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State Aid as a Crisis Management Tool: Observations into EU State Aid Law and Impacts on Member State Discretion

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Summary

Since 2000, the EU has faced significant economic challenges linked to both the Global Financial Crisis in 2008 and the outbreak of the COVID-19 pandemic in 2020. These challenges triggered the need for urgent intervention on both national and EU levels, which prompted rapid responses from the European Commission. This thesis explores the relationship between EU state aid law and the crisis response mechanisms introduced during these crises to ascertain whether they have prompted a reevaluation of the leniency in the face of such emergencies.

Within the field of EU state aid law, there is a general prohibition of state interventions. The Commission, however, has the exclusive competence to categorize aid as compatible with the internal market, following an analysis of notifications provided by Member States and their effect and potential damage. The responses taken pursuant to the crises led to the Commission embracing a more malleable approach in its assessment of notified aid. This thesis addresses whether these responses have altered the discretion of Member States in the process, to provide a comprehensive understanding of how crises have impacted Member States' involvement in the granting of aid.

In reaching its conclusion, the thesis analyzes five main sections following a black-letter analytical approach coupled with a running comparative analysis of the approaches taken through the lens of the Global Financial Crisis and the COVID-19 pandemic. To help further discussion, it conducts an assessment of parallels with similar approaches taken in the fields of free movement and public procurement law to help determine whether a shift in the level of discretion has been awarded in practice.

The thesis concludes that, in relation to the Commission decisions taken and the frameworks adopted, the flexible and lenient approach embraced in its analysis has heightened the impression of greater Member State discretion. Particularly, as the burden of proof to provide all necessary information falls on the Member States, ultimately enabling them to take the steps necessary to ensure the aid measure notified aligns with the Commission's new interpretations.

Keywords: competition law, state aid law, discretion, financial crisis 2008, COVID-19 pandemic, free movement, public procurement, Member States, European Commission

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Table of Abbreviations

2008 Banking Communication	Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis
2013 Banking Communication	Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favor of banks in the context of the financial crisis
Citizens' Rights Directive	Directive 2004/38/EC
Commission	European Commission
Coordinated Economic Response Communication	Coordinated Economic Response to the COVID-19 Outbreak
COVID-19 pandemic, the Outbreak	Coronavirus disease 2019
COVID-19 Temporary Framework, Temporary Framework, Framework	Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak
CJEU, the Court	Court of Justice of the European Union
De Minimis Regulation	Regulation on the application of Articles 108 and 108 TFEU to <i>de minimis</i> aid
EC Treaty	Treaty Establishing the European Community
EU	European Union
Financial Crisis	Global Financial Crisis

Financial Crisis Temporary Framework, Temporary Framework, Framework	Temporary Framework for State Aid Measures to Support the Access to Finance in the Current Financial and Economic Crisis
Impaired Asset Communication	Communication from the Commission on the treatment of impaired assets in the Community banking sector
MEO	Market Economy Operator
Prolongation Communication 2011	Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favor of banks in the context of the financial crisis
Prolongation Communication 2012	Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favor of banks in the context of the financial crisis
Recapitalization Communication	Communication on the recapitalization of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition
Rescue and Restructuring Guidelines	Community Guidelines on State Aid for Rescuing Firms in Difficulty
Restructuring Communication	Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under State aid rules
Schengen Borders Code	Regulation (EU) 2016/399
TFEU	Treaty on the Functioning of the European Union

1. Introduction

1.1 Background

The legal framework of state aid and its umbrella field of competition law share a nexus of goals established in their objectives to ensure a fully functioning internal market and economic welfare, to foster competition.¹ Consequently, aid that is granted by Member States or through state resources is generally prohibited if it might distort competition and affect intra-European Union ('EU') trade by favoring certain undertakings or the production of certain goods.² While the default stance is one of prohibition within the purview of the EU's regulatory framework, there are exceptional circumstances within the EU's policy objectives where state aid is nevertheless granted.³

