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The Role of State Aid in the COVID-19 Pandemic – Polish Case Study

Abstract: The article aims to assess the utility of the legal instruments implemented during the COVID-19 pandemic in terms of responding to other sudden crises with vast economic consequences. The analysis will consist of presenting the legal basis for state aid, the measures undertaken and their consequences on both the EU and national level.

Firstly, the legal response to the crisis on the EU level will be tackled with a particular focus on the provisions of the temporary framework. Other possible legal bases will also be taken into consideration – Article 107(2)b TFEU, Article 107(3)c TFEU, de minimis regulation, General Block Exemption Regulation. Secondly, the response to the crisis in Poland will be analysed on two levels: legislation (implementation of the “anti-crisis shield”) and jurisprudence (using the example of the judgement of the Administrative Court in Opole I SA/Op 97/21 from April 23, 2021, which resolved the legal controversies regarding the so-called PKD classification).

Keywords: state aid, COVID-19 pandemic, competition law, EU law

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Introduction

Given the huge economic consequences of the outbreak of the COVID-19 pandemic, a range of unprecedented state aid measures were introduced all over Europe, both on the national and EU level. The main focus of the paper will be to present how state aid measures function³ in member states through an analysis of EU policies as well as their implementation, and of national measures, taking Poland as a case study.

First of all, the legal basis for the state aid measures implemented by the EU will be presented with a particular focus on the State Aid Temporary Framework. Next, the reaction to the crisis on a national level will be examined through the analysis of the so-called Polish “anti-crisis shield.” Case-law will also be taken into account in order to present how certain legal controversies regarding eligibility for state aid were resolved. Finally, the paper will conclude with an assessment of the effectiveness of the measures in terms of responding to other sudden crises with far-reaching economic consequences, for instance, the 2022 Russian invasion of Ukraine.

Legal Response to the Crisis – EU

The outbreak of the COVID-19 pandemic in Europe was followed by a quick reaction of the EU. Due to previous experience from earlier crises, a significant change in crisis management and response time could be observed. It is already known that during a crisis, the lack of an effective crisis management mechanism and uncoordinated actions taken by individual countries can only increase tensions in the markets.⁴ Moreover, in order for state aid to be effective

³ Since, as announced, the main focus will revolve around state aid, it is necessary to recall the definition of the term introduced in article 107 of the Treaty on the Functioning of the European Union (hereinafter: TFEU), according to which the phrase “state aid” can refer to “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.” Such a definition will be adopted in the present article.

⁴ Małgorzata Jabłońska et al., “Public Aid and Entrepreneurship During the Covid-19 Pandemic in the European Union Countries,” *Journal of Finance and Finance Law* 3, no. 31 (2021): 63, <https://doi.org/10.18778/2391-6478.3.31.04>.

and not to distort free competition, it is absolutely necessary that state support be clearly defined and limited in time with regard to what is needed to address the crisis.⁵ On March 13, 2020, the European Commission published the communication on “Coordinated economic response to the COVID-19 outbreak,”⁶ which outlined the EU’s actions regarding COVID-19. Section 5 of this document is dedicated to state aid. The European Commission stated that the main fiscal response to the crisis will come from member states’ national budgets and that member states can design ample support measures in line with existing state aid rules such as:

- Article 107(2)b TFEU regarding damage caused by natural disasters or exceptional occurrences;
- Article 107(3)c TFEU regarding aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- de minimis Regulation⁷;
- General Block Exemption Regulation.⁸

Moreover, the preparation of a special legal framework under the Article 107(3)b TFEU was announced. This provision considers state aid as a form to remedy a serious disturbance in the economy of a member state as compat-

5 Andreea-Emanuela Drăgoi, “Supporting the EU Economy through State Aid during COVID-19 Crisis: A Comparative Approach,” *Global Economic Observer* 8, no. 1(2020): 15.

6 Communication from the European Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup of March 18, 2020 – Coordinated economic response to the COVID-19 outbreak, EUR-Lex – 52020DC0112.

