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Financing green technologies through State aid – between the right to a clean environment and economic pragmatism

Introduction

With each month's temperatures exceeding historic maximums, the task of halting climate change is no longer regarded as a secondary concern and has been elevated to one of the European Union's (EU, the Union) top priorities. From a purely legal standpoint, this is reflected in an increased normativisation of the right to a clean environment and its increased judiciability[1]. At the practical level, efforts to address environmental degradation have taken the form of a set of policies under the common label of the European Green Deal. The initiative seeks to create a net-zero, emission-free European economy by 2050, limiting dependence on fossil fuels in an inclusive manner so that no group will be left behind and worse off as a result of economic transformation[2].

State aid law is one of the tools used to pursue the Green Deal's agenda. Aside from the Temporary Crisis and Transition Framework (TCTF), which is a short-term ruleset adopted in the aftermath of the Russian invasion of Ukraine, the European Commission (EC, the Commission) has adopted the Guidelines on State Aid for Climate, Environmental Protection, and Energy (CEEAG) as well as amended the existing General Block Exemption Regulation (GBER)[3]. All acts introduce new, more lenient compatibility criteria for aid

[1] See: A. Sikora, *European Green Deal – legal and financial challenges of the climate change*, „ERA Forum" 2021, No. 21, p. 685.

[2] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Green Deal, COM/2019/640 final.

[3] Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia (TCTF) [2022] (OJ C131/1); Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy 2022 (CEEAG) [2022] (OJ C80/1); Commission

measures designed to fund the development and commercial rollout of green technologies. In addition, public support for these eco-friendly technologies can be approved directly under Article 107(3)(c) TFEU. Resorting to State aid is generally considered necessary since many green technologies are either experimental, requiring maturing for commercial use, or are expensive[4].

This, in turn, creates a dilemma: On the one hand, the natural implication of the right to a clean environment is the increasingly permissive stance towards pumping public funds into the economy to pursue environmental goals. On the other hand, however, State aid is in principle prohibited in the Internal Market because a selective advantage granted to some undertakings is inherently distortive to trade and competition. Whereas only a highly competitive economy can generate enough revenue for the public purse to adequately fund all environmental initiatives.

The need to strike a delicate balance between fulfilling environmental objectives and maintaining well-functioning markets is multifaceted[5]. This paper will exclusively focus on the issue concerning the possibility of using the important goal of promoting green objectives as a convenient justification for Member States to create unfair advantages for selected undertakings when the existing interpretative standard for the assessment of aid's effect on trade and competition is lacking. In other words, the fact that environmental objectives are prioritized opens the door for abuses whereby any aid labelled as serving them may provide carte blanche for funding. While the author's intention is not to question the need to support green technologies, the described abuse may cause support for undertakings to become a goal, with environmental objectives merely a fig leaf.

To discuss the issue, the paper will take the following line of inquiry: First, the analysis will focus on synoptically presenting the status of environmental objectives and competition as processes among the goals of the EU. Then, the discussion will move to outlining the existing interpretative standard for as-

Regulation (EU) 2023/1315 of 23 June 2023 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty [2023] (OJ L167/1).

[4] N. Gràcia, I. Lunneryd, A. Papaefthymiou, *The race towards a more sustainable future: is current State aid policy fit for purpose?*, „Competition Law & Policy Debate" 2023, No. 8, p. 95.

[5] See e.g. Ch. Binet, *L'Europe et son Green Deal-Quel avenir pour le climat?*, „Journal de droit européen 2020", No. 5, pp. 207–211; M. Pianta, M. Lucchese, *Rethinking the European Green Deal: an industrial policy for a just transition in Europe*, „Review of Radical Political Economics" 2020, No. 54, pp. 633–647; R. Rodrigues, R. Pietzcker, P. Fragkos, J. Price, W. McDowall, P. Siskos, T. Fotiou, G. Luderer, P. Capros, *Narrative-driven alternative roads to achieve mid-century CO_2 net neutrality in Europe*, „Energy" 2022, No. 239(A), p. 121908. The list is not exhaustive but it does provide an overview.

sessing aid's effect on trade and competition. Subsequent analysis will be dedicated to how environmental and competition-related objectives potentially synergize with the discussed assessment standard in State aid cases, assessed either under secondary regimes or directly under the Treaty.