For aid to be compatible with the internal market, Member States must demonstrate, in their obligations to notify the European Commission ('Commission') of their plans to amend or allocate aid, the need for state intervention through a counterfactual analysis.⁴ They must establish that the distortion to the market that the aid may cause is justified through a proportionality assessment in relation to the potential harm inflicted by the distribution of the aid.⁵ Following this, the Commission exercises its discretion to conduct an *ex ante* assessment of the notified measure to determine its compatibility with the internal market through an analysis of its positive and negative effects.⁶ Despite the scope extending to certain exceptional circumstances, both their notion and implementation have undergone various changes attributed to an initial lack of guidelines and legal precedent. However, following multiple crises over the past years, a vital shift is notable within the

¹ Christian Scheinert, 'Fact Sheets on the European Union: Competition Policy' (*European Parliament*, April 2024) <<https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy>> accessed 23 April 2023.

² Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU), Article 107(1).

³ *ibid* Article 107(2)(3); European Court of Auditors, 'Special Report, State aid in times of crisis: Swift reaction but shortcoming in the Commission's monitoring and inconsistencies in the framework to support the EU's industrial policy objectives' (2024) <https://www.eca.europa.eu/ECAPublications/SR-2024-21/SR-2024-21_EN.pdf> accessed 15 May 2025.

⁴ Adiana Claiici and Stephanie Tizik, 'The Economics of State Aid in times of Crisis: How Large is the Debate?' (*Copenhagen Economics*, 31 March 2020) <https://copenhageneconomics.com/wp-content/uploads/2021/12/copenhagen-economics_covid-19-state-aid-newsletter.pdf> accessed 23 April 2025.

⁵ *ibid*.

⁶ European Court of Auditors State Aid (n 3).

state aid regime, which has prompted both Member States and the Commission to reassess the use of legal bases in the evaluation of compatibility with the internal market.⁷

The onset of the Global Financial Crisis (‘financial crisis’) in 2007-2008, which was triggered by the collapse of the United States’ mortgage market and the Lehman Brothers, exposed inadequacies in the EU’s state aid structure.⁸ Particularly, in regard to the financial sector, which placed an excessive burden on the Commission’s prevailing policy at the time.⁹ In response to the unparalleled challenges faced and the necessity to intervene to avert further collapse, the Commission adopted more flexible guidelines to enable Member States to support businesses that were struggling to cope.¹⁰ These guidelines and frameworks delineated specific conditions under which national crisis state aid measures could be considered compatible with the internal market.¹¹ The underlying aim was to streamline administrative burdens, expedite approvals, and enhance legal certainty.¹² The exceptional circumstances in response to the crisis, permitted Member States to influence the content of their notifications, thereby facilitating the application of state aid as both the choice of conditions and ease of approval at their disposal shifted.¹³ Nevertheless, this shift also introduced complexities, as the requirements for assessing aid schemes were subject to unprecedented and unforeseen challenges.

The classification of a crisis as an ‘exceptional occurrence’ remained dormant until the declaration of the global outbreak of the coronavirus disease 2019 (‘the COVID-19 pandemic’ or ‘the outbreak’) as a ‘Public Health Emergency of International Concern’ in 2020.¹⁴ The rapid transmission of the virus and the accompanying mitigation measures that were introduced to curb its spread led to a global economic standstill, heightening the threat of economic recession.¹⁵ As a result, similarly to measures enacted during the financial crisis, both national and EU public authorities offered immediate assistance to companies struggling to cope, to alleviate the economic impacts. In mid-March 2020, the Commission adopted a temporary framework that addressed state aid measures implemented

⁷ See for example: the Great Financial Crisis and the COVID-19 Pandemic.

⁸ Jaap Hage, *European Integration: A Theme* (Maastricht Law Series, 10th edn, Eleven International Publishing 2020) 163.