7 Communication from the European Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup of March 18, 2020 – Coordinated economic response to the COVID-19 outbreak, EUR-Lex – 52020DC0112.

8 Regulation (EC) No 651/2014 of June 17, 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, Official Journal of the European Union 2014 L 187/1.

ible with the internal market. It is worth mentioning that such a framework has only been introduced once – during the 2008 financial crisis.⁹

The aforementioned provisions of the TFEU regarding state aid proved to be insufficient for coping with the economic crisis, since they required notification to the EC and other prerequisites. Only the positive decision of the EC enabled the application of the measure.

In case of article 107(2)b TFEU, even though it may appear to be a suitable provision for all COVID-related cases, it can be inferred from the decisional practice of the European Commission that aid granted on its basis must satisfy three criteria: exceptionality, causality and proportionality. The Commission has narrowed the scope of interpretation of Member States by declaring that the outbreak of COVID-19 qualifies as an “exceptional occurrence” for the purpose of Article 107(2)(b) of the TFEU.¹⁰ However, in practice it remains much more difficult to fulfill the remaining two requirements.¹¹

The impediment to the application of Article 107(3)c TFEU is the need for the measure to be in concordance with the strict criteria set out by the Rescue and Restructuring Guidelines,¹² in particular with the principle ‘one-time, last time’, which means that aid can be granted to undertakings in difficulty in respect of only one restructuring operation. Moreover, it must be shown that the aid is truly in the public interest in the sense that saving the undertaking would prevent social hardship or address market failures.¹³ Although in certain cases

9 Communication (EC) – Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis of January 22, 2009, Official Journal of the European Union 2009 C 16/1.

10 Decision (EC) of March 12, 2020, SA.56685, Denmark.

11 Phedon Nicolaides, “Application of Article 107(2)(b) TFEU to Covid-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence,” *Journal of European Competition Law & Practice* 11, no. 5–6(2020): 238–43, <https://doi.org/10.1093/jeclap/lpaa026>.

12 Communication (EC) of July 31, 2014 – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Official Journal of the European Union 2014 C 249/01.

13 Paulina Kubera, “The State Aid Instruments In Response to the COVID-19 Crisis,” *The Journal of Organizational Management Studies*, no. 1(2021): 7, article 930488, <https://doi.org/10.5171/2021.930488>.

it was possible to prove the fulfillment of these requirements,¹⁴ the number of decisions taken on the basis of this provision remained the lowest.

As for the other forms of permitted state aid, the *de minimis* Regulation limits proved to be insufficient¹⁵ and the scope of the General Block Exemption Regulation did not cover the demand for state aid in the situation of pandemic.

The need for a new legal framework was therefore identified and on March 19, 2020 the Temporary Framework for state aid Measures to support the economy during the COVID-19 outbreak¹⁶ as well as six developments to it were announced. Like many other legal acts adopted by the EC the Temporary Framework (hereinafter: TF) is soft law, which means it does not establish directly effective law, but rather a set of guidelines for member states. It presents the terms that allow for receiving the EC's approval for state aid in response to COVID-19. Without such an act, it would be much more difficult to predict whether a particular measure would be accepted by the EC. Even though state aid based on the TF still requires notification to the EC, the unification of its rules and allowing only aid schemes without individual aid projects made the whole procedure more efficient. The first EC decisions were approved after mere days and later decisions did not take longer than a few weeks.

It should be noted that the five first amendments to the TF have already been extensively analysed in literature.¹⁷ More detailed information on the subject will

14 For instance, decision (EC) of June 10, 2020, SA.57369, Portugal.

15 Under this regulation grants of up to €200,000 over a 3-year period do not constitute State aid. In the road freight transport sector, the threshold is €100,000 over a 3-year period. For agriculture and fisheries, the threshold amounts to €25,000 and €30,000.

16 References in this article are based on the informal consolidated version of the Temporary Framework of November 18, 2021, accessed August 11, 2022, https://competition-policy.ec.europa.eu/system/files/2021-11/TF_consolidated_version_amended_18_nov_2021_en_2.pdf.

