable also to the tax matters - as it is stressed in the doctrine, these rules are even a mean to tackle harmful tax competition in the European Union between Member States (Verhagen 2017, p. 279). To the fiscal state aid the same rules are applicable as to the traditional state aid, based on subsidies. However, the perspective of the aid is reversed. The latter consists of a transfer of public assets to a private party. In the fiscal cases, private assets are not transferred to the public budget (Schön, 2015, p. 3), as it is brilliantly described in a legal doctrine - a state simply “taxes less to tax more” (Maitrot de la Motte 2017, p. 75). It should be also stressed that in the cross border trade, imposition of taxes (both direct and indirect) on products of other Member State were clearly forbidden (art. 110 TFEU). However, art. 107 TFEU has much wider scope of application than art. 110 TFEU. In the Polish doctrine it is emphasized that tax reliefs, as a rule, do not have a selective character and therefore they could not be recognized as illegal state aid⁵. Such a classification reflects the conclusions made in the ECJ judgments concerning state aid, which not only can have a direct character (such as subsidies), but also which can be a kind of indirect measures (such as selective tax preferences⁶). However, under some conditions a tax incentive may create the illegal state aid. The Polish Council of Ministers has issued official acts, concerning application of the state aid rules to the tax law, such as the regulation on reporting the state aid.⁷ One of the attachment to that act is a list of state aid forms. It has been there clearly

⁴ Treaty on the Functioning of the European Union, Consolidated Text Official Journal of the European Union, 26.10.2012, C 326.

⁵ A. Dobaczewska (2017), Pomoc publiczna, in: A. Powałowski (ed.), Prawo gospodarcze publiczne, C.H. Beck, Warszawa, p. 334.

⁶ I. Postuła and A. Werner referred illustrative judgments of the ECJ in cases: Commission vs. Germany 70/72, Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA vs. International Factors Italia SpA (Ifitalia) et. Al., C-259/97. *See gen.* I. Postuła, A. Werner (2008), Prawo pomocy publicznej, Warszawa, p. 39.

⁷ Rozporządzenie Rady Ministrów z dnia 7 sierpnia 2008 r. w sprawie sprawozdań o udzielonej pomocy publicznej, informacji o nieudzieleniu takiej pomocy oraz sprawozdań o zaległościach przedsiębiorców we

stressed that tax incentives also should be regarded as the state aid – such a list encompasses i.a. tax exemptions (code A2.1), deduction from tax (code A2.2), reduction of tax or tax base (code A2.3), cessation of tax collection (code A2.6), annulment of late tax interests (code A2.9), immediate amortization (code A2.16), deferral the time limit for tax payment (code C2.1), deferral of the time limit for arrears or tax payment together with late interests (code C2.1.2), spreading the tax payment into instalments (code C2.2), spreading an arrear or arrear together with late interests (code C2.3.1). It should be noted that not-being covered by a new tax was not considered by this act as state aid (in contrary to e.g. an exemption from tax).

The only example of Polish tax provision, which has been considered by the European Commission as contrary to the EU State aid rules, was an Act of Retail Sales Tax, which laid down a tax on the retail sector in Poland. The Act on Retail Sales Tax had not been notified to the Commission nor declared compatible with the internal market. The European Commission got the information that Poland was considering adopting the tax in press articles, published in February 2016. On 19.08.2016 the Commission opened the formal investigation procedure. The progressive rate structure was deemed to discriminate retailers, basing on their size and, as a result, to favour domestic retailers. Hence, this regulation was favouring retailers operating under a franchise model or independently as compared to those operating under a holding company model (§ 48 EC Decision 2018/160). The European Commission grounded its conclusions, concerning relation between amount of turnover and investments of the foreign capital, on the judgment of the CJEU in the joined cases C-106/09 P and C-107/09 P (Commission and Spain vs. Government of Gibraltar and United Kingdom). Pursuant to the European Commission, the appropriate reference system in the presented case was the imposition of a single (flat) rate tax on the monthly turnover generated from retail sales, without the progressive tax structure being a part of that system (§ 49 EC Decision 2018/160).

