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Observations about the Notification Procedure for State Aid, Notification for Legal Certainty, and the Standstill Clause in article 108(3) TFEU

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Observations about the Notification Procedure for State Aids, Notification for Legal Certainty, and Standstill

1. Introduction

Over the past few years there have been preparations in Finland aimed at reforming the structure of social and healthcare services (so-called SOTE reform), in which the responsibility for organising public social and healthcare services would be transferred from municipalities and municipal federations to larger autonomous regions, or provinces. The provinces would not have the right to levy taxes. Provinces would be responsible for organising social and healthcare for the residents of their regions, but both public and private sector providers would be responsible for producing the service. Thus the customer would have the freedom to choose either the public or private sector as their provider of basic services (freedom of choice legislation). This kind of situation enables, at the very least, quality-based competition between private and public service providers. This, in turn, opens a debate on potential state aid because public service providers get an advantage through their bankruptcy protection, for instance.

Most recently, there has been a debate in connection with the drafting of the new legislation on the social and healthcare sector and provinces of how state aid problems related to the legislation should be notified to the Commission. The Government's premise has been that the legislative proposals do not entail state aid and therefore there is no obligation to notify. In spite of this, in February 2019 in its opinion of PeVL 65/2018 vp the Constitutional Law Committee required that questions concerning state aid of the legislative proposals must be notified to the Commission in accordance with the procedure laid down in Article 108 (3) of TFEU. As a result of this, the Government was going to issue "a notification of legal certainty" ("oikeusvarmuusilmoitus") in order to obtain a declaration of

why it believes there is no reason to execute an actual notification under TFEU 108(3). In the end, problems with EU Law and the constitution proved to be so great that the Government of Prime Minister Juha Sipilä tendered its resignation on March 8, 2019. I analyse this Finnish state aid problem in the following article mainly from the perspective of the notification procedure.

2. Notifications to the Commission regarding matters of state aid

Notification is governed by the Commission Regulation (EU) 2015/2282¹; the following four types of notifications appear in Part 1 of its Annex 1:

- a) Pre-notification
- b) Actual notification, or notification under Article 108 (3) of TFEU
- c) Simplified notification under Article 4(2) of Regulation (EC) No 794/2004
- d) Notification for legal certainty

Of these, the key procedure is the actual notification, so I will only give a brief description of pre-notification, simplified notification, and notification for legal certainty.

2.1 Pre-notification

A pre-notification is not yet an actual notification, the submission of which triggers the start of the time limits that are related to the notification procedure and are binding on the Commission. A pre-notification serves as a background for the so-called pre-notification procedure², which makes it possible to prevent an investigation from becoming locked in the actual notification procedure under part b), and to minimise the risk of advancing to the formal investigation procedure under Article 108 (2) of TFEU. It is therefore natural that a pre-notification would be submitted during the initial phase of a legislative project before political decisions on the details of the aid scheme have been made. Confidential discussions related to the pre-notification phase between the member state and

¹ See Council Regulation (EU) 2015/1589 of 13 July 2015 which lays down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, page 9.

² For more information on the pre-notification procedure, see e.g. *Alkio, Mikko – Hyvärinen, Olli: Valtiontuet, Talentumpro, Helsinki, 2016, p. 471-474.*

Commission usually last about two months, albeit this length of time varies depending on the scope³ of the state aid question under consideration. If necessary, problematic features of an aid scheme can be changed in connection with pre-notification.

2.2 Simplified procedure

If a member state sees the existence of a certain element of state aid in a legislative project but believes, with good reason, that it will be approved in the Commission's review, there is an accelerated procedure for this called a simplified procedure.⁴ In its notice, the Commission has given a detailed description of the kinds of contexts in which simplified procedure comes into play. For example, it is used when the budget of an authorised aid scheme is raised by more than 20 per cent or when an approved aid scheme is extended for a maximum of six years. Under the simplified procedure, an aid for which there is no doubt as to its compatibility with the internal market, is approved one month after member states have submitted a complete notification of it.⁵ Application of this procedure was never proposed in connection with the SOTE matter.

2.3 Notification for legal certainty

There has been very little research on notifications for legal certainty in legal literature that deals with state aid law.⁶ In fact the term itself is merely an abbreviation of the expression in Part 1 of Annex 1 of (EU) 2015/2282.