17 The analysis of the TF, in particular of its first amendments was the subject of extensive research by, among others: Agnieszka Alińska, "Publiczne pakiety stymulacyjne i działania pomocowe ograniczające skutki pandemii COVID-19 w krajach Unii Europejskiej," *Finanse Publiczne* 1, no. 13(2021): 83–95; Aleksandra Kopeć, "Pomoc publiczna w dobie pandemii COVID-19," *Internetowy Kwartalnik Antymonopolowy i Regulacyjny*, no. 1(2021): 81–99; Anna Dobaczewska, "Pomoc publiczna na zwalczanie ekonomicznych skutków pandemii COVID-19 w kontekście prawa Unii Europejskiej," *Prawo i Więź* 2,

be provided with the addition of the sixth amendment that turned out to be the last modification of the TF before it was phased out by the EC on May 12, 2022.

The very first version of the TF provided the conditions for approval of aid schemes and state aid in form of direct grants, repayable advances or tax advantages (section 3.1 TF), guarantees on loans (section 3.2 TF), subsidised interest rates for loans (section 3.3 TF), guarantees and loans channeled through credit institutions or other financial institutions and short-term export credit insurance. The TF was intended to remain in force until the end of 2020.

The first amendment to the TF was adopted on April 3rd 2020 and this broadened its scope by adding five new measures: aid for COVID-19 relevant research and development (section 3.6 TF), investment aid for testing and up-scaling infrastructures (section 3.7 TF), investment aid for the production of COVID-19-relevant products (section 3.8 TF), aid in the form of deferrals of tax or of social security contributions and aid in the form of wage subsidies for employees to avoid lay-offs during the COVID-19 outbreak (section 3.10 TF). Some other changes and clarifications were also introduced by the sections 3.1 to 3.5 TF. It is worth mentioning that the measures from sections 3.6–3.8 TF are assessed on the basis of the article 107(3) c TFEU, while all other measures from this document are assessed on the basis of 107(3) b TFEU.

On May 8, 2020, the second amendment was published. It introduced the criteria based on which Member States can provide recapitalisations and subordinated debt to companies in need (section 3.11 TF). It should be noted that it is the only measure in the TF that allows individual aid projects.

The third amendment from June 29, 2020 enabled Member States to provide support under the Temporary Framework to all micro and small companies, even if they were already in financial difficulty on December 31, 2019.

no. 36(2021): 72–82, <https://doi.org/10.36128/priw.vi36.275>; Aleksander Werner, “Pomoc państwa w obliczu COVID-19 na przykładzie instrumentów wykorzystywanych w Polsce,” *Kwartalnik Nauk o Przedsiębiorstwie* 62, no. 5(2021): 63–75, <https://doi.org/10.33119/KNoP.2021.62.5.6>; Wiktor Żochowski, “Pomoc publiczna dla przedsiębiorców przed oraz w okresie trwania pandemii COVID-19,” *Pracownik i Pracodawca* 1, no. 6(2021): 67–82, <https://doi.org/10.12775/PiP.2021.005>.

Heretofore, state aid based on TF could only be provided in case of financial difficulties due to COVID-19.

On October 13, 2020, the fourth amendment was adopted. The main alteration was the prolongation of all sections until June 30, 2021 and the section to enable recapitalisation support was prolonged until September 30, 2021. Moreover, aid in the form of support for uncovered fixed costs (section 3.12 TF) and some other minor changes was introduced.

Due to the appearance of new variations of coronavirus and to the lack of possibilities to respond to the economic crisis on January 28, 2021, the EC published the fifth amendment to the TF, which kept it in force until December 31, 2021. Another important aspect of it is the increase in the frameworks set out in the TF for limited amounts of aid.

The last amendment of the TF was adopted on November 18, 2021 and it prolonged the TF until June 30, 2022. Moreover, two new measures were introduced: investment support towards a sustainable recovery (section 3.13 TF) and solvency support (section 3.14).