Therefore, the incompatibility of the Act on Retail Sales Tax with the European Union State aid law was clearly ruled in the EC Decision 2018/160, issued on 30.07.2017. Not to create a breach of the European Union law, the Polish Government decided to suspend the payment of the Retail Sales Tax, as a result of the opportunity to submit comments, given by the European Commission, in accordance with Article 13 par. 1 Regulation 2015/1589. The suspension of payment to the end of 2016 was adopted in the Regulation of the Minister of Development and Finances of 18.10.2016 on cessation of collection of the retail sales tax.⁸ Further-going suspension was implemented by the way of statute, to the 01.01.2018.⁹ By the virtue of act of 12.10.2017, amending the retail sales tax act¹⁰, the period of suspension was extended to 01.01.2019. As a result of above-mentioned suspensions, State aid had not been effectively granted and there was no need to require recovery by the Commission both at the date of issuing the decision (§§ 70-73 EC Decision 2018/160) as well as later. However, the Act on Retail Sales Tax is only suspended (until 01.01.2019) and still has not been repealed. The main reason for not repealing the Act is the claim, that Poland brought before the CJEU on 30th November 2016¹¹ in relation to the decision of the European Commission, initiating

wpłatach świadczeń należnych na rzecz sektora finansów publicznych, Official Journal of Law 2008 No. 153 heading 952.

⁸ Official Journal of Laws 2016, heading 1723.

⁹ Act of 15.11.2016 amending the retail sales tax act, Official Journal of Laws 2016 heading 2099.

¹⁰ Official Journal of Laws 2017 heading 2178.

¹¹ Republic of Poland vs Commission, Case T-836/16.

proceedings against Poland¹², as well as on 13 September 2017 against the EC Decision 2018/160, claiming for annulment the EC Decision 2018/160.¹³ Poland still persists, that Act on Retail Sales Tax does not constitute a breach of the European Union law.

3. AVOIDANCE OF THE STATE AID IN THE POLISH LAW-MAKING PROCESS

The assessment of the conformity between the European Union law and the law adopted in Poland could be divided into two areas - institutionalized (assessment during the legislative process) and social (made by other entities than public authorities, such as societies and academics).¹⁴ The latter, as more common in the European Union and not supervised by the public authority, will be intentionally omitted in the Article. The first one – institutionalized examination – has been deeply grounded in the Polish legal system. Even before the date of accession, Poland was obliged to adjust its domestic regulations to the European Union Law on the ground of art. 68 Association Agreement between Poland and European Union.¹⁵ Also then, the Constitutional Tribunal ruled that *Sejm*¹⁶ is obliged to assess the conformity between the created law and the Constitution.¹⁷

The legal basis for that activity has been adopted as a part of the internal parliamentary act, called Rules of Procedure¹⁸. According to the regulation, the Marshal of the Sejm (President of the Lower Chamber of the Polish Parliament) coordinates and supervises the preparation of a bill, having regard the compatibility of the domestic acts with the European Union law. Thus the Marshal of the Sejm can be treated as an authority, which is responsible for the merits-related compatibility the bill with the European Union state aid law. According to the Rules of Procedure, each legislative bill should have a grounding. One of the elements, which have to be included in the grounding, is a statement, that the proposed regulation either comply with the European Union Law or is not subject thereto.¹⁹ The statement could be and usually is only one-sentence long.²⁰ The bill with the statement is brought to the Marshall, who orders to make the additional opinion on compatibility the projected regulation with the European Union law by the Sejm experts²¹. It should be stressed that examination of the project is obligatory, even when the statement is clear and does not indicate on the possible incompatibility.²²

¹² Decision of the European Commission of 19.08.016, initiating proceedings against Poland, in the case relating to State Aid SA.44351 (2016/C) (ex 2016/NN), document C(2016) 5596.

¹³ Republic of Poland vs. Commission, Case T-624/17.

¹⁴ P. Kuczma (2015), Procedura badania zgodności projektu ustawy z prawem UE, [in:] M. Jabłoński (ed.), S. Jarosz-Żukowska (ed.), Zasada pierwszeństwa prawa Unii Europejskiej w praktyce działania organów władzy publicznej RP, Wrocław, p. 133.

¹⁵ Ibidem, p. 135.

¹⁶ Lower chamber of the Polish Parliament.

¹⁷ Judgment of the Constitutional Tribunal, 23.11.1993, K 5/93.