” a measure which does not constitute State aid within the meaning of Article 107(1) TFEU but is notified to the Commission for reasons of legal certainty/ En åtgärd som inte utgör statligt stöd i den mening som avses i artikel 107.1 i EUF-fördraget men som anmälts till kommissionen av rättssäkerhetsskäl”.

³ See *Bacon, Kelyn*: European Union Law of State Aid, Second edition, Oxford University Press, Oxford, 2013, p. 446.

⁴ See Notice from the Commission on a simplified procedure for treatment of certain types of State Aid, OJ C 136, 16.6.2009, p. 3, and Commission Regulation (EC) No 794/2004, of 21 April 2004, implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.4.2004, p. 1, Article 4 (2), and in more detail from e.g. *Bacon* 2013, p. 444-446.

⁵ See Notice from the Commission on a simplified procedure for treatment of certain types of State Aid, OJ C 136, 16.6.2009, p. 3.

⁶ See *Alkio-Hyvärinen* 2016, p. 482-483.

A notification for legal certainty can be made where a member state does not see anything to be notified in its legislative project, in other words does not believe the conditions of state aid within the meaning of Article 107 (1) of TFEU are fulfilled. The member state has the competence to decide on what stage of a legislative process it makes a notification of legal certainty or an actual notification, but in principle, the system dealing with state aid notification assumes that a notification is made early enough to afford the Commission an opportunity to affect the content of the legislation.⁷ In that sense, not issuing a notification for legal certainty until the legislative project is brought to the national parliament for adoption is inappropriate timing from the point of view of EU Law. Regulation (EU) 2015/2282 instructs a government that is resorting to a notification for legal certainty to specify in detail why it considers that the measure does not constitute State aid within the meaning of Article 107(1) of TFEU. For example, a member state must clarify whether the notified measure implies a transfer of public resources or whether the notified measure confers an advantage upon undertakings. It is also essential to determine whether the aid is selective, whether it affects competition within the internal market, or whether it threatens to distort intra-Union trade.

3. Actual notification procedure

The basis of the procedure for monitoring new and altered state aids is the notification obligation of member states, which is indicated in Article 108 (3) of TFEU. Commission Regulation (EU) 2015/2282⁸ deal with state aid notification, and lays down detailed rules for using notification forms, among other things, to determine what kind of state aid is at issue. According to Article 1 (c) of the so-called procedural regulation of 2015/1589⁹ on state aid, “new aid”, in other words aid that is to be notified to the Commission under TFEU 108 (3), refers to:

c) ... all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

A similar regulation is included in Article 1c¹⁰ of the predecessor of the 2015 regulation, Council

⁷ See T-188/95 Noord-West Brabant v. Commission (1998) ECR II-3716, point 118, which states: “...aid measures must therefore be notified to the Commission while they are still at the draft stage, that is to say before they are implemented and while they are still capable of being adjusted in the light of any observations the Commission may have”.

⁸ See OJ L 325, 10.12.2015, p. 1.

⁹ See OJ L 248, 24.9.2015, p. 9.

¹⁰ See Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article

Regulation (EC) No 659/1999. Thus, in principle, any aid scheme that does not fall within the scope of the *de minimis* regulation (EC) No 1407/2013¹¹, general block exemption regulation (EU) No 651/2014¹², or the decision to grant an exemption related to aiding SGEI services 2012/21/EU¹³ must be notified to the Commission, though the actual definition of state aid in TFEU 107 (1) creates legal uncertainty in borderline cases.

An actual notification triggers a so-called preliminary and formal investigation procedure in the Commission. Upon receiving a notification of state aid, the Commission begins a preliminary investigation procedure to see whether the aid is compatible with the internal market.¹⁴ At this stage, the Commission does not have an obligation to consult third parties. The Commission must issue its preliminary opinion on whether the aid is compatible with the internal market within two months of receiving a complete notification; this too is connected with legal certainty.¹⁵ At the end of the preliminary investigation the Commission must take a decision on the compatibility of the aid with the internal market. The alternatives are: the aid is not prohibited state aid; it is permitted on an exceptional basis; or it is incompatible with the internal market, in which case the Commission initiates the formal investigation procedure referred to in TFEU 108 (2). The Commission may take a decision not to initiate a formal investigation procedure only if it does not encounter any serious difficulties in its preliminary investigation in assessing the compatibility of the aid measure with the internal market.¹⁶ The concept of serious difficulties has not been defined precisely, so it has been necessary to clarify it by means of case-law.¹⁷

A formal investigation procedure is defined in Article 108 (2) of TFEU. It must be initiated if the Commission is not convinced of the compatibility of the aid with the internal market on the basis of

93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1, and case-law, for example C-690/13 Trapeza Eurobank Ergasias, ECLI:EU:C:2015:235, paragraphs 47-54.