It is worth noting that the TF was the legal basis for the vast majority of decisions that were taken by the EC. The analysis of the legal basis of decisions taken in Polish cases confirms this pattern.

Table 1. The amount of the EC's decisions on the particular legal basis

Legal basis	107 (2) b	107 (3) b	107 (3) c	TF	In total
Amount of decisions EU/Poland	104/4	28/2	4/0	724/29	860/35

Source: author's own data elaboration, based on data from the website of the European Legal Commission (Coronavirus outbreak – list of Member State Measures approved under Articles 107 (2) b, 107 (3) b, 107 (3) c TFEU and under the State Aid Temporary Framework¹⁸).

18 "State Aid Rules and Coronavirus," European Commission, accessed August 11, 2022, https://competition-policy.ec.europa.eu/state-aid/coronavirus_en.

Another interesting aspect is the choice of the legal basis within the TF. Taking Poland as an example, it can clearly be seen that almost 2/3 of all of the measures were approved under section 3.1 of the TF. The reason for this is the high financial limit per undertaking (EUR 2.3 mln).

Table 2. The amount of the Polish aid measures approved by the EC on the particular legal basis

Legal basis	3.1	3.2	3.3	3.4	3.5	3.6	3.7	3.8	3.9	3.10	3.11	3.12	107(2)b	107(3)b	In total
Amount of measures	40 ¹⁹	4	6	–	–	1	1	1	2	3	1	1	4	3	62

Source: author's own data elaboration, based on data from the website of the Polish Office of Competition and Consumer Protection (Lista instrumentów pomocowych związanych z COVID-19).

As mentioned above, in May 2022 the EC announced that the TF will not be extended beyond the current expiry date – June 30, 2022.²⁰ However, some of the measures were in force for a longer period of time. Investment support (section 3.13 TF) was possible until December 31, 2022 and solvency support was possible (section 3.14 TF) until December 31, 2023. Member states also retained the possibility to convert repayable instruments like guarantees or loans granted under the TF into other forms of aid, such as direct grants under certain conditions until June 30, 2023.

Most significantly, after February 24, 2022 the EU faced a further crisis triggered by Russia's aggression to Ukraine. What is worth mentioning when considering the question of state aid is that on March 24, 2022 the EC adopted the Temporary Crisis Framework for State Aid, which was withdrawn with the effect from October 27, 2022, and on March 9, 2023 the Temporary Crisis

¹⁹ One decision might encompass more than one measure.

²⁰ "State Aid: Commission Will Phase Out State Aid COVID Temporary Framework," European Commission, accessed August 12, 2022, https://ec.europa.eu/commission/presscorner/detail/en/statement_22_2980.

and Transition Framework was introduced.²¹ Both frameworks are based on article 107(3)b TFEU, as in the case of the COVID-19 Temporary Framework. In conclusion, it can be stated that the concept of a “Temporary Framework” seen as a set of guidelines for member states proved effective enough to serve as a general pattern to respond to an economic crisis and subsequently was adopted for the third time in EU history.

Legal Response to the Crisis – Poland

Legislation – the “Anti-Crisis Shield”

The rapid spread of the COVID-19 pandemic and the subsequent detection of the first infection case in Poland on March 4, 2020 led the Polish government to implement a series of measures aimed at limiting citizens’ mobility. Due to the large number of measures implemented after the detection of the first infection and the multi-aspectual character of the regulations, the present section will be limited to an analysis of a selected range of the most significant questions.

The character of state aid rapidly changed to become more universal.²² The first measures were introduced on March 24, 2020 by means of a regulation of the Health Minister²³ and on March 31, 2020 by a regulation of the Council of Ministers.²⁴ These measures encompassed the following restric-

21 Communication from the Commission – Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia of 24 March 2022, Official Journal of the European Union 2022 C 131 I/1.

22 See Jabłońska et al. “Public Aid and Entrepreneurship During the Covid-19 Pandemic in the European Union Countries,” 64 (footnote 40).