Normativisation of environmental objectives in the EU law

The objectives of the European Union do not have a hierarchy. Their broad catalogue set out in Article 3 TEU is a *superfluum* and paints an idealized picture of the desired European model of welfare, blending economic with non-economic goals[6]. The following passage from Article 3(3) TEU constitutes the general basis for the EU's environmental objectives: "The Union shall work for the sustainable development of Europe, based on (…) a high level of protection and improvement of the quality of the environment"[7]. The formula is largely repeated in Article 37 CFR by the reference to "a high level of environmental protection and the improvement of the quality of the environment", which should be integrated into EU policies. These general objectives are, to an extent, fleshed out in Article 191 TFEU, which states that the EU's environment-related policies should preserve, protect, and improve the quality of the environment; protect human health; ensure the prudent and rational utilization of natural resources; and promote measures at the international level to deal with regional or worldwide environmental problems, in particular combating climate change[8]. Notably, Article 191 TFEU further states that policies in these areas should be based on the precautionary principle, which means attempting to eliminate problems at their source rather than merely mitigating their effects[9]. This is prima facie what State aid to support green technologies intends to do.

Nevertheless, the vague and open-ended wording of all the primary law's provisions quoted above naturally compels viewing them more as policy declarations or guidelines rather than law sensu stricto[10]. Indeed, in C-149/96 *Portugal v. Council*, the Court stated that the objectives listed in Article 3 TEU "merely lay down a programme" and by themselves confer no rights nor create

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[6] J. Larik, *From speciality to a constitutional sense of purpose: on the changing role of the objectives of the European Union*, „International and Comparative Law Quarterly" 2014, No. 63, p. 935.

[7] L. Krämer, *EU environmental law. Bloomsbury*, London 2016, p. 12.

[8] D. Langlet, S. Mahmoudi, *EU environmental law and policy*, Oxford 2016, p. 35.

[9] M. Kellerbauer, M. Klamert, J. Tomkin (eds.), *The EU treaties and the Charter of Fundamental Rights: a commentary*, Oxford 2019, p. 1520.

[10] L.A. Avilés, *Sustainable development and the legal protection of the environment in Europe*, „Sustainable Development Law & Policy" 2012, No. 3, pp. 29–34, 56–57; L. Krämer, op. cit., p. 12.

obligations[11]. However, in C-284/95 *Safety Hi-Tech v. S. & T.* and T-229/04 *Sweden v. Commission* the Court of Justice (CJEU, the Court) has stated that "the principle that a high level of protection should be ensured must be substantially accepted", which when read together with Article 11 TFEU opens the door to greater normativisation and enforceability[12]. Yet such greater normativisation – in concrete legally actionable terms – is primarily seen in the context of the rights of individuals, which have no relevance to the discussed issue[13].

Whereas at the level of the status of environmental objectives vis-à-vis other EU objectives, while the *verba legis* has not changed since the Treaty of Lisbon, there is an observable shift in rhetoric in the acquis. This shift – facilitated by the systemic position of Article 3(3) TEU and Article 37 CFR – entails elevating environmental objectives from just one of the policies pursued by the EU to a guiding principle permeating the whole of EU legislation[14]. This is important for the discussed issue because the Court, on multiple occasions – e.g., in T-289/03 *BUPA* and T-275/11 *TF1* – held that the EC duty to apply non-State aid provisions when making State aid decisions arises only where certain aspects of aid are "indissolubly" linked with the object of the aid, such that failure to comply with those provisions would necessarily affect the compatibility of the aid with the Internal Market[15]. By affording environmental protection a cross-sectoral status, expanding beyond the confines of Article 191 TFEU, in the words of AG Bot, it is the "quintessence of what is both the raison d'être and the objective of the European project"; it could not be regarded as an external goal to those of State aid, on par with other sectoral and horizontal goals associated with many specific EU policies that State aid law also tangentially serves[16].

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[11] Case C-149/96 *Portugal v. Council*, EU:C:1999:574, para 86. However, in C-444/15 *Associazione Italia Nostra Onlus*, EU:C:2016:978, paras 64–64 and C-128/17 *Poland v. Parliament and Council*, EU:C:2019:194, paras 129–131, the Court stated that the validity of the secondary legislation may be subject to judicial review for its compliance with requirements deriving from Article 191 TFEU.

[12] Cases C-284/95 *Safety Hi-Tech v. S. & T.*, EU:C:1998:352, paras 49–55; T-229/04 *Sweden v. Commission*, EU:T:2007:217, paras 262–263. See also: case C-535/15 *Pinckernelle*, EU:C:2017:315, para 43.

[13] See e.g. K. Scheppele, D. Kochenov, B.Grabowska-Moroz, *EU values are law, after all: enforcing EU values through systemic infringement actions by the European Commission and the member states of the European Union*, „Yearbook of European Law" 2020, No. 39, p. 3 et seq.

[14] M. Humphreys, *Sustainable development in the European Union: a general principle*, Abigdon 2018, p. 44.

[15] Cases T-289/03 *BUPA and Others v. Commission*, EU:T:2008:29, para 314; T-275/11 *TF1 v. Commission*, EU:T:2013:535, paras 86–88.