¹¹ See OJ L 352, 24.12.2013, p. 1.

¹² See OJ L 187, 26.6.2014, p. 1.

¹³ See OJ L 7, 11.1.2012, p. 3.

¹⁴ See 120/73 Lorenz (1973) ECR 1471, paragraph 3.

¹⁵ See e.g. T-239/04 & T-323/04 Italy v. Commission (2007) ECR II-3265, paragraph 88. The period begins on the day following the receipt of a complete notification.

¹⁶ See e.g. 84/82 Commission v. Germany (1984) ECR 1451, paragraph 13.

¹⁷ See e.g. T-388/03 Deutsche Post (2009) ECR II-199, especially paragraph 90 concerning serious difficulties.

the preliminary investigation. A formal investigation procedure must also be initiated when existing aid cannot be considered compatible with the internal market and the member state concerned does not accept the Commission's proposal for altering or abolishing the aid. The formal investigation process safeguards the legal protection of third parties in that they have the opportunity to be heard during the investigation. The formal investigation process is initiated by virtue of a decision under Article 4 (4) of the procedural regulation (EU) No 2015/1589. In it, the Commission presents the legal aspects and facts involved with sufficient precision, as well as its preliminary assessment of the compatibility of the aid with the internal market, including reasons. In the decision, the member state concerned and third parties that are related to the case and whose interests may be affected by the granting of the aid, are requested to submit any comments within the prescribed period, which is often one month, in accordance with Article 6 (1) of the procedural regulation. The period can be extended if the request is justified. Sufficient precision requires, among other things, identification of the beneficiary of the aid so it would know to exercise its rights of defence before the Commission's final decision.¹⁸ If the Commission does not grant third parties the opportunity to be heard, it may be a procedural error that results in the annulment of the decision.¹⁹

It is naturally in the interests of the beneficiary of the aid to try to show that the aid it receives is compatible with the internal market. After receiving comments, the Commission is obligated to investigate the matter carefully and impartially.²⁰ It may also resort to expert opinions in its investigation.²¹ The Commission delivers the comments it receives to the member state concerned by virtue of Article 6 (2) of the procedural regulation so that the member state may express its views on them. If the member state has not been consulted in this way, the Commission cannot cite the comments in questions in its decision against the member state.²²

No period of time has been prescribed for a formal investigation procedure, therefore the investigation process must be carried out within a reasonable period of time that is determined on a case-by-case basis.²³ The formal investigation process is closed by virtue of a decision under Article 9 of the

¹⁸ See e.g. T-34/02 *Le Lavant* (2006) ECR II-267, paragraphs 82–83.

¹⁹ See T-68/03 *Olympiaki Aeroporia Ypiresies* (2007) ECR II-2911, paragraph 41.

²⁰ See e.g. C-367/95 P *Sytraval* (1998) ECR I-1719, paragraph 62.

²¹ See. e.g. T-106/95 *FFSA* (1997) ECR II-229, paragraph 102.

²² See T-198/01 *Technische Glaswerke* (2004) ECR II-2717, paragraph 201.

²³ For example T-190/00 *Regione Siciliana* (2003) ECR II-5015, paragraph 136 and Article 9 (6) of procedural regulation

procedural regulation (EU) No 2015/1589. The Commission may find that the aid does not constitute state aid. It may consider the support to be state aid that is compatible with the internal market as such or conditionally. It may also find the aid to be incompatible with the internal market, resulting in the termination of the payment of the aid and its recovery, depending on the context.