23 Rozporządzenie Ministra Zdrowia z dnia 24 marca 2020 roku zmieniające rozporządzenie w sprawie ogłoszenia na obszarze Rzeczypospolitej Polskiej stanu epidemii [Regulation of the Health Minister of March 24, 2020 announcing the “state of pandemic” on Polish territory], Journal of Laws of 2020, item 522.

24 Rozporządzenie Rady Ministrów z dnia 31 marca 2020 roku w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii [Regulation of the Council of Ministers from March 31, 2020 on the establishment of limitations, obligations and prohibitions in relation to the state of pandemic], Journal of Laws of 2020, item 566.

tions: mandatory quarantine for hotel guests, lockdown on barber shops, tattoo and piercing studios, interdiction of leaving home for reasons other than grocery shopping, doctor visits, medication purchase, outdoor physical activity and exceptional situations. The above limitations to economic activity affected numerous sectors of the economy, causing major social unrest, in particular among entrepreneurs. In response to these social expectations of state aid compensating incurred losses, the government announced the implementation of the “anti-crisis shield” – a set of different measures introduced in various legal acts providing a legal basis for state aid. In the following passages, an overview and analysis of the shield will be presented.

First of all, it should be highlighted that the “anti-crisis shield” should not be regarded as a uniform, static legal act but as a whole range of legal acts that were multiply amended over the course of 2020 and 2021. The first version of the shield – the “anti-crisis shield 1.0” – was introduced on April 1, 2020²⁵ and was immediately followed by a series of amendments that came into force on April 18, 2020²⁶ under the name “anti-crisis shield 2.0.” According to the information preannounced by the Polish Development Fund on April 15, 2020, the shield focused on five key aspects (with a total budget of 45.6 billion euro): preserving and securing employment (6.5 billion euro), support for entrepreneurs (16 billion euro), healthcare (1.6 billion euro), strengthening the financial system (15 billion euro), and public investment (6.5 billion euro).²⁷

The most significant aspect taking into consideration its economic magnitude and social perception was supporting entrepreneurs. According to the Polish Development Fund, the shield had the following aims in this respect:

- providing small and medium-sized enterprises with preferential financing, largely non-returnable, to ensure liquidity and stability during

25 “Tarcza antykryzysowa,” gov.pl, accessed July 20, 2020, <https://www.gov.pl/web/tarczaantykryzysowa>.

26 “Tarcza antykryzysowa.”

27 “Tarcza antykryzysowa.”

times of major disruptions in the economy due to the effects of the COVID-19 pandemic;

- transfer of financial compensation to entrepreneurs in the form of lost income or additional costs incurred as a result of the COVID-19 pandemic;
- counteracting disruptions in the functioning of the economy during the economic crisis caused by the COVID-19 pandemic;
- financial stabilization of small and medium-sized enterprises in order to protect jobs and financial security of citizens;
- providing financial assistance to sectors particularly hard hit by the effects of the COVID-19 pandemic.²⁸

The above listed aims were to be achieved through the implementation of a series of specific measures. According to a selection carried out by A. Łopatka and K. Fedorowicz,²⁹ the most significant of these aims were:

- Micro companies employing no more than 9 workers received a loan of PLN 5,000. The loan paid out by the Labour Fund was non-refundable if the company did not lay off its employees over the next 3 months.
- If a term of a working capital loan taken out by a company came to an end, the entrepreneur was able to renew it automatically. Thanks to the regulations of the Financial Supervision Commission, banks could calculate creditworthiness based on financial data as of the end of 2019.
- By the end of 2020, micro-, small and medium-sized enterprises had the opportunity to obtain a loan with *de minimis* guarantee of up to PLN 3.5 million. The amendment allowed the guarantee to cover up to 80 per cent of the loan amount.

28 Polski Fundusz Rozwoju, *Przewodnik Antykryzysowy dla Przedsiębiorców* [Anti-crisis Guide for Entrepreneurs] (Polski Fundusz Rozwoju, 2020); “Tarcza Finansowa dla Firm,” PFR, accessed July 20, 2022, www.pfr.pl/tarcza; “Tarcza antykryzysowa – materiały,” gov.pl, accessed July 20, 2022, <https://www.gov.pl/web/tarczaantykryzysowa/materialy>.