¹⁸ The Rules of Procedure of the Sejm, Consolidated Text M.P. 2012 heading 32, amended, hereinafter: The Rules of Procedure.

¹⁹ Art. 32 par. 2 The Rules of Procedure.

²⁰ P. Kuczma (2015), Procedura..., Op. Cit., p. 137.

²¹ Art. 34 par. 9 The Rules of Procedure.

²² P. Kuczma invokes the examples of bills, which grounding included clear statement, that the project is in accordance with the European Union law. As a result of the opinion it was possible to detect that the statement was incorrect. See gen. Kuczma, 2015, Procedura..., Op. Cit., p. 139.

However, such an opinion is not required if a bill was prepared by the President of the Republic of Poland or the Council of Ministers. These entities use the internal experts' opinion, which are employed in President Office and Legislative Council²³. Thus, in the initial phase bills created by the President of Poland or Council of Ministers are subject to a presumption of conformity with the European Union law. It should be noted that if there are doubts on the compatibility of the bill with the European Union law, the Marshal of Sejm can receive the opinion of the Sejm Presidium and then pass the bill to the Legislative Commission²⁴. With the qualified majority of voting (3/5), the Commission can decide that the bill is inadmissible. In such a case, the Marshal cannot longer proceed on the bill²⁵. The Sejm experts, which make an opinion on each non-governmental and non-presidential bill, are employed in the unit called Bureau of Research Chancellery of the Sejm- which one the task is to advise and to provide opinions in matters related to Poland's EU membership.

The additional examination in the legislative process may occur also after the First Reading of the bill, when the bill is passed to the proper commission to discuss eventual amendments. The commission may ask independent, external experts for an opinion. These opinions are not binding to the members of Parliament, but usual have a great significance for the reason of the experts' reputation. In this phase a legal representative of the Chancellery of the Sejm takes part in the proceedings and additionally presents conclusions concerning compliance of the bill with the European Union law. Such an opinion is also not binding to the proper commission, however, if the opinion is ignored, the Marshall can pass his conclusions to the Legislative Commission. That body can oblige the proper commission to introduce recommended amendments to the bill. During the whole proceedings in Sejm it is also possible to ask the minister in charge for the membership of Poland in the European Union, for a formal opinion.²⁶

The above described proceedings has a general character – it examines conformity of the bills with the European Union law in general and is not limited to the state aid rules. Besides these regulations, in Poland was established a separate, highly specialized authority, which is responsible for exercising detailed-described functions related to the state aid rules – the President of the Office of Competition and Consumer Protection (POCCP), which i.a. issues opinions concerning conformity domestic legal acts with the State aid rules. As highly qualified authority, the President on behalf of Polish authorities appeals against the European Commission decisions. Furthermore, the President represents Poland in the proceedings before European Commission and the Court of Justice.

Each aid scheme or project of individual aid requires the opinion of the President of the Office of Competition and Consumer Protection, before it is formally notified to the European Commission. It should be also stressed that when the possibility of granting a state aid is depicted in a bill, there is no formal procedure, which had been established to notify such a project to the European Commission by the Parliament.²⁷

²³ Ibidem, p. 139.

²⁴ Commission is a part of the Chamber and consists – as of June 2018 - of 33 Members of Parliament.

²⁵ Art. 34 par. 8 Rules of Procedure of the Sejm.

²⁶ P. Kuczma (2016), *Procedura...*, Op. Cit., pp. 144-147.

²⁷ B. Pawłowski (2016), *Notyfikacja - obowiązek informowania UE o projektowanych krajowych aktach prawnych*, *Infos Biuro Analiz Sejmowych* nr 9 (213), p. 4.