4. Notification for legal certainty in the SOTE matter and the standstill obligation.

The notification obligation is supplemented by standstill laid out in Article 108 (3) of TFEU, according to which a member state shall not put its proposed aid measures into effect before the Commission has issued its final decision on the matter after the investigation procedure, or when the Commission can be deemed to have approved the aid due to prolonged decision-making.²⁴ Thus, a proper notification of new aids referred to in Article 108 (3) of TFEU results in a standstill that applies equally to both a preliminary and formal investigation procedure.²⁵ It should be noted that the Commission's monitoring is directed at new forms of aid or aid schemes as well as existing ones. The difference between monitoring existing and new forms of aid is that the monitoring of existing aids may only result in measures that can be applied in future.²⁶ This can be justified on the grounds of legal certainty.²⁷

Based on legal literature it is possible to support an interpretation according to which that the standstill period following the notification for legal certainty planned in the SOTE matter could not be timed to start until the start of the formal investigation procedure.²⁸ In his expert opinion published in the

(EU) 2015/1589 9(6), which sets a goal for the Commission to be able to take a decision within 18 months. It should be noted that Article 7 of the procedural regulation is being revised as it pertains to the consultation procedure and protection of business secrets of undertakings, but not with regard to the time limit for the investigation procedure.

²⁴ For example, 120/73 *Lorenz* (1973) ECR 1471, paragraph 4, which deemed two months be a reasonable amount of time for the Commission to give a preliminary opinion on the eligibility of the aid, and procedural regulation (EU) No 2015/1589, OJ L 248, 24.9.2015, p. 9, Article 4 (6).

²⁵ See e.g. 120/73 *Lorenz* (1973) ECR 1471, paragraph 4 and *Quigley, Conor*: *European State Aid Law and Policy*, Third Edition, Oxford, 2015, s. 515 ja Bacon 2013, p. 447.

²⁶ T-354/05 *TF1* (2009) ECR II-471, paragraph 166.

²⁷ See e.g. T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 – T-607/97, T-1/98, T-3/98 – T-6/98 and T-23/98 *Alzetta Mauro et al.* 2000) ECR II-2319, paragraph 148. It is essential that, once approved by the Commission, an aid creates a protection of legitimate expectations for the members state and undertakings that the aid that has been granted cannot be suspended for reasons beyond the control of the parties without a final decision.

²⁸ See e.g. *Säcker, Franz Jürgen – Montag, Frank* (eds.): *European State Aid Law, A Commentary*, C.H.Beck -Hart -Nomos, Krefeld, 2016, p. 1540, which states the following: “*The standstill obligation in principle applies only to*

SOTE matter, Justice *Jääskinen* referred to case-law in this context concerning the suspension of implementing aid.²⁹ Interpreted by analogy, it is also the assumption in a notification for legal certainty that the arrangement under review does not entail any notifiable state aid in the view of the member state.

However, let us consider the context of the notification for legal certainty planned in the SOTE matter in more detail because none of the case-law above deals expressly with the legal effects of a notification for legal certainty, or a situation similar to the SOTE matter, which would investigate the arrangements of a massive structural reform that possibly entails different kinds of state aid. It is possible to find support in legal literature for an interpretation according to which the obligation to engage in sincere cooperation pursuant to Article 4 (3) of TFEU emphasises the implementation of a notification on the sole ground that a suspicion of the existence of state aid has emerged.³⁰ In Finland this kind of legitimate suspicion had emerged at the latest when the Supreme Administrative Court published its opinion on state aid questions in the SOTE sector in December of 2017.³¹ As regards the SOTE legislation, bankruptcy protection or an implicit state guarantee have been mentioned as examples of a factor requiring notification in different contexts.

Against this background, one can speculate further what would happen if the Commission took the view that a notification for legal certainty as regards the SOTE and freedom of choice legislation was merely an attempt to circumvent an actual notification. It is possible that in this kind of situation a notification for legal certainty would be treated as an actual notification from a practical point of view, with a standstill obligation, although with the difference that it would be the Commission that would carry out the investigation on the question of state aid. This interpretation option is not entirely

measures that fulfil the conditions for State aid. If the Member State contests the classification of a measure as aid and/or as a new aid, but the Commission initiates the formal investigation procedure, the standstill clause applies and the Member State has to suspend the aid". This interpretation is supported by the case C-400/99 Italy v. Commission (2001) ECR I-7303, paragraph 59.

²⁹ See *Niilo Jääskinen's* opinion dated 7 March 2019 (published on the website of the Social Affairs and Health Committee on 12 March 2019, <https://www.eduskunta.fi/FI/lakiensaaminen/valiokunnat/sosiaali-ja-terveysvaliokunta/Sivut/sotelausunnot-12032019.aspx>) and T-554/15 ja T-555/15 Hungary v. Commission, ECLI:EU:T:2018:220, paragraphs 26-28.