29 Agnieszka Łopatka and Karol Fedorowicz, “Evaluation of the Effectiveness of State Aid Offered to Enterprises During the COVID-19 Pandemic,” *Procedia Computer Science* 192, 2021: 4828–36. <https://doi.org/10.1016/j.procs.2021.09.261>.

- Medium and large companies could obtain a capital increase or bond financing from the PFR Investment Fund – with a total value of PLN 6 billion.
- The loss incurred in 2020 was deductible from the taxpayer's income earned in 2019. To do so, taxpayers filed a correction to their 2019 return. This was available for those whose 2020 income fell by at least 50 per cent compared to the income earned in 2019. A loss of up to PLN 5 million was deductible from 2019 income (the excess will be deductible in subsequent years).
- The taxpayer did not incur the fee for deferring the tax payment deadline or spreading the tax payment into instalments, or deferring or spreading into instalments the payment of tax arrears with interest. Furthermore, the entrepreneurs were exempt from the necessity to pay the prolongation fee in the following cases: contributions to be collected by Social Insurance Fund; concluding an agreement on deferring the date of payment of contributions; or an agreement on splitting the due amount into instalments.
- Micro, small and medium-sized companies that benefited from the support from EU funds could count on more favourable terms of capital repayment. New rules were introduced, which include, an additional grace period in repayment, 4-month loan holidays, reduction of loan interest rates, and no interest charges.
- Entrepreneurs who took out a loan to develop their tourism-related business could apply for more favourable repayment terms due to loss of liquidity. Business owners could apply for an extension of the repayment grace period, credit holidays, or a reduction in interest rates.³⁰
- It might be significant to briefly analyze the evolution of the measures that came into force as the “anti-crisis shield.” The socio-economic

30 Łopatka and Fedorowicz, “Evaluation of the Effectiveness of State Aid Offered to Enterprises During the COVID-19 Pandemic.”

situation in Poland changed multiple times over the course of 2020, 2021 and 2022, which resulted in the numerous revisions and amendments to the initial state aid measures implemented by the “anti-crisis shields” 1.0 and 2.0 that are the focus of this section. As an example, major changes were introduced by the “anti crisis-shield” 3.0: standstill benefits were granted to certain entrepreneurs and wider groups of entrepreneurs could benefit from the forms of state aid introduced by the “anti-crisis shield” 2.0.³¹

It has to be highlighted, however, that in several cases the extensive regulations implemented by the subsequent “anti-crisis shields” sparked significant legal controversies that needed to be resolved through judicial interpretation. Such a situation will be discussed in section 3.2., using the example of the public debate regarding the so-called ‘PKD classification’.

The Role of the Judiciary on the Example of the Judgement of the Administrative Court in Opole I SA/Op 97/21 from April 23, 2021 That Resolved the Legal Controversies Regarding the ‘PKD Classification’

Even though the measures themselves were widely supported, the regulations concerning eligibility caused certain controversy, as they linked the process of being granted state aid to the Polish Classification of Activities (PKD).³² The PKD classification is a conventionally adopted, hierarchically structured set of socio-economic activities that are carried out by economic entities and is related to the National Official Business Register (REGON). In this classifica-

31 “Nowe wnioski na PUE ZUS w związku z rozwiązaniami tzw. Tarczy Antykryzysowej 3.0,” ZUS, published May 25, 2020, <https://www.zus.pl/-/nowe-wnioski-na-pue-zus-w-zwiazku-z-rozwiazaniami-tzw-tarczy-antykryzysowej-3-0>.