4. AVOIDANCE OF THE STATE AID IN THE APPLICATION OF LAW

According to the art. 7 Constitution²⁸, organs of public authority shall function on the basis of the law and within its limits. It means that in the Polish legal order there is “no place for lawless decisions or excessive freedom in appraisal of evidence”²⁹. That rule was repeated on the ground of the Tax Ordinance³⁰. According to the art. 120 TO, tax authorities shall act in accordance with the provisions of law. Therefore it is impossible to act by the tax authority in the different way than proceedings clearly and strictly stated in the Constitution, in the closed list of legal sources. Art. 67b TO is invoked as an example of a lack of legal possibility to grant state aid in the mean of administrative decision, being in contrary to the European State Aid law. Pursuant to the art. 67a TO, upon a taxpayer’s application, in the events substantiated by important interest of the taxpayer or public interest, the tax authority may give three kinds of incentives (1) to defer the time limit for tax payment or spread the tax payment into instalments; (2) to defer or spread into instalments the payment of tax arrears including the default interest or interest on tax advance payments not paid timely; (3) to annul tax arrears, default interest or prolongation fee in whole or in part. In order to avoid applying that rules in the way contrary to the state aid rules, the additional provisions were introduced as the art. 67b TO. This article limits the possibility of giving the incentives to these cases, when state aid is not constituted, when the state aid does not exceed the *de minimis* threshold, or when although the state aid occurs, however is not illegal - for the reason of the accordance with a casuistic list of exceptions, making the aid admissible under the European Union law. Also on the ground of the restructuring proceedings the possibility to grant the public state aid was predicted and regulated in a very detailed way.³¹

Furthermore, in Poland there are many institutions, which provide taxpayers with a certain kind of protection – not only individual tax rulings, but also: general tax rulings, tax clarifications, established interpretational practice of tax authority. General tax rulings are issued by the minister competent for public finance, in order to ensure uniform application of tax law provisions by tax authorities issuing *ex officio* or upon application for their interpretation.³² When issuing general rulings, the Minister has to regard to the judicial pronouncements of the courts, the Constitutional Tribunal or the Court of Justice of the European Union. In general, the same protection is given a taxpayer by individual and general tax ruling. General interpretations shall be published, without undue delay, in the official gazette *Dziennik Urzędowy Ministra Finansów* [Official Gazette of the Minister of Finance] and in the official gazette *Biuletyn Informacji Publicznej* [Public Information Bulletin]. The other kind of institution which provides a taxpayer with some kind of protection - tax clarifications – is a quite new institution implemented to the TO on 01.01.2017. In contrary to the general tax rulings, tax clarifications are issued by the minister competent for public finance only *ex officio* and have to explain also the practical application of the provisions. However, other rules concerning general tax rulings and tax clarifications are the same –

²⁸ Constitution of Republic of Poland, Journal of Laws 1997, No. 78, heading 483, amended, hereinafter: Constitution.

²⁹B. Banaszak (2012), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, C.H. Beck, Warszawa, p. 78.

³⁰ Act of 29.08.1997, Tax Ordinance Act, Consolidated Text Official Journal of Laws 2017 heading 201, amended, hereinafter: TO.

³¹ Art. 139 et seq. Act of 15.05.2015 - Restructuring Law, Consolidated Text Official Journal of Laws 2018 heading 398, amended, hereinafter: Restructuring Law.

³² Art. 14a § 1 TO.

especially in relation with their purpose (to ensure uniform application of tax law provisions by tax authorities) and protection given only if the entity obeys to them. Tax clarifications shall also serve to explain the issues, which although have a little significance, but are problematical. As a result of that legal institution, the number of individual tax rulings shall be lowered³³. Tax clarifications are published in the Public Information Bulletin, on the dedicated website of the office supporting the minister competent for public finance, under the “Tax Clarifications” name, with their publication date. The last kind of special regulation, which creates a risk of granting the illegal state aid in the application phase is the established interpretational practice of tax authority, included to the domestic legal order also on 01.01.2017³⁴. Pursuant to art. 14n § 5 TO, the established interpretation practice is an explanation of the scope and manner of applying tax law provisions, which prevails in individual interpretations issued in the same states of facts or with respect to the same future events and in the same legal circumstances, in the course of the settlement period in the period of 12 months preceding the commencement of such settlement period. If an entity (not only a taxpayer) obey the established interpretational practice, it is protected under the same conditions as in the case of individual tax rulings, general tax rulings or tax clarifications.

There are no examples of Polish rulings or other above-mentioned legal institutions, which have been scrutinized by the European Commission and considered as a prohibited State aid. A possibility to consider tax incentives given through an individual ruling as contrary to European Union State aid law is only theoretical and grounded in the assumption that a tax authority will either apply domestic provisions, which would be in contrary to the state aid rules, or will issue a ruling without a legal basis (both assumptions are unacceptable on the ground of the Polish legal order).