³⁰ See e.g. *Quigley* 2015, p. 513-514, which states the following: "Although, there is no obligation to notify measures, which do not constitute State aid, in the past the Commission has been of the view that the obligation to notify applies even though the Member State concerned may consider that the plan does not have all the characteristics necessary to come within the scope of Article 107(1) TFEU. This approach may still apply, pursuant to the Member States' duty of cooperation under Article 4(3) TEU, at least where there is some reason to suspect that aid may be involved".

³¹ See Record number H 567/17.

unfounded, as a notification for legal certainty is not comparable to an actual notification procedure. It is quite an unusual procedure which should come into play when there is no significant uncertainty concerning state aid related to the case.

The background behind the differences in interpretation is, in my opinion, the question of how much uncertainty is believed to be regarding the existence of elements of state aid in the SOTE and freedom of choice legislation and hence the need to notify. We are still at the basic question of whether the social and healthcare sector is entirely non-economic activity or not. The question of state aid does not come into play at all if the solidarity principle covers the entire social and healthcare sector. In my opinion it is an incorrect interpretation to take the view that the social and healthcare sector is entirely non-economic activity and within the scope of the solidary principle.³² With respect to this, I have referred to a decision concerning patient transfers, for example KHO:2018:29.³³ Consequently, from the perspective of the duty of sincere cooperation, I consider as misleading the interpretation that regards making a notification for legal certainty in the SOTE case as an option that is as equally justified as making an actual notification and, in a sense, a neutral option.

Regardless of whether the Commission is notified of state aid as a notification for legal certainty or as an actual notification, the process may be prolonged and proceed from the Commission to the EU's General Court (EGC) and eventually to the EU Court of Justice. Thus, different interpretation situations related to standstill should still be considered, especially in the relationship between the Commission and the EU Court of Justice. For example, the question can be posed: What happens to a standstill if the EU Court of Justice annuls a decision of Commission according to which national aid is prohibited state aid? According to a relatively formal interpretation, a standstill continues in spite of a judgment of the EU Court of Justice because the Commission has the power, by decision, to declare an aid arrangement to be compatible with the internal market. What if the situation is the reverse, that is to say, the EU Court of Justice finds an aid scheme to be prohibited state aid, even if the Commission has previously found that the aid was compatible with the internal market? Whether or not a standstill applies for the period of time during which a prohibited aid scheme has been in force or only from the beginning of the formal investigation procedure after a judgment of the EU

³² See e.g. the Slovakia case T-216/15 *Dôvera zdravotná poisťovňa, a.s. v. European Commission*, ECLI:EU:T:2018:64.

³³ See *Raitio, Juha*: Notification obligation regarding state aid in SOTE reform, *Defensor Legis*, 5/2018, p. 750-753, where I highlight the significance of cases C-41/90 *Höfner* (1991) ECR I-1979 and C-159/91 and C-160/91 *Poucet and Pistre* (1993) ECR I-637 with regard to interpreting the nature of economic activities.

Court of Justice is somewhat open to interpretation.³⁴ This question of retroactive effect, which is relevant to legal certainty and the protection of legitimate expectations, is of great economic importance from the perspective of recovery.³⁵

This problematic issue of the relationship between the Commission and the EU Court of Justice in monitoring state aids is not entirely irrelevant with respect to the Finnish SOTE matter, either. In parliamentary proceedings of the SOTE matter, attention was drawn to the question of how to regard the so-called Slovakia case, which clarifies the economic or non-economic nature of the social and healthcare sector, and where the General Court (EGC) decided on whether the state aid was to be prohibited differently than the Commission.³⁶ The case has been appealed to the EU Court of Justice, therefore there has also been some deliberation on how to interpret the legal consequences of the EU Court of Justice's future decision. It is my view that the Slovakia case favours notification over not notifying because the General Court (EGC) found that competition based on quality existed therein, and appeals may be lodged with the EU Court of Justice only on a point of law, not evidence. Hence, economic activity relevant to state aids occurred in the market under investigation.

5. Observations on a notification for legal certainty from the perspective of national legislation and the Constitutional Law Committee.