⁹ Juan Jorge Piernas López and Michelle Cini, ‘State Aid Control: Rule Making and Rule Change in Response to Crisis’ in Diane Fromage, Adienne Héritier, and Paul Weismann (eds), *EU Regulatory Responses to Crisis: Adaptation or Transformation?* (Oxford University Press 2025) 92-114.

¹⁰ Claici (n 4).

¹¹ European Court of Auditors State Aid (n 3).

¹² *ibid.*

¹³ See for example the shift from Article 107(3)(c) TFEU to Article 107(3)(b) TFEU.

¹⁴ World Health Organization, ‘Coronavirus disease (COVID-19) pandemic’ (*World Health Organization Europe*) <<https://www.who.int/europe/emergencies/situations/covid-19>> accessed 23 April 2025.

¹⁵ Claici (n 4).

in response to the pandemic.¹⁶ An adaptation that built on the modifications made to the framework adopted during the financial crisis.

The adoption of the temporary crisis frameworks, in response to both the financial crisis and the COVID-19 pandemic, enabled Member States to rapidly propose state aid measures and grant sizeable quantities of aid, which triggered substantial increases in state aid expenditure.¹⁷ Since 2000, numerous cases have been filed with notifications from Member States based on specific exceptions linked to the nature of the crises.¹⁸ Further, in the period 2020 to 2021, the Commission approved aid measures, which totaled over 3.1 trillion Euros.¹⁹ This surge in state aid expenditure and subsequent Commission approvals has enabled Member States to influence the content provided in their notifications, given that the demands for exceptional aid measures reached unprecedented levels. This may, in turn, have extended the discretion awarded to Member States in their notification of aid schemes, thereby blurring the line between the objectives of combatting market distortions and the imperative to support economic recovery.

1.2 Aim and Research Question

This thesis analyzes the EU's regulatory approach to state aid response by focusing on the 2008 financial crisis and the COVID-19 pandemic. The thesis takes on an adjudicative perspective to examine how the state aid framework has been built in light of crises and whether a shift in the discretion awarded to Member States in the application of the conditions and requirements has been noted. To achieve this aim, the thesis addresses the following research question:

'Has the EU's regulatory approach and temporary state aid frameworks introduced in response to the 2008 financial crisis and the COVID-19 pandemic altered the approach to the discretion and flexibility awarded to Member States in their ability to grant aid?'

In answering the above, the thesis conducts an in-depth analysis of the current EU state aid framework, the rule-making changes made in response to the specifically chosen crises, and the temporary frameworks adopted. It further

¹⁶ Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/c 91 I/01 [2020] OJ CI 91/1 (COVID-19 Temporary Framework); European Court of Auditors State Aid (n 3).

¹⁷ European Court of Auditors State Aid (n 3).

¹⁸ TFEU (n 2) Article 107(2)(3); European Commission, 'State aid Scoreboard data: New dissemination tool for statistics (2000-2023) Reference metadata on methodology and quantity' (*European Commission*) <https://competition-policy.ec.europa.eu/state-aid/scoreboard/scoreboard-state-aid-data_en> accessed 20 May 2025.

¹⁹ European Commission, 'State aid cases' (*European Commission*) <https://commission.europa.eu/strategy-and-policy/coronavirus-response/supporting-jobs-and-economy-during-coronavirus-pandemic/state-aid-cases_en> accessed 19 May 2025.

investigates how the frameworks have been built to adjust to these crises and if they have altered the discretion and flexibility awarded to Member States. This has been done specifically in regard to the Member States' ability to impact the legal basis used in their notifications to the Commission.²⁰ The thesis further investigates relevant case law to determine how the rules enshrined in the legislation have affected the level of discretion awarded in practice via the Commission and its decisions taken. The analysis conducted focuses on a specific sector in relation to each crisis, namely, the financial sector during the financial crisis and the aviation sector during the COVID-19 pandemic. Based on the analysis and a comparison of the discretion awarded to Member States in free movement and public procurement in times of crises, the objective is to identify the interlink between the framework and discretion to determine if a more flexible approach to state aid has been developed in times of economic crises. An analysis that is made possible as state aid does not exist in a legal void and has relationships with other provisions.²¹

1.3 Limitations and Value Added

As the thesis has a limited word count and scope, the topics that can be examined within the scope of the paper are confined. In order to adapt to this, the thesis has narrowed down the research question and limited the case law and sector-specific analysis conducted to ensure that the content is elaborated upon sufficiently.