5. REFUND OF ILLEGAL STATE AID IN POLAND

To the most important domestic acts, concerning refund of the state aid, belong Act on Proceedings in State Aid Matters³⁵, Act on Public Finance³⁶, Act on Administrative Enforcement Proceedings³⁷ (act concerning execution of public debts), and provisions of Code of Civil Procedure³⁸ concerning judicial executive proceedings. On the ground of the European Law, crucial provisions for the described issue have been introduced into Council Regulation 2015/1589³⁹. Polish domestic acts do not repeat provisions of the Regulation 2015/1589 – in accordance with the requirements concerning implementation of the European

³³ See gen. A. Tim (2017), Interpretacje przepisów prawa podatkowego [Tax rulings], [in:] A. Mariański (ed.), Ordynacja Podatkowa 2017 [Tax Ordinance 2017], Warszawa, p. 59.

³⁴ See gen. Ibidem, p. 60.

³⁵ Act on Proceeding in State Aid Matters, Consolidated Text Official Journal of Laws 2018, heading 362, amended, hereinafter PSAMA.

³⁶ Act of 27.08.2009 - Public Finance Act, Consolidated Text Official Journal 2017 heading 2077, hereinafter PFA.

³⁷ Act of 17.06.1966 on Administrative Enforcement Proceedings, Consolidated Text Official Journal of Laws 2017 heading 1201, amended, hereinafter AEPA.

³⁸ Code of Civil Procedure, Consolidated Text Official Journal of Laws 2018 heading 155, amended, hereinafter: CPC.

³⁹ Council Regulation 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), Official Journal of the European Union 2015 L 248 pp. 9 et seq., hereinafter: Council Regulation 2015/1589.

Union law. In Poland it is also clearly stressed that the obligation to refund the illegal state aid is not absolute, since Regulation 2015/1589 contains 3 exceptions: legal certainty principle⁴⁰, principle of legitimate expectations⁴¹, absolute impossibility or expiration of the limitation period (10 years).⁴² On the ground of the Regulation 2015/1589, the European Commission can issue a decision, which has a direct effect in relation to the State⁴³. On the other hand, in the Polish domestic legal order, decisions issued by the European Commission are not directly applicable. That kind of rule is common in the European Union - the majority of the Member States refuse to recognize the direct effect of the European Commission decisions⁴⁴.

However, the Member States are bound by these decisions on the virtue of art. 288 par. 4 TFEU together with art. 4 par. 3 TEU, and are responsible only for a result of their actions – such a far reaching responsibility of states is being called in the legal writing an “obligation of result”⁴⁵. From the perspective of the Polish residents, decisions claiming the refund are not legal acts, but rather a non-normative acts, close in their essence to the national administrative acts. Therefore, as a result of the European Commission decision, the additional, domestic procedure should be opened. Pursuant to art. 27 PSAC, the authorities, which granted the state aid to a beneficiary, are also in charge to claim its refund. Only in exceptional cases it is possible to entrust another authority with a competence to lead the proceedings. As it was stressed above, in Poland the European Commission decisions are not binding for beneficiaries and, therefore, cannot be a warrant of execution. To have a legal basis for execution of the refund, it is necessary to initiate further-going proceeding, which is grounded entirely in the domestic legal order. If the aid was granted on the ground of administrative decision, the competent authority can annul or repeal it (art. 27-28 PSAC). If it was granted in the way of an agreement – the authority can claim for a dissolution of contract or for issuing a return warrant, in accordance to the private law provisions. Execution of such a liability is subject either to the administrative or civil execution rules⁴⁶.

In the legal doctrine it is stressed that there are numerous issues, which may make it difficult (or in some cases even impossible) to refund the tax aid. To these circumstances belong i.a. (1) a lack of renunciation as a source of the state aid and (2) temporary refund of state aid and the issue of keeping the date of execution the European Commission’s decision. M. Rzotkiewicz stresses that art. 27 PSAC does not take into account, that a renunciation can also provide to the state⁴⁷. However, such an oversight makes it not impossible to undertake proper actions by the public authorities. According to the latter circumstance – it is stressed that on the ground of the domestic legal order, none of legal institutions allows on execution of temporary refund of state aid, when a beneficiary exercises his or her procedural rights. However, some institutions - both on the ground of the administrative execution as well as in the civil procedure – may be used to secure the fulfilment of obligations⁴⁸. On the ground of the public law, a legal basis can be found in art. 33 *et seq.* To and on the ground of private law

⁴⁰ Judgment of the European Court of Justice, 29.4.2004, C-372/97.