The Constitutional Law Committee dealt with notification as a procedure that increased legal certainty, which is relevant in securing the basic rights under paragraph 3 of Section 19 and Section 22 of the Constitution of Finland. The Constitutional Law Committee did not seek to establish a binding interpretation of EU Law, but addressed numerous EU legal interpretation issues properly and very thoroughly in its statement. It is worth noting that in the aforementioned statement of PeVL 65/2018 vp of the Constitutional Law Committee there is not a single word about notification for legal certainty as a way to communicate state aid questions of the SOTE and freedom of choice legislation to the Commission. This procedure was not a subject of public debate until the press

³⁴ See e.g. *Hancher, Leigh – Ottervanger, Tom – Slot, Piet Jan*: EU State Aids, Fifth Edition, Sweet & Maxwell, 2016, p. 1073-1074.

³⁵ See more on retroactive effect and legal certainty for example *Raitio, Juha*: The Principle of Legal Certainty in EC Law, Kluwer Academic Publishers, Dordrecht, 2003, p. 217-240.

³⁶ See Commission Decision (EU) 2015/248, of 15 October 2014, on the measures SA.23008 (2013/C) (ex 2013/NN), implemented by Slovak Republic for undertakings Spoločná zdravotná poisťovňa, a. s. (SZP) and Všeobecná zdravotná poisťovňa, a. s. (VZP), OJ L 41 17.2.2015, p. 25-40 and Judgment of the General Court of 5 February 2018 T-216/15 *Dôvera zdravotná poisťovňa, a.s. v. European Commission*, ECLI:EU:T:2018:64, which annulled the Commission's decision in the Slovakia case.

conference on that statement, in other words, after the proceedings of the Constitutional Law Committee.

The situation can be considered quite peculiar because in its statement of PeVL 65/2018 vp the Constitutional Law Committee drew attention to a recent review of case-law on actual notification. The Constitutional Law Committee explicitly referred to a case settled in September 2018 C-438/16 P, *Commission v. French*,³⁷ which concerned implicit guarantees, which according to my interpretation refers to the discussion on bankruptcy protection. It can be concluded, as the Constitutional Law Committee did, from the judgement that a legal situation where there are no insolvency proceedings applicable to a public body should be classified as an aid scheme as such.

In addition, the Constitutional Law Committee brought up the cases of PeVL 65/2018 vp in its statement after having considered that social and healthcare services may entail activity that is to be classified as economic activity,³⁸ even though the nature of the services are generally viewed as non-economic. The Constitutional Law Committee also dismissed, in no uncertain terms, the argument that notification is not necessary because it would have only been notification of a legislation framework and hence notification would have been premature in this case. There is no other way to interpret the following opinion of the Constitutional Law Committee: “Based on the information received by the Constitutional Law Committee, it follows from this judgment, too, (that is, the aforementioned C-438/16 P) that the argument given in the Government’s bill against notification, i.e. that it is premature, is flawed”. All of this, according to my interpretation, suggests that it is more likely that the Constitutional Law Committee held the view that the SOTE matter potentially involves state aid that should be notified than not. This conclusion is supported by the position I cited in the beginning, in which the Constitutional Law Committee called for “proper” notification.

In a situation like this, a notification for legal certainty that is specifically aimed at denying the possibility of state aid does not sound like a logical alternative. However, PeVL 65/2018 vp does not offer an explicit opinion on the nature of a notification to be submitted to the Commission. It is nevertheless odd that a member state whose Supreme Administrative Court has acknowledged

³⁷ See C-438/16 P, *Commission v. France*, ECLI:EU:C:2018:737.

³⁸ See T-216/15 *Dôvera zvravotná poist'ovňa v. European Commission*, decision issued on 5.2.2018, ECLI:EU:T:2018:64 and *Commission’s Decision on public hospitals in Italy’s Lazio region* 4.12.2017 State Aid SA.39913, *Alleged compensation of public hospitals in Lazio*, Brussels 4.12.2017, C (2017) 7973 final and the related pending appeal T-233/18 *Casa Regina Apostolorum della Pia Società delle Figlie di San Paolo v. European Commission*.

bankruptcy protection as a factor requiring notification in its statement dated 13 Dec. 2017³⁹ concludes over a year later that a mere notification for legal certainty is the proper procedure to notify the Commission that the legislative project does not entail anything to notify. The question may be asked: How sincere can the Government be on the lack of a need for notification when you also add the fact that in connection with the legislative proposal concerning freedom of choice there was hardly any focus on investigating those possible elements of state aid which fall within the administrative domain of the Ministry of Finance (such as possible tax advantages, level of rents of the Counties' Service Centre for Facilities and Real Estate Management, and state guarantees to provinces). The so-called ministry in charge in the SOTE matter was the Ministry of Social Affairs and Health.

All in all, the policy proposed by the Government in public on the use of a notification for legal certainty seems to have arisen late in time and in a very vague way with regard to how the matter was deliberated in Parliament. Apparently it was resorted to because the Constitutional Law Committee required that the matter be brought to the Commission for review, but the Government did not want to abandon its line that there was nothing to notify. Letters supplied to the Government during parliamentary proceedings by Commission officials are not official positions or decisions of the Commission that would entail the protection of legitimate expectations. There is earlier case-law related to legal certainty on this matter.⁴⁰ The criterion of a diligent economic operator related to the protection of legitimate expectations (the so-called prudent trader test)⁴¹ requires that aid be granted in a proper procedure under Article 108 (3) of TFEU, of which the beneficiary of the aid must be assured.⁴²

6. Observations about the date of entry into force of the law and effectiveness of the monitoring of state aids

In its statement of 65/2018 vp, the Constitutional Law Committee gave the opportunity to change the regulation on entry into force of the SOTE legislation in such a way that application of the law would begin sometime in the future after the Commission has approved regulation for it that has been properly notified. There is support in legal literature for an interpretation according to which state aid

³⁹ See Record number H 567/17.

⁴⁰ See e.g. T-241/97 *Stork Amsterdam* (2000) ECR II-309 and for more details Raitio 2003, p. 204-214.

⁴¹ See Raitio 2003, p. 222 and e.g. 78/77 *Lühns* (1978) ECR 169, paragraph 6.

⁴² For example C-5/89 *Commission v. Germany* (1990) ECR I-3437, paragraph 14.

can be conditionally implemented nationally where necessary without the Commission's authorisation.⁴³ I have reservations about this option and stress the exceptional nature of conditional implementation.

The conditional entry into force of state aid could possibly be justified for example in the case concerning a promise of direct financial aid received by a Siemens plant that manufactures power semiconductors from the Austrian State, State of Carinthia, and the municipality of Villach.⁴⁴ The promise was conditional and the aid measure could not be carried out until it had received approval from the Commission after proper notification. The way I interpret the Austria v. Commission case is that it involves an entirely different context than the SOTE matter at issue here. In the Austria case, the state aid is the simplest possible state aid arrangement, one that is executed by a bank transfer. Therefore, it is not equivalent to a context in which new structures are created for some sector. That case is more related to when a notification concerning state aid is so complete that the Commission begins to commit a 2-month time deadline for processing.

I would stress that the notification procedure for state aids is, above all, a prior assessment procedure that is relatively strictly binding on member states. This main guideline is clearly evident from established case-law of the EU Court of Justice. For example, in the van Calster case, the EU Court of Justice stated the following:

*“Moreover, the illegality of an aid measure, or of part of that measure, owing to infringement of the obligation to notify prior to its implementation is not affected by the fact that the measure has been held to be compatible with the common market by a final decision of the Commission”.*⁴⁵

It is therefore not possible to recommend that a member state first pass a law that entails some component of state aid without an actual notification, believing that it does not involve prohibited state aid. The justification for this given in the van Calster case is that the direct effect of Article 108 (3) of TFEU should not be impaired, and at the same time the interests of those individuals who are

⁴³ See Alkio – Hyvärinen 2016, p. 483.

⁴⁴ See C-99/98 Austria v. Commission (2001) ECR I-1101.

⁴⁵ See C-261/01 and C-262/01 van Calster (2003) ECR I-12249, paragraph 62

to be protected by national courts should not be deprived.⁴⁶ Any other solution would undoubtedly undermine the threat associated with the duty of national courts to protect individuals, especially from the harmful effects of illegal implementation of state aid.⁴⁷ A national court must prevent payment of unlawful aid and issue an order for the recovery of unlawful aid in accordance with national procedural rules.⁴⁸ Even though the *van Calster* case does not address a situation that is equivalent to a notification for legal certainty, I nevertheless consider it to be a relevant example for illustrating the significance of an actual notification and the negative effects of ignoring it on the member state.