This thesis aims to provide a clearer understanding of EU state aid law and the development of its framework during times of crisis and explore the influence these crises have on the level of discretion awarded to Member States. The focus will be placed on the EU frameworks in relation to the 2008 financial crisis and the COVID-19 pandemic. Consequently, no comparative analysis will be conducted with other frameworks in the state aid field to highlight different approaches. Additionally, the analysis will concentrate on one sector per crisis, namely, the financial and aviation sectors, thus preventing an overarching examination into all sectors impacted.

Furthermore, the thesis primarily focuses on complex case law related to state aid within the context of competition law and therefore, emphasizes the key connections relevant to the research question. As a result, the depth of detail provided for the cases discussed is limited.

Moreover, while the thesis covers some aspects of EU state aid law, it only provides an overview necessary to comprehend the depth of the paper. It

²⁰ TFEU (n 2) Article 108(3).

²¹ Joined cases C-14991 and C-150/91 *Sanders Adour SNC and Guyomarc'h Orthez Nutrition Animale SA v Directeurs des Services Fiscaux des Pyrénées-Atlantiques* [1992] ECLI:EU:C:1992:261.

examines critical legal concepts to distinguish the elements pertinent to the research question. However, in reference to the research question, the focus is placed on Article 107 ‘Treaty on the Functioning of the European Union’ (‘TFEU’), including its criteria and the exemptions outlined within it. Other Articles related to state aid within the regulatory framework, such as Article 108 and Article 109 TFEU, are only briefly mentioned. Similarly, the aspects brought up as a comparative element on free movement and public procurement are only concisely mentioned to allow for parallels to be drawn. This comparison is motivated by the need for discussion to allow for conclusions to be made. The rationale behind choosing free movement and public procurement is grounded in their regulated nature with regard to Member State discretion and the lack thereof within EU state aid law.

1.4 Methodology and Outline

This thesis aims to provide a comprehensive overview of the EU’s regulatory approach to state aid in crises and its impact on the discretion given to Member States to help foster recovery. The intention is to depict the consequences and impacts of the subsequent frameworks introduced to allow for an in-depth analysis of their influence on Member States’ discretion in practice.

The thesis is divided into five main sections, not including section one (Introduction) and section seven (Conclusion). To begin with, sections two and three adopt an evaluative doctrinal analysis/black-letter methodological approach.²² To that end, both sections provide an analysis of the relevant principles, rules, concepts, and case law to connect state aid law with the concept of discretion. Section two provides an overview of the law and highlights the legal framework as a reference for its relevance in crises. The first sub-section addresses the principal objectives in state aid law in comparison to its overarching field of competition law. Following this, the second sub-section addresses the scope and application of EU state aid law by focusing on critical legal concepts and principles required for its application. Consequently, section two provides a deeper analysis of the letter of the law in Article 107 TFEU, the notion of aid, and the general prohibition and exceptions provided.

Following that, section three briefly focuses on the scope and limits of discretion within EU state aid law through an analysis of the Commission and Member States’ roles in its procedural enforcement. Here, specific focus is placed on the standstill obligation and the notification procedure.²³ The first sub-section highlights the role and importance of discretion within the EU Framework, while

²² Mike McConville and Wing Hong Chui, ‘Research Methods for Law’ (2nd edn, Edinburgh University Press) 1.