⁴¹ Judgment of the European Court of Justice, 20.03.1997, C-24/95.

⁴² *See gen.* Dobaczewska 2017, p. 358.

⁴³ M. Rzotkiewicz (2016), Wykonywanie przez Polskę decyzji Komisji Europejskiej nakazujących odzyskanie pomocy państwa w świetle prawa Unii Europejskiej, Warszawa, p. 58.

⁴⁴ *Ibidem*, p. 67.

⁴⁵ *Ibidem*, p. 225.

⁴⁶ *Ibidem*, p. 226.

⁴⁷ *Ibidem*, p. 227.

⁴⁸ *Ibidem*, pp. 248-249.

– in art. 747 CPC. However, in both cases, securing of obligations cannot result in the satisfaction of the secured claims. On the other hand, there are numerous proceedings, which makes it easier to execute the European Commission decisions, in comparison to the general rules. President of the Office of Competition and Consumer Protection and the minister for agriculture and fishery are responsible for the effective refund of the illegal State aid. In the judicial and administrative proceedings, related to the obligation of the refund of illegal State aid, the POCCP and the Minister execute rights and duties of prosecutor as well as can execute their rights irrespective of a consent or even knowledge of a person, on which account the claim is lodged. In the civil procedure public authorities became applicants in the formal sense (art. 56 § 2 CPC) – e.g. they cannot renounce the claim, as well as reach a compromise and conclude an agreement before the court⁴⁹. Information about extension of the proceeding is made known to the public by the POCCP or the Minister, what is aimed to stimulate the beneficiary to refund illegal State aid within the time limit⁵⁰. It should be also noted that the State can indicate any other authority to conduct the proceedings on the state aid return⁵¹. Monitoring of the state aid in Poland is executed not only by the European Commission's representatives, but also was entrusted POCCP and - in the matter of agriculture and fishery – the minister of agriculture. Beneficiaries are obliged to provide POCCP with annual reports and information on his demand⁵². National reports are then presented to Sejm⁵³ and to the European Commission. In the legal writing it is stressed that such reports are often unreliable and do not cover all the necessary information⁵⁴.

Domestic tax law order contains also the institution, which has a significant impact on the possibility to change the final tax decision. Pursuant to art. 253a TO a final decision on the basis of which a party has acquired a right may be, upon this party's consent, annulled or amended by the tax authority which issued it unless special provisions are contrary to the annulment or amendment of such a decision and if this is justified by a public interest or an important interest of the party. The authority may not issue a decision detrimental to the party. From that reason such institution has significance in the domestic practice. However, pursuant to art. 27 par. 1 pt. 1 PSACA, tax authority, which has issued the decision, can repeal or change it also without a consent of the parties or can order the return of the aid. Furthermore, such a decision can be detrimental to the party. In cases concerning return of public aid, the 5-year period, limited the right to initiate such a proceedings, is also not applicable. Despite what was indicated above, the proceedings may take a lot of time, especially when the party will be its active participant. On the ground of the fiscal and administrative law occurs a necessity to carry out even two proceedings concerning illegal state aid – the first one concerns annulment of the final decision, which was a base for the state aid (the major basis for that activity is the art. 27 par. 1 pt. 1 PSACA). The latter is focused on issuing a new decision, in which return of the state aid would be ordered. In both proceedings a party can appeal from the decisions, as well as make a claim to administrative courts (administrative judicial proceedings is in Poland two-staged), what may significantly delay the day of execution of the Commission decision.

⁴⁹ Ibidem, p. 256.

⁵⁰ A. Dobaczewska (2017), *Pomoc...*, Op. Cit., p. 358.

⁵¹ Ibidem, p. 154.

⁵² Ibidem, p. 356.

⁵³ Lowest Chamber of the Polish Parliament.

⁵⁴ Ibidem, p. 356.