32 Ustawa z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych [Act of March 2, 2020 on the specific measures to prevent, counteract and fight COVID-19 and other contagious disease as well as the crises caused by them], Journal of Laws of 2021, item 2095.

tion, economic entities are ranked according to PKD sections (from A to U), which include PKD divisions. The allocation of the PKD division depends on the type of activity the entity performs. Examples can be found below:

- Division 55 – hotels and similar accommodation, holiday and other short-stay accommodation, camping grounds (including trailer parks) and tent fields, other accommodation,
- Division 56 – restaurants and other food service establishments, mobile food service establishments,
- Division 93 – sports activities, operation of sports facilities, operation of sports clubs, operation of fitness centers, other sports-related activities, entertainment and recreation activities, amusement parks and theme parks, other entertainment and recreation activities.³³

In order to be eligible to receive support from the “anti-crisis shield,” entrepreneurs needed to be registered under at least one of a series of PKD divisions.³⁴ The list of PKD divisions eligible for state aid changed several times over the course of the pandemic. Making PKD registration one of the criteria that had to be fulfilled in order to receive state aid caused a series of inconveniences, since before the outbreak of the pandemic PKD divisions had barely had practical relevance. In certain cases, they remained unchanged from the moment of registration of a particular firm, regardless of the character of the activity performed by a given company.

The fact that eligibility for state aid was assessed based on the PKD divisions under which entrepreneurs operated and not on the activity that they actually performed caused widespread resentment among those who provided services that made them eligible for state aid but who failed to register their activity under the corresponding PKD divisions and were thus denied financial support. The legal

33 Rozporządzenie Rady Ministrów z dnia 24 grudnia 2007 roku w sprawie Polskiej Klasyfikacji Działalności (PKD) [Regulation of the Council of Ministers from December 24, 2007 on the Polish Classification of Activities (PKD)], Journal of Laws of 2007, no. 251, item 1885.

34 Ustawa z dnia 2 marca 2020 r. o szczególne szczególnych rozwiązaniach związane z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych.

acts implementing the “anti-crisis shield” did not provide an answer to whether the decisive aspect when it comes to state aid eligibility was being registered under a given PKD division or whether it was the activity that was actually being carried out. The Polish Social Insurance Institution (ZUS) in its decisions over the course of 2020 consequently denied state aid to entrepreneurs who failed to register their activity under a PKD division listed in the legal acts introducing the “anti-crisis shield.” Subsequently, a decisive role was played by the case-law, since numerous decisions were challenged by entrepreneurs and courts had to rule either in favour of formal registration or of the activity that was *de facto* carried out.

The judgement of the Administrative Court in Opole I SA/Op 97/21 from April 23, 2021³⁵ that was posteriorly regarded as a landmark decision by other courts³⁶ can serve as an illustration of the above. When it comes to the facts, the entrepreneur A.C. was denied by the Polish Social Insurance Institution the right to be exempt from paying contributions from July to September 2020, as despite the activity performed being among the ones listed in the act introducing this form of state aid, there was no registration under the corresponding PKD division. While interpreting the “anti-crisis shield” act listing the PKD divisions, this resulted in one of the most significance aspects being the analysis of the phrasing of article 31, paragraph 8 of the Act on the specific measures to prevent, counteract and fight COVID-19 and other contagious disease, as well as the crises caused by them from March 2, 2020. This article listed a series of PKD divisions and stated that entrepreneurs whose “predominant activity”

35 Judgement of the Administrative Court in Opole of April 23, 2021, I SA/Op 97/21.

36 The judgement was often cited by other courts and the arguments presented in it were adopted by them. A direct reference to the judgment of the Administrative Court in Opole of April 23, 2021, I SA/Op 97/21 can be found in the text of numerous judgements, as the ones cited beneath: Judgement of the Administrative Court in Poznań of December 7, 2021, III SA/Po 793/21; Judgement of the Administrative Court in Opole of February 23, 2022, I SA/Op 547/21; Judgement of the Administrative Court in Opole of January 21, 2022, I SA/Op 398/21.

matched given PKD divisions could be exempt from paying social insurance contributions from July 1, 2020 to September 30, 2020.³⁷