²³ TFEU (n 2) Article 108(3).

the second focuses on its wider application with reference to the roles of the Commission and the Member States.

As opposed to sections two and three, sections four and five further encompass comparative legal research in their focus on the EU's regulatory approach to crisis. A choice driven by the importance of examining the parallel approaches taken by the Commission in the face of crises and the effect the resulting case law and decisions taken have had on Member State discretion. Therefore, a comparison is drawn between the approaches taken before, during, and after the financial crisis of 2008 and the COVID-19 pandemic. Both sections provide sector-specific analysis of case law in the financial and aviation sectors.

Following this, section six contextualizes the approaches taken by assessing their impact on discretion through an analysis of case studies and a running comparative analysis with the free movement and public procurement regimes. This comparison is conducted due to the lack of discussion on discretion from the point of view of state aid and crises. By adopting such a comparison, this thesis aspires to generate new insights into the interlink between state aid and Member State discretion by filling the current gap in research. To complement the comparative analysis conducted, the thesis also adopts an overarching historical method as it touches upon the development of the approaches taken and the shifting landscape in relation to the crisis.

Lastly, section seven concludes the thesis and summarizes the main points addressed.

2. The Legal Framework of European Union State Aid Law and State Interferences

In contrast to other areas of competition policy, which primarily address private restrictions, such as the abuse of market power and collusive behavior, state aid distinctly focuses on potential distortions that arise from state subsidies, rather than actions taken by other undertakings.²⁴ Section 2.1 outlines the main objectives and aims of the state aid regulatory framework within the EU as a foundation for its historical development. Section 2.2 examines the scope and application of state aid rules to allow for a later examination into their development over time in light of crises. This section further elaborates on the criteria that define state aid to reinforce what the parameters encompass and concludes with a discussion of the possible exemptions and justifications available.

²⁴ Philipp Werner and Vincent Verouden, *EU State Aid Control: Law and Economics* (Kluwer Law International B.V. 2025) ch. 1.

2.1 General Objectives and Aims

Since its onset in the EU treaties, the law and policy within the field of state aid law have undergone significant shifts in relation to the overall objectives and aims.²⁵ The need to regulate the extent to which Member States could financially support firms, and prevent the emergence of ‘national champions,’ was brought to the forefront as early as the Spaak Report and the Treaty of Rome.²⁶ In that regard, as part of the ambit of competition policy, the intended aim stems from the will to avert negative market outcomes that have the potential to distort competition, to enforce a level playing field, and to avoid unauthorized exploitation of the internal market.²⁷ This is exemplified in the *Limburg* judgment, where the Court held that subsidies or aid that obstruct the fundamental aims of the internal market are incompatible and prohibited.²⁸

On the one hand, the aim thus ensures the stability and maintenance of the internal market by preventing adverse effects and distortions triggered by government subsidies to protect market competitiveness as a necessary supplement to competition law.²⁹ On the other hand, it upholds the notion that the integrity of the internal market would be compromised if Member States were to grant undue and biased advantages to domestic competitors without oversight measures in place.³⁰ However, in line with the development of broader EU objectives and priorities, there has been a notable shift away from the internal market as the

²⁵ Lena Hornkohl and Dionysios Pelekis, ‘Aid and Abet? The Role of State Aid in Shaping EU Industrial Policy (And its Limits)’ (*Kluwer Competition Law Blog Wolters Kluwer*, 20 February 2025) <<https://competitionlawblog.kluwercompetitionlaw.com/2025/02/20/aid-and-abet-the-role-of-state-aid-in-shaping-eu-industrial-policy-and-its-limits/#:~:text=Traditionally%20aimed%20at%20preventing%20market,the%20EU%27s%20industrial%20policy%20ambitions>> accessed 19 May 2025.