[16] Opinion of AG Bot Case C-643/15 & C-647/15 *Slovakia and Hungary v. Council*, EU:C:2017:618, para 17.

Competition as a goal of EU the state aid law

From a purely systemic perspective, State aid rules are set out in Chapter 1, Title VII TFEU form a part of broader competition law. The Court also has held on multiple occasions that competition rules and State aid rules share the same objectives[17].

Article 3(3) TEU sets the objective of establishing the Internal Market, while Article 26 TFEU defines this market not only by removing the pre-Lisbon passus about "undistorted competition" but also by introducing the concept of a "highly competitive social market economy" while eliminating direct references to competition linked to the Internal Market. The imperative to ensure that competition is not distorted was relegated to Protocol 27 on the Internal Market and competition – this is the only mention of competition in the Internal Market context. According to Article 51 TEU, protocols are an "integral part" of the Treaties[18]. In this sense, legally, nothing has changed although de facto it may seem like a downgrade[19].

A view of State aid as merely a reactive part of competition law, as the above systemic analysis could prima facie suggest, is, in the author's opinion, incomplete. State aid is anticompetitive by definition. If avoiding distortion of competition were the overriding goal, then the prohibition encapsulated in Article 107(1) TFEU would have to be absolute. In this sense, the reference to "undistorted competition" in the State aid context is somewhat of a *lapsus linguae*, an automatic transposition of the pre-Lisbon antitrust mindset where this objective was thought to be possible to pursue (if not to be fully realized)[20]. Rather, more convincing are references to "workable competition" and "effective competition" seen in case law[21]. This results from a more realistic assumption that a black-and-white view of distortions to competition as something capable of being eliminated does not survive contact with reality[22]. A more nuanced approach to competition and a rigorous stance on permissible distortions were further reinforced with the introduction of the "social market economy" as

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[17] Cases C-225/91 *Matra v. Commission*, EU:C:1993:239, para 42; T-49/93 *SIDE v. Commission*, EU:T:1995:166, para 72; T-156/98 *RJB Mining v. Commission*, EU:T:2001:29, para 113.

[18] M. Kellerbauer, M. Klamert, J. Tomkin (eds.), op. cit., p. 332.

[19] See: A. Riley, *The EU reform treaty and the competition protocol: undermining EC competition law*, „European Competition Law Review" 2008, No. 12, pp. 703–707.

[20] F. de Cecco, *State aid and the European Economic Constitution*, Cheltenham 2012, p. 26. Although it must be noted that references to "undistorted competition" have also appeared in post-Lisbon case law: E.g. C-622/16 P *Scuola Elementare Maria Montessori v. Commission*, EU:C:2018:873, para 52; T-47/19 *Dansk Erhverv v. Commission*, EU:T:2021:331, para 66.

[21] E.g. cases 6/72 *Europemballage Corporation and Continental Can Company v. Commission*, EU:C:1973:22, para 26; 26/76 *Metro v. Commission*, EU:C:1977:167, paras 20–21; C-209/78 *Van Landewyck v. Commission*, EU:C:1980:248; para C2; T-88/92 *Leclerc v. Commission*, EU:T:1996:192, para 70.

[22] W. Sauter, *Coherence in EU competition law*, Oxford 2016, p. 109.

a backbone of the EU economic model by the Treaty of Lisbon[23]. However, this step must be seen merely as a codification of earlier trends, not as a single causative factor[24].

When read in the spirit of the "Laval Quartet" – a series of cases where the Court stated that the EU serves not only economic goals and that obligations of the Internal Market must be balanced by other EU policies – it is clear that the act of balancing various objectives should take place in all spheres of EU law[25]. Perhaps a competition-oriented approach should indeed be strongly emphasized overall in State aid cases, but not as the sole and overriding criterion[26]. Therefore, competition concerns must not be analysed in isolation from the policy goals associated with specific sectoral and horizontal aid regimes[27]. If this were the case, then one would have to question the whole concept of State aid compatible with the Internal Market. And while indeed there is no rule of reason in determining whether a measure constitutes State aid, the subsequent compatibility assessment essentially boils down to determining whether there is a valid policy counterweight for the distortion of competition[28]. This counterweight (even post-Hinkley Point) must at least generally be derived from Article 3 TEU; otherwise, there could be no compatibility with the Internal Market[29].

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[23] It must be noted that the issue of what exactly constitutes a social market economy, and whether and to what extent it can be realized by the EU with the associated impact on competition rules, remains open to discussion. Cf e.g. F. Scharpf, *The asymmetry of European integration, or why the EU cannot be a 'social market economy'*, „Socio-Economic Review" 2010, No. 8, pp. 211–250 with e.g. D. Damjanovic, *The EU market rules as social market rules. Why the EU can be a social market economy*, „Common Market Law Review" 2013, No. 50, pp. 1685–1717.

[24] F. Jorges, S. Rödl, *„Social market economy" as Europe's social model?*, „EUI Working Paper LAW" 2004, No. 8, s. 19–21. The change in the CJEU's approach has started from cases C-267/91 *Keck and Mithouard*, EU:C:1993:905; C-185/91 *Bundesanstalt für den Güterfernverkehr v. Reiff*, EU:C:1993:886; C-2/91 *Meng*, EU:C:1993:885.

[25] Cases C-341/05 *Laval un Partneri*, EU:C:2007:809, paras 104–105; C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union*, EU:C:2007:772, paras 78–79; C-346/06 *Rüffert*, EU:C:2008:189; C-319/06 *Commission v. Luxembourg*, EU:C:2008:350.

[26] See: L. Parret, *The multiple personalities of EU competition law: time for a comprehensive debate on its objectives*, [in:] D. Zimmer (ed.), *The goals of competition law*, Cheltenham 2012, p. 80. The author argues that Article 3 TEU, read together with the imperative of maintaining consistency between EU policies as set out in Article 7 TFEU, does not justify giving competition a more prominent role than any other objective.

[27] See e.g. P. Werner, V. Verouden (eds.), *EU state aid control: law and economics*, Alphen aan den Rijn 2016, pp. 195–202; H.W. Friederiszick, L.-H. Roller, V. Verouden, *European state aid control: an Economic framework*, [in:] P. Buccirossi (ed.), *Handbook of antitrust economics*, Cambridge 2008, pp. 641–647.

[28] H. Kassim, B. Lyons, *The new political economy of EU state aid policy*, „Journal of Industry, Competition and Trade" 2013, No. 13, p. 1.

[29] Opinions of AG Trstenjak in case C-271/08 *Commission v. Germany*, EU:C:2010:183, paras 183–184, 190; AG Cruz Villalon in case C-515/08 *dos Santos Palhota and Others*, EU:C:2010:245, paras 51, 54. In T-356/15 *Austria v. Commission (Hinkley Point)*, EU:T:2018:439 case, the Court held that Article 107(3)(c) TFEU aid does not have to pursue objectives of "common interest".

Assessment of effect on trade and competition in state aid cases

From the above brief overview of the systemic position of environmental objectives and competition in EU law, it is clear that their axiological equality is neither new nor legally controversial. However, the actual balancing of these goals may prove problematic when viewed through the lens of the standard of assessment of the effect on trade and competition in State aid cases. Critical voices directed at this standard, as lagging behind antitrust and merger control in the utilization of economic knowledge, are raised with telling regularity[30].

Although distortion of competition and distortion of trade are separate criteria, they are almost always assessed together, and fulfilling one tends to mean the other is fulfilled as well, with only incidental exceptions in the acquis[31]. State aid must at least be liable to distort trade and competition[32]. For the purpose of State aid cases, no actual data concerning the measure's impact is analysed[33]. The sole reliance on forecasts cannot be criticized by itself. The reason is that notifiable State aid is assessed ex ante, before the measure enters into force. As the Court stated in C-298/00P *Italy v. Commission*, accepting the actual data would benefit those Member States who violated the obligation to notify aid because only they would have actual data when adopting measures without prior notifying the Commission[34].

The standard for assessing the forecasted effect of aid on trade and competition is not particularly high. It is generally regarded as a product of the interpretative approach first applied by the Court in the 730/79 *Philip Morris* ruling, particularly the following passage: "When state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade, the latter must be regarded as affected by that aid"[35]. To ascertain the distortive effect of State aid, notwithstanding

[30] See e.g C. Ahlborn, C. Berg, *Can state aid control learn from antitrust? The need for a greater role for competition analysis under the state aid rules*, [in:] A. Biondi, P. Eeckhout, J. Flynn (eds.), *The law of state aid in the European Union*, Oxford 2004, pp. 40–65; J. Temple, J. Lang, *EU State aid rules – the need for substantive reform*, „European State Aid Law Quarterly" 2014, No. 13, pp. 440–453; S. Cnossen, G. Dictus, *Big on big, small on small: never ending promise? Critical assessment of the Commission decision practice with regard to the effect on trade criterion*, „European State Aid Law Quarterly" 2021, No. 20, pp. 30–40.

[31] With rare exceptions of "purely local" operations, which may have an impact on competition but not on trade. See e.g. Decisions SA.44692 *Port of Wyk*, [2016] OJ C302; SA.44942 *Basque Language*, [2016] OJ C369.

[32] E.g. cases C-148/04 *Unicredito Italiano*, EU:C:2005:774, para 55; C-494/06 P *Commission v. Italy and Wam*, EU:C:2009:272, para 50.

[33] E.g. cases C-372/97 *Italy v. Commission*, EU:C:2004:234, para 44; T-211/05 *Italy v. Commission*, EU:T:2009:304, para 152.

[34] Case C-298/00 P *Italy v. Commission*, EU:C:2004:240, para 49 and similarly in C-346/03 *Atzeni and Others*, EU:C:2006:130, para 74.

[35] Case 730/79 *Philip Morris*, EU:C:1980:209, para 11.

direct references in the acquis to "competitive conditions", "markets", or "competitors", there is no requirement to carry out an economic analysis involving the identification of relevant markets, existing competitors, their respective market shares, and an analysis of how the aid would impact their situation[36]. There is no need to identify competitors at all[37].

Nevertheless, in T-254/00 *Hotel Cipriani*, the Court stated that the effect on trade and competition cannot simply be assumed[38]. Instead, the EC must present circumstances leading to the conclusion that a measure is liable to be distortive. In practice, this means that the Commission must present a theoretically valid, justifiable on the grounds of microeconomics, mechanism of how a measure under review would affect markets. Given that no identification of relevant markets and other key elements of assessment is required, there would be insufficient input of methodologically valid factual data. And for this reason, the EC's assessment does not go far beyond nomothetic generalizations. As a result, there exists a quasi-assumption that a measure conferring selective advantage is almost automatically distortive[39]. Even though in C-15/98 *Sardegna Lines* the Court clearly stated that the EC cannot simply recycle the findings on selectivity to determine distortive effect, this dicta in practice primarily refers to editorial and drafting aspects of the decision rather than substantive issues[40].

Notably, however, the newest case law can be seen as an early precursor of improvement in this area. It is too early to speculate whether indeed these so far ad hoc and scattered cases, where the Court criticized the Commission for its perfunctory approach to the effect on trade and competition, will catch on. In any case, while there are some signs of a drive towards a more rigorous assessment of distortion caused by aid measures, they so far lack transparency, consistency, and methodological rigour in approach, thus providing no meaningful guidance as to what improvements could be made in the standard of assessment of the effect on trade and competition[41].

It can be said, in conclusion to this segment of the discussion, that since the existing standards fail to gauge the scale of distortion, the twin criteria of effect on trade and competition are therefore approaching a black-and-white

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[36] E.g. cases C-654/17 P *Bayerische Motoren Werke v. Commission and Freistaat Sachsen*, EU:C:2019:634, para 91; T-160/16 *Groningen Seaports and Others v. Commission*, EU:T:2018:317, para 91; T-253/12 *Hammar Nordic Plugg v. Commission*, EU:T:2015:811, para 131; T-58/13 *Club Hotel Loutraki and Others v. Commission*, EU:T:2015:1 para 88–89.

[37] Case T-210/02 RENV *British Aggregates v. Commission*, EU:T:2012:110, para 72.

[38] Case T-254/00 *Hotel Cipriani v. Commission*, EU:T:2008:537, paras 227–228.

[39] A. Heimler, F. Jenny, *The limitations of European Union control of state aid*, „Oxford Review of Economic Policy" 2012, No. 28, p. 347.

[40] Case C-15/98 *Italy and Sardegna Lines v. Commission*, EU:C:2000:570, paras 66–67.

[41] See especially cases T-578/17 *a&o hostel and hotel Berlin v. Commission*, EU:T:2019:437; C-466/21 P *Land Rheinland-Pfalz v. Deutsche Lufthansa*, EU:C:2023:666.

category: Either they are met because the measure is selective or they are not when the measure is not selective. However, it can also be argued that any attempts at measuring economic effects on the market are misplaced in the discussed context. Even if the assessment standard were to improve, ultimately one faces an "apples and oranges" type of situation where there exist no common metrics to weigh economic quantifiable effects against non-economic environmental objectives. The assessment would thus always involve value judgment, especially considering the axiological equality of these objectives. This argument is only partially correct. This is because if the standard of assessment of aid effect on trade and competition fails to detect all economic effects, there is a risk – increasingly recognized – that aid can be used to create unfair advantages for some market players, all without achieving stated environmental objectives.

Design philosophy of aid framework – a single point of failure

The highlighted problem of inadequate balancing of the environmental against competition objectives has, while not solved, to some extent been circumvented at the secondary law level. Especially the CEEAG, but also the still-in-force TCTF and amended GBER, introduced a model where compatibility criteria are highly formalized. Where possible, these criteria are described in quantitative terms setting out permissible levels of aid intensity, duration, etc., for specific objectives, specific green technologies, and so on. It is therefore assumed that when aid falls within the limits set out in secondary law, its distortive effects would be at a manageable enough level to be declared compatible with the Internal Market[42].

Such a model has its undeniable advantages as it fosters transparency and certainty of law. It is also indispensable for non-notifiable GBER, whereby Member States responsible for self-assessment must have clear enough instructions to avoid encroaching upon the EC's sole competence in declaring aid compatible with the Internal Market[43]. However, at the same time, this described model constitutes, to use an analogy from engineering, a system with a single point of failure. This means that if one part fails, it can bring down the entire system. In this case, the single part upon which the system's operation hinges refers to the assessment of the measure's impact on the market, which is conducted at the legislative level during the design of compati-

[42] N. Gràcia, I. Lunneryd, A. Papaefthymiou, op. cit., p. 95. The model has been "battle-tested" in GBER.

[43] Constantly emphasised in the case-law. E.g. in T-296/97 *Alitalia v. Commission*, EU:T:2000:289, para 73; T-323/99 *INMA and Itainvest v. Commission*, EU:T:2002:38, para 56.

bility criteria. If these criteria are deficient, it will have a cascading knock-on effect on all State aid cases assessed under the given framework.

The arising question of whether such a design may indeed hinder achieving environmental objectives boils down to, first, whether lawmakers will be capable of objectivizing their legislative process, and second, whether they will be able to gather and analyse sufficient data inputs to make as informed decisions as possible while mitigating as many negative consequences and gaps as possible.

Concerning the former aspect, every collective decision is burdened with several biases[44]. The EC, not being dependent on political considerations of electoral cycles, lessens its susceptibility to short-term political expediencies. Nevertheless, since various biases marring the objectivity of actions are inherent in human nature, they cannot be eliminated in any situation. At best, they can be minimized by achieving what Rawls described as a system in which "(…) there is no independent criterion for the right result: instead, there is a correct or fair procedure such that the outcome is likewise correct or fair, regardless of what it is, as long as the procedure has been correctly followed"[45].

With regards to the latter aspect, when discussing the integration of economic knowledge into legislative processes, a relatively new concept called science-based lawmaking emerges, describing a technocratic approach to lawmaking[46]. This approach conceptually stands as a counterpart to the more economic approach well-known in antitrust and merger control, which emphasizes the application rather than the creation of laws. It is also reflected in the Better Regulation Package, aimed at ensuring that EU policymaking is evidence-based[47]. In terms of the general approach, if taken seriously, science-based lawmaking should furnish lawmakers with more practical data compared to the current standard of assessing the effect on trade and competition in individual cases.

However, the only guarantee for such evidence-based lawmaking lies in the duty to provide adequate reasoning as set out in Articles 296 TFEU and 41 CFR[48]. These provisions are frequently invoked in individual cases, where the interpretative approach to the locus standi of unprivileged applicants typically prevents cases from being assessed on their merits[49]. Consequently,

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[44] W. Eskridge, J. Ferejohn, *Structuring lawmaking to reduce cognitive bias: a critical view*, „Cornell Law Reviev" 2002, p. 620.

[45] J. Rawls, *Theory of justice*, Cambridge 1971, p. 86.

[46] D. Avgerinopoulou, *Science-based lawmaking. How to effectively integrate science in international environmental law*, Cham 2019, p. 15.

[47] Better regulation: joining forces to make better laws, COM(2021) 219 final.

[48] Reasoning must be sufficient for judicial control. Case C-108/81 *Amylum v. Council*, EU:C:1982:322, para 19.

[49] See example in e.g. case C-583/11 P *Inuit Tapiriit Kanatami and Others v. Parliament and Council*, EU:C:2013:625.

there is scarce case law on whether an insufficient economic impact assessment, forming the basis of contested acts, constitutes valid grounds for annulment. Even if a privileged applicant were to bring an action for annulment, one may question – albeit theoretically due to a lack of case law – the Court's ability to assess the adequacy and quality of an aid's effect on trade and competition. Especially considering that the Court cannot replace the EC's economic analysis with its own[50]. While a complete lack of reasoning would be identifiable, issues such as insufficient methodology or the need for more data would likely remain unverifiable[51].

Although hardly a decisive factor by itself, nevertheless, the de facto uncontrollability of how thoroughly economic knowledge was relied upon during the legislative process may be interpreted as disincentivizing legislators from carrying out time-consuming, elaborate analyses, which may potentially derail the political vision they are pursuing. A counterargument may be tentatively proposed that even without controllability, there is an incentive to rely as much as possible on economic knowledge because, without it, adopted measures would fail to fulfil intended objectives. Since the actual legislator's stance will likely not lean entirely towards one of these opposing motivations, in this sense, the single point of failure-based model is neither inherently better nor worse than a more case-specific approach when assessment in the latter is carried out under the existing standard of assessment of effect on trade and competition.

Moreover, the lawmakers' heavy reliance on quantitative criteria poses the risk of excessive rigidity and inflexibility, which may hinder acts' ability to fulfil their *ratio legis*[52]. This aspect is also part of a broader, ongoing, and ultimately unresolvable debate between certainty and flexibility in law[53]. While this debate is beyond the scope of this paper, it suffices to point out the following dilemma: overly rigid rules will fail to react to changing realities in a timely manner – for example, to new developments in green technologies – or conversely, too frequent changes will harm legal certainty and may be too spurious by, for example, introducing lenient aid conditions for technologies before determining whether they are viable[54]. Since there will never be an optimum balance between certainty and flexibility, the existence of both risks must be recognized as unavoidable.

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[50] Judicial review is limited to questions of law. See cases C-225/91 *Matra v. Commission*, EU:C:1993:239, para 23; C-323/00 P *DSG v. Commission*, EU:C:2002:260, para 43; C-290/07 P *Commission v. Scott*, EU:C:2010:480, para 64.

[51] See example in case T-1/08 *Buczek Automotive v. Commission*, ECLI:EU:T:2011:216 especially paras 103–107.

[52] See: K. Roosevelt, *Certainty v. flexibility in the conflict of laws*, „Public Law and Legal Theory Research Paper" 2018, No. 2–3, pp. 18–40.

[53] Certainty of law has many aspects. Their analysis is beyond the scope of this paper. See: F. Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*, Vienna 2011, p. 325.

[54] S. Ranchordás, *Sunset clauses and experimental regulations: blessing or curse for legal certainty?*, „Statute Law Review" 2015, No. 36, p. 28.

Assessing State aid directly under the Treaty

The observable emphasis on quantitative compatibility criteria and exhaustively described aid targeting also mean that there is no practical possibility for all potential green technologies and, broadly speaking, eco-friendly improvements to be exhaustively listed in ex-ante criteria set out in secondary law or soft law. For this reason, one must reasonably expect an increased number of cases to be assessed directly under the Treaty.

Over the years, the European Commission has strived to depart from the direct application of Article 107 TFEU alone. Instead, an effort has been made to "encase" the general, open-ended Treaty criteria with more detailed ones set out either in secondary law or in soft law[55]. The overriding goal is to introduce as much transparency and certainty as possible while retaining the degree of flexibility offered by the open-ended Treaty provisions.

According to the Court in e.g. T-380/94 *AIUFFASS* or T-27/02 *Kronofrance*, although the EC is not formally bound by its earlier interpretations in State aid cases, it must adhere to secondary law or soft law regulating a particular area when these rules exist[56]. When such rules are in place, the EC, according to the Court, can rely on the Treaty directly only in "exceptional circumstances"[57]. While there can be no detailed guidance on what constitutes such circumstances, in practice, the direct application of Article 107 TFEU is not uncommon.

When measures are assessed directly under the Treaty, the layer of protection against undue distortion of competition and trade afforded by lawmakers defining precise quantitative criteria is absent. Although here, the argument of "apples and oranges" concerning the lack of common metrics to assess economic and non-economic goals comes into play, nevertheless, the existing standard of assessment of impact on trade and competition used in individual cases fails to identify which market players may be negatively affected and to what extent by State aid to support green technologies granted to other undertakings.

This is important because the decision to grant State aid is the sole competence of Member States. As explicitly stated by the Court in the C-850/19 P *Holýšov* case, there is no such thing as a right to State aid[58]. No one can successfully request to receive aid on the grounds that someone else in a comparable legal and factual situation received it. If then environmental objectives

[55] O. Ştefan, *Soft law in court: competition law, state aid, and the Court of Justice of the European Union*, Den Haag 2013, pp. 52–57.

[56] Cases T-380/94 *AIUFASS and AKT v. Commission*, EU:T:1996:195, para 57; T-27/02 *Kronofrance v. Commission*, EU:T:2004:348, para 79.

[57] Cases C-526/14 *Kotnik and Others*, EU:C:2016:570, paras 41–43 and 98; C-431/14 P *Greece v. Commission*, EU:C:2016:145, paras 70–75.

[58] Case C-850/19 P *FVE Holýšov and Others v. Commission*, EU:C:2021:740, para 142.

are regarded as important enough to solely justify granting aid, then by largely discarding meaningful analysis of effects on other market players, a door to potential abuses opens whereby Member States may create undue advantages for selected undertakings using carte blanche funding. This, in turn, creates a situation highly conducive to subsidy arms racing – something that EU State aid law was originally designed to prevent[59].

It must be noted that this is a risk that also occurs where there is secondary legislation or soft law in place. As the Competition Commissioner Vestager observed, regardless of how lenient aid compatibility criteria may be, nothing can compel Member States to use them. Therefore, wealthier States will naturally be better positioned to take advantage of easier justifications for State aid, thereby contributing to deepening developmental disparities between wealthier and poorer Member States[60]. At the same time, this risk is inherent as long as funds are coming from Member States. Yet even though it cannot be eliminated due to the nature of State aid, the subpar standard of assessment of impact on trade and competition increases such risk beyond what is unavoidable.

Conclusions

In the beginning of the conclusion, it must be clearly stated that no one can at present reasonably question the need to take urgent steps to address environmental degradation and, by implication, the necessity to spend substantial resources for that purpose. However, it must be done reasonably. Even accepting the premise of overriding environmental objectives, the possible room for abuses described in this paper cannot be treated as a price worth paying for tackling the environmental crisis. This is because such abuses will ultimately be self-defeating; the actual effect on improving the environment, when the measure is in fact concealed support for specific undertakings, will be questionable at best, and the economy, which must generate enough funds to support states' initiatives, will suffer as a result. In this sense, State aid – when seen from the whole EU perspective – is a distinctly suboptimal tool because, firstly, it will always be distortive, and secondly, being dependent on whether Member States are willing and able to spend their funds, it will also to an extent deepen economic disparities between EU Members. There is no possibility of halting aid granted by a wealthier State solely for the reason that a less affluent State has not decided to support its own undertakings in a similar manner.

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[59] See: D. Gerber, *Law and competition in twentieth century Europe. Protecting Prometheus*, Oxford 2001, p. 347.

[60] Introductory speech of Commissioner Vestager on the TCTF draft, 1 February 2023, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_23_527 (accessed: 18.06.2024).

Therefore, regarding the importance of environmental objectives as almost carte blanche for funding is not a sign of seriously approaching the combat against climate change. Rather, it is a sign of wastefulness. On a final note, thus, both as a postulate and as an opening for new avenues of research inquiries, is – to call for greater emphasis on state aid for research and development, together with more importance placed on the commercial viability of technologies funded through state aid.

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Summary

Financing green technologies through State aid – between the right to a clean environment and economic pragmatism

Keywords: European Union law, state aid, Green Deal, green technologies, competition.

The need to counteract the progressing degradation of the natural environment has become one of the European Union's top priorities. Efforts in this direction are carried out through a set of policies and legislative initiatives

under the common label Green Deal. The stated objective is to eliminate emissions caused by the European economy and reduce its dependence on fossil fuels. This requires employing State aid since many necessary green technologies are immature and expensive. This paper presents the relationship between the Treaty's imperative of promoting a clean environment and the objective of maintaining a competitive European economy. The analysis will seek to verify the hypothesis that the existing standard of assessment of the effect on trade and competition used in State aid cases can potentially lead to abuses whereby Member States can create an unfair advantage to selective undertakings by using environmental justification as *carte blanche* for funding.

Streszczenie

Finansowanie zielonych technologii przez pomoc państwa – miedzy prawem do czystego środowiska a ekonomicznym pragmatyzmem

Słowa kluczowe: prawo Unii Europejskiej, pomoc państwa, Zielony Ład, zielone technologie, konkurencja.

Konieczność przeciwdziałania postępującej degradacji środowiska naturalnego stała się jednym z priorytetów Unii Europejskiej. Wysiłki w tym kierunku są realizowane w ramach zestawu polityk i inicjatyw prawodawczych łącznie określanych jako Zielony Ład. Docelowo europejska gospodarka ma stać się bezemisyjna oraz uniezależnić się od paliw kopalnych. Wymaga to opracowania i wdrożenia całego szeregu zielonych technologii, które często są jeszcze eksperymentalne lub kosztowne, stąd konieczne staje się zaangażowanie pomocy państwa. W tym kontekście celem niniejszego artykułu jest przedstawienie relacji między traktatowymi imperatywami wspierania ochrony środowiska i utrzymania konkurencyjności gospodarki europejskiej. Prowadzona analiza ma za zadanie udowodnić hipotezę postawioną w artykule, że istniejący interpretacyjny standard dotyczący oceny wpływu środka pomocowego na handel i konkurencje otwiera drogę do nadużyć, gdzie państwa mogą tworzyć niektórym przedsiębiorstwom nieuczciwą przewagę konkurencyjną, wykorzystując uzasadnienie konieczności ochrony środowiska jako *carte blanche* dla subsydiowania.