The Commission and national courts have concurrent jurisdiction in state aid issues and it is essential to stress the cooperation between them, which is referred to in Article 29⁴⁹ of the procedural regulation (EU) 2015/1589.⁵⁰ However, national courts are, to some extent, subordinate to interpretations of the Commission, which manifests the obligation of sincere cooperation in Article 4 (3) of TFEU. For example, according to the resolution handed down in the *Lucchini* case,⁵¹ the final decision of the Commission, which prohibits state aid that is in breach of Article 107 of TFEU, is applicable despite the fact that after the Commission's decision a national court finds the same aid to be permissible contrary to the decision. In the *Lucchini* case the national judgment on state aid was thereby made consciously contrary to the Commission's decision.

In addition to national legal processes, it should be noted that any person has the right to initiate a preliminary investigation by notifying the Commission of a suspicion of illegal or misused aid. In practice, it is often in the interest of a competitor of the beneficiary of the aid to do this. Enacting the freedom of choice legislation conditionally would have given rise to the risk that complaints would be lodged to national courts as well as the Commission. Thus, it must be emphasised that a notification or a notification for legal certainty are by no means the only ways by which state aid questions related to SOTE could end up in the Commission. In such a situation, the Commission shall, if necessary,

⁴⁶ *Ibid*, paragraph 63.

⁴⁷ For example C-295/97 *Piaggio* (1999) ECR I-3735, paragraph 31. Commission notice on the enforcement of State aid law by national courts concerns the role of national courts in state aid issues OJ C 85 9.4.2009, p. 1.

⁴⁸ For example C-39/94 *SFEI* (1996) ECR I-3547, paragraph 68.

⁴⁹ For more details see e.g. *Säcker- Montag* 2016, p. 1639-1641 and *Hofmann, Herwig C. H. – Micheau, Claire* (eds.): *State Aid Law of the European Union*, Oxford University Press, Oxford, 2016, p. 386-389.

⁵⁰ See OJ L 248, 24.9.2015, p. 9.

⁵¹ See C-119/05 *Lucchini* (2007) ECR I-6199.

request additional information from the member state in order to be able to assess the compatibility of the aid with the internal market. In the procedural regulation (EU) No 2015/1589,⁵² an investigation procedure of an unlawful or misused aid does not include the aforementioned two-month time period, albeit legal certainty requires a “reasonable” period of time, which in turn requires consideration on a case-by-case basis.⁵³ During an investigation of unlawful or misused aid, the Commission has the right to impose measures to safeguard the rights of undertakings operating in the market. In practice this is done by means of an interim decision to suspend aid or, in the case of unlawful aid, temporary recovery of the aid through an interim decision.⁵⁴

6. Conclusions

Taken as a whole, I find it rather confusing that Finland as a member state sought to bring state aid questions related to the SOTE legislation to the attention of the Commission by means of a notification for legal certainty. In my opinion, the legitimate suspicions of state aid should have been brought to the Commission’s attention and for its consideration as an actual notification. It is an entirely different question whether the only two politically realistic policy options in Finland were non-notification or a notification for legal certainty, both of which were based on the premise that there was nothing to notify. At times, national politics in a member state may begin to guide the kinds of EU legal arguments or means that are resorted to, making use of an increasingly broad interpretation.⁵⁵

In my opinion, what is ultimately relevant when assessing the question of notification in the SOTE legislation is acting in accordance with the obligation of sincere cooperation under Article 4 (3) of TFEU, under which a mere justified suspicion of elements of state aid, such as the existence of bankruptcy protection or transfers of property at below-market prices, triggers the notification obligation. The likely basis of the counterargument is that a notification obligation does not exist at all in the social and healthcare sector, which is interpreted as non-economic activity covered by the solidarity principle. In any case, it should be agreed that it would be desirable with respect to any SOTE legislation to be enacted in future, that any elements related to the legislative project that

⁵² See OJ L 248, 24.9.2015, p. 9.

⁵³ See e.g. T-73/95 *Oliveira* (1997) ECR II-381, paragraph 45.

⁵⁴ See C-301/87 *Commission v France* (1990) ECR I-307.

⁵⁵ See e.g. C-364/10 *Hungary v. Slovakia*, ECLI:EU:C:2012:630.

potentially involve state aid should be taken into account in the drafting of the law more thoroughly and earlier.

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