²⁶ Werner (n 24) ch. 1; Andrea Biondi, ‘State aid and free movement’ in Leigh Hancker and Juan J. Piernas López (eds), *Research Handbook in European Law series* (Edward Elgar Publishing 2021) 88; Ashurst, ‘Quickguides: EU State Aid’ (*Ashurst*, 24 October 2019) <<https://www.ashurst.com/en/insights/quickguide-eu-state-aid/>> accessed 21 April 2025.

²⁷ Franz Jörgen Säcker and Frank Montag (eds), *European State Aid Law: A Commentary* (1st edn, Bloombury Publishing 2017) ch. 1.

²⁸ Case 30-59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community* [1961] ECLI:EU:C:1961:2, para. 19.

²⁹ Pier Luigi Parcu, Gioglio Monti, and Marco Botta, ‘Introduction’ in Pier Luigi Parcu, Giorgi Monit, and Marco Botta (eds), *EU State Aid Law: Emerging Trends at the National and EU Level* (Edward Elgar Publishing Limited 2020) 5; Massimo Merola and Filippo Celiento, ‘Is the notion of aid broadening or shrinking over time, and if so, why? A subjective view on the rationale of the case law’ in Pier Luigi Parcu, Giorgi Moni, and Marco Botta (eds), *EU State Aid Law: Emerging Trends at the National and EU Level* (Edward Elgar Publishing Limited 2020) 40.

³⁰ Werner (n 24) ch. 1; Graham Butler, ‘State Aid: Extension of the *Acquis* and the ‘Effect on Trade’’ in Federico Fabbrini (ed), *The Law and Politics of Brexit: The Protocol on Ireland/Northern Ireland* (Oxford University Press 2022).

principal focus, towards a more efficiency-oriented approach that coincides with the EU's broader objectives.³¹

In *British Aggregates*, the Court held that the objectives and legal concepts of state aid are directly defined in the Treaty.³² In that vein, the following subsection outlines the scope and application of EU state aid law as covered by 'Title VII TFEU, on Common Rules on Competition, Taxation, and Approximation of Laws.' Preliminary focus will be placed on Article 107 TFEU, and the general prohibition and justifications laid down therein.

2.2 Scope and Application

The general framework that governs aid granted by EU Member States is set out in Articles 107 to 109 TFEU. Article 107 TFEU outlines the substantive rules with reference to the general prohibition of state aid and the derogations to the general ban. Article 107(1) TFEU covers the overall prohibition and the thresholds that need to be met, and Article 107(2) and Article 107(3) TFEU respectively address the exceptions and justifications for incompatible aid to be deemed permitted. Article 108 TFEU focuses on the purview of the Commission, the Member States, and the Council, in regard to procedural enforcement and intervention. Lastly, Article 109 TFEU introduces block exemptions outlining the procedure for their application. The state aid framework within the TFEU operates, akin to other competition law domains, in conjunction with secondary legislation and guidelines.³³ This sub-section explores this legal framework by focusing on its scope and application.

2.2.1 The Legal Framework of State Aid

Market intervention through state measures is considered unlawful under Article 107(1) TFEU, unless it proportionately pursues a legitimate objective. The general prohibition set out therein forbids:

*'... any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods... in so far as it affects trade between Member States...'*³⁴

The direct definition of aid as a subsidy granted to an undertaking, outlined in the Article, is wide-ranging and subject to interpretation by Member States in their

³¹ Hornkohl (n 25).

³² C-487/06 P *British Aggregates Association v Commission of the European Communities and United Kingdom* [2008] ECLI:EU:C:2008:757, para. 111; Merola (n 29), 18.

³³ Pierre Larouche and Alexandre de Stree, European Commission, 'Interplay between the New Competition Tool and Sector-Specific Regulation in the EU: Expert Study' [2020].

³⁴ TFEU (n 2) Article 107(1).

application. Hence, to mitigate the possibility of excessive discretion and broad interpretation among Member States, the Court of Justice of the European Union ('CJEU' or 'the Court') has set out four conditions that must be met for aid to be classified as state aid within the meaning of Article 107(1) TFEU.³⁵ In addition to the general prohibition, the Article provides exemptions, including but not limited to the General Block Exemption and the *de minimis* rule to allow certain contexts in which state aid is compatible and positively influences the internal market.³⁶ These criteria and exemptions in relation to the concept of aid will be further discussed below.

2.2.1.1 *The Notion and Criterion of State Aid*

As established in *Borken-Bochult*, Article 107(1) TFEU does not differentiate between various categories of aid, nor does it provide a framework that automatically incorporates certain forms of aid within its scope.³⁷ Since the concept of state aid fundamentally relies on the effects doctrine,³⁸ Article 107 TFEU neither distinguishes the aid through an analysis of the intervention's underlying cause or objective. Rather, as held in *Italian Republic v Commission*, it assesses the aid in relation to the effects the intervention may have.³⁹ Accordingly, for state aid to fall within the legal purview of Article 107(1) TFEU, the CJEU has, in its landmark *Altmark* judgment,⁴⁰ developed four cumulative conditions that must be met for the measure to be catalogued as aid.⁴¹

³⁵ Kelyn Bacon, *European Union law of state aid* (3rd edn, Oxford Competition Law, Oxford University Press 2017) 3-16; Werner (n 24).

³⁶ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance [2014] OJ L 187/1; Werner (n 24); *ibid*.

³⁷ Case 248/84 *Federal Republic of Germany v Commission of the European Communities* [1987] ECLI:EU:C:1987:437, para. 18.

³⁸ Säcker (n 27) ch. 2.

³⁹ C-173/73 *Italian Republic v Commission of the European Communities* [1974] ECLI:EU:C:1974:71, para. 13; C-241/94 *French Republic v Commission of the European Communities* [1996] ECLI:EU:C:1996:353, para. 20.

⁴⁰ C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECLI:EU:C:2003:415, para. 74. See also: C-142/87 *Kingdom of Belgium v Commission of the European Communities* [1990] ECLI:EU:C:1990:125, para. 25; Joined Cases 278/92, C-279/92 and C-280/92 *Kingdom of Spain v Commission of the European Communities* [1994] ECLI:EU:C:1994:325, para. 20; C-482/99 *French Republic v Commission of the European Communities* [2001] ECLI:EU:C:2001:685, para. 68.

⁴¹ Säcker (n 27) ch. 1-2; See also: e.g., *ibid*.

Namely that:

- The aid grants an undertaking with an economic advantage that it would not have received under normal circumstances;⁴²
- The advantage was granted, directly or indirectly, through state resources and can be imputable to the state (i.e., state origin);⁴³
- The aid is selective; it favors certain undertakings or the production of certain goods and;⁴⁴
- The aid is liable to distort competition and affect intra-EU trade.⁴⁵
- The criteria will be addressed in the abovementioned order below.

2.2.1.1.1 Advantage, State Origin, Selectivity Competition Distortion, and Effect on Trade

2.2.1.1.1.1 *Advantage*

The first step stipulates that there must be an advantage.⁴⁶ In the context of Article 107(1) TFEU, ‘advantage’ refers to an economic benefit granted to an undertaking that it could not have acquired under ordinary market conditions.⁴⁷ Two steps must be taken to determine whether an advantage is present.⁴⁸ First, whether a favored undertaking has received aid, and second, whether adequate considerations have been balanced with the benefit granted.⁴⁹ If the aid has not been balanced, it is considered to confer an economic advantage. To assess this, the financial situation of the undertaking prior to the granted aid is compared to its situation following the measure within its own factual and legal context.⁵⁰ Consequently, the existence of an advantage cannot be dismissed merely because competing firms in other Member States are placed in a more favorable

⁴² *Altmark* (n 40) para. 75.

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ C-39/94 *Syndicat français de l’Express international (SFEI) and others v La Poste and others* [1996] ECLI:EU:C:1996:285 para. 60; C-342/96 *Kingdom of Spain v Commission of the European Communities* [1999] ECLI:EU:C:1999:210 para. 41.

⁴⁸ *Säcker* (n 27) ch. 2.

⁴⁹ *ibid.*

⁵⁰ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] C 262/01.

position.⁵¹ Similarly, consistent with the effects doctrine, the cause and objective of the measure taken are irrelevant, and only the effect of the measure is pertinent.⁵²

Firstly, in determining the presence of an advantage, it is necessary to establish that the aid was granted to an undertaking. In the context of state aid and competition law, the CJEU has consistently referred to ‘undertaking’ as any entity engaged in an economic activity, irrespective of its legal status or way in which it is financed.⁵³ For an undertaking to be engaged in an economic activity, the CJEU has clarified that it must offer goods or services on a particular market.⁵⁴ Referring to the language used in Article 107(1) TFEU, the limitation of the prohibition to ‘certain undertakings’ denotes that measures that apply to all undertakings within a Member State do not qualify as state aid.⁵⁵

Once it has been established that aid has been granted to an undertaking, it must be assessed whether the benefit is balanced by adequate considerations.⁵⁶ The basic concept under state aid law is that monetary transactions conducted by public bodies do not, when carried out under normal market conditions, confer advantages upon the recipient.⁵⁷ To determine the presence of state aid, the CJEU has established the ‘Market Economy Operator’ (‘MEO’) test as referred to by the ‘Commission in its Notice on the Notion of State Aid as Referred to in Article 107(1) TFEU.’⁵⁸

The MEO test aims to ascertain whether a measure granted an advantage to an undertaking whilst not acting as a market economy operator.⁵⁹ Consequently, a comparison of the conduct of a public body with that of a private economic operator in a comparable legal and factual situation is warranted to determine whether an advantage has been granted.⁶⁰ If that is not the case under normal market conditions, the undertaking has received an advantage it would not have obtained without the Member State’s involvement.⁶¹ This aligns with the classic interpretation in *Van der Kooy*, where aid provides an economic advantage to

⁵¹ *Italian Republic* (n 39).

⁵² *ibid.*, para. 13; C-251/97 *French Republic v Commission of the European Communities* [1998] ECLI:EU:C:1998:572, Opinion of Advocate General Fennelly, para. 26.

⁵³ C-41/90 *Klaus Höfner and Fritz Elser v Mactotron GmbH* [1991] ECLI:EU:C:1991:161, para. 21; Joined cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECLI:EU:C:2000:428, para. 74.

⁵⁴ *Pavlov* (n 53) para. 75; Case 118/85 *Commission of the European Communities v Italian Republic* [1987] ECLI:EU:C:1997:283, para. 7; C-35/96 *Commission of the European Communities v Italian Republic* [1998] ECLI:EU:C:1998:303, para. 36; C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECLI:EU:C:2001:577, para. 19.

⁵⁵ Ashurst (n 26).

⁵⁶ Säcker (n 27) ch. 2.

⁵⁷ *SFEI* (n 47) para. 60, 61.

⁵⁸ Commission Notice C 262/01 (n 50).

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ *ibid.*

undertakings when it improves their position beyond what would have been feasible under normal circumstances.⁶²

2.2.1.1.2 State origin

In addition to granting an economic advantage, the measure must be attributable to the state through state origin.⁶³ Namely, the measure must be imputable to the state and granted, directly or indirectly, through state resources to exhibit a sufficient nexus between the measure taken and the state.⁶⁴ While these criteria initially appear as two separate and alternative conditions, they are often considered together as both pertain to the public origin of the intervention.⁶⁵ The criteria for aid cannot be fulfilled if only one of these criteria is satisfied.⁶⁶ As demonstrated by the Court in *PreussenElektra*, these conditions are not to be portrayed as