Besides above-described rules it should be noted that in more complicated and larger cases it is possible to regulate the return proceedings in the way of separate statute. Such a regulation was issued as a result of the Commission decisions concerning Polish shipyards, leading to their insolvency and closure⁵⁵. In these statutes the special procedures were adopted, tailored to the particular circumstances of the case.⁵⁶ What should be noted as interesting example of the particular position of the European Union law in the domestic legal order, in contrary to the illegal state aid on the ground of the European law, none of national authorities has an explicitly expressed right to claim the refund under WTO law on prohibited subsidies. The European Commission can indicate in a decision an amount of the illegal aid – however, that is not obligatory⁵⁷. Just as the amount of the illegal aid, the amount of the refund also does not have to be included in the decision. If so, national authorities will be obliged to compute it on their own. In the legal doctrine it is stressed that even when such a sum is included in the decision, Polish courts or authorities may make different conclusions – for the reason of a lack of direct effect of the European Commission decision. The interests are computed in a different than domestic manner. The base rate of interests, established for Poland since 1.4.2018 is 1,85%.⁵⁸ Therefore, unless the European Commission decides otherwise, the interests rate would be on a level of 2,85%. The detailed rules of computation of the interests, which was not established in the Regulation 2015/1589, shall remain in accordance with the Polish Civil Code or TO. In particular, interests are calculated to the date when state aid will be returned, with an exception concerning insolvency proceedings.

6. CONCLUSIONS

The tax state aid in the European Union is being called a particularly complicated issue, which at the same time has a great importance for the single market. For new Member States the issue of state aid has been called even as “puzzling” (Blauberger 2009, p. 1030). In 2012 at the European Union level certain actions were undertaken to make EU state aid control more efficient and predictable, some clarifications in relation to the fiscal state aid were concluded also in the European Commission Report from 2016⁵⁹ (German Federal Ministry of Finance 2017, p. 7). However, existing rules still raise many doubts, what has been brilliantly described by Ch. Bobby in the Article written from the American perspective: “*A Method inside the Madness: Understanding the European Union State Aid and Taxation Rulings*” (Bobby, 2017). The formal, advanced internal examination of the legislative bills under criterion of conformity with the European Union law has been established in Poland, significantly reducing the possibility of an unintended adoption of the law, being in contrary to the EU rules in general – not only to the European state aid rules. An advanced regulation, being a legal base for execution of the European Commission decision on recovery of the

⁵⁵ Commission Decision of 06.11.2008 no. C 17/2005 (ex N 194/2005 and PL 34/2004) on State aid granted to Shipyard Gdynia by Poland; Commission Decision of 06.11.2008 no. C 19/2005 (ex N 203/2005) on State aid granted to Shipyard Szczecin (Stettin) by Poland.

⁵⁶ Act of 19.12.2008 on compensation proceeding in entities, having particular significance for the Polish shipbuilding industry (Official Journal of Laws 2008 No. 233 heading 1569).

⁵⁷ M. Rzotkiewicz (2016), *Wykonywanie...*, Op. Cit., p. 84.

⁵⁸ Basis rates for the 28 Member States as od 1.4.2018, access: ec.europa.eu [access: 10th August.2018].

⁵⁹ European Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, OJ C 262, 19.7.2016.

state aid, have been also implemented into the domestic legal order. However, these rules could not be sufficient to execute the decision on time. To avoid that, in major cases special acts, tailoring general rules to the circumstances of a certain case, have been adopted. These special rules still do not solve the issue in a structured and systematic way. It could be concluded that in Poland advanced mechanisms have been established to guarantee the conformity between European Union law and domestic regulations, as well as between administrative practice in the scope of the tax law and fiscal state aid rules. Even if the regulation on sales tax act was recognised by the European Commission to be in contrary to the European Union law, the state aid was not effectively granted. However, as a reaction on the new tax, many companies changed their business models to avoid that tax, mainly in the way of significant reorganization (e.g. dividing into dozens of smaller companies⁶⁰). Although the tax was not effectively introduced, the doubts can be raised, if private entities did not suffer damage as a result of the new concept of taxation.

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⁶⁰ See gen. M. Zatoński (2016), Sklepy już uciekają przed podatkiem [Shops are running away from the tax], *Puls Biznesu* 07/2016.

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