The court repealed the decision of the Polish Social Insurance Institution interpreting the term “predominant activity” in favour of entrepreneurs defining it as “the activity with the largest share indicator (e.g. value added, gross production, sales value, employment volume or remuneration) characterizing the activities of the entity”³⁸ and not the one under the registered PKD division. The reasons behind this interpretation were firstly, that the Regulation of the Council of Ministers from December 24, 2007 on the Polish Classification of Activities provided a legal definition of the term “predominant activity,”³⁹ and secondly, the *ratio legis* of the act. Moreover, the significance of previous judgments of the Polish Supreme Court should not be omitted.⁴⁰ As it was stated in the judgement, “proper definition of the concept of predominant activity is therefore of great importance also in the context of the aim of the anti-crisis shield, which is to respond to the negative effects of the COVID-19 pandemic. The purpose of these legal regulations is to provide real support for entities that actually bear the effects of the COVID-19 pandemic (for instance, by incurring losses caused by restrictions on the economic activity carried out by them). Therefore, the point is that support should be granted to entities actually

37 Ustawa z dnia 2 marca 2020 r. o szczególne szczególnych rozwiązaniach związane związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych.

38 Judgement of the Administrative Court in Opole of April 23, 2021, I SA/Op 97/21.

39 The regulation stated that “the predominant activity of a statistical unit is the activity with the largest share indicator (e.g. value added, gross production, sales value, employment volume or remuneration) characterizing the activities of the entity. Rozporządzenie Rady Ministrów z dnia 24 grudnia 2007 roku w sprawie Polskiej Klasyfikacji Działalności (PKD).

40 The Polish Supreme Court in judgements of January 7, 2013 and of November 23, 2016 when analyzing the legal significance of PKD divisions stated that “information on the type of activity resulting from the REGON [PKD divisions] register does not create any legal status, but only is to confirm the factual situation according to the statement of knowledge of the entity conducting such activity.” See Judgement of the Supreme Court of the Republic of Poland of January 7, 2013, II UK 142/12; Judgement of the Supreme Court of the Republic of Poland of November 23, 2016, II UK 402/15.

conducting at a given date as the predominant activity in the indicated scope an activity according to the given PKD.”⁴¹

It can thus be concluded that jurisprudence responded to the dissonance between formal registration and actual carrying out of a given economic activity in favour of the *status quo* of entrepreneurs, according to the aim and *ratio legis* of the “anti-crisis shield.”

Conclusions

Besides highlighting the swift reaction to the COVID-19 crisis by both the EU and individual member states, it should be noted that member states put in place unprecedented support measures to preserve the financial integrity of companies through the various waves of the pandemic. The TF served as a catalyst to these processes and increased their efficiency. The Polish case study shows that local aid schemes such as the “anti-crisis shield” can work effectively and even though interpretative doubts might arise they can be clarified by case-law.

Although some scholars emphasise that if the recovery was funded directly by the EU, there would be less distortions within the internal market and more common goals achieved,⁴² the implementation of the Temporary Crisis Framework for State Aid (providing support following the Russian aggression against Ukraine) suggests that there will be no significant changes in the mechanism of providing state aid in times of crisis. Thus, in conclusion, it has to be said that both the COVID-19 TF and the Polish “anti-crisis shield” served as landmark schemes and were followed by similar sets of regulations aimed at tackling the crisis caused by Russia’s aggression towards Ukraine.⁴³ Since the economic and

41 Judgement of the Administrative Court in Opole of April 23, 2021, I SA/Op 97/21.

42 Irene Agnolucci, “Will COVID-19 Make or Break EU State Aid Control? An Analysis of Commission Decisions authorizing Pandemic State Aid Measures,” *Journal of European Competition Law & Practice* 13, no. 1(2022): 3–16, <https://doi.org/10.1093/jeclap/lpab060>.

43 Christian Rusche and Samina Sultan, “Beihilfen im Lichte der Coronapandemie,” *Wirtschaftsdienst* 103, no. 3(2023): 206. Moreover, what is particularly significant is that the measures taken on a national level also strictly follow the pattern adopted over the

political reality of the EU is subject to dynamic change, state aid schemes based on the TF offer the chance to reach a balance between responding to sudden crisis situations and preserving the integrity of the internal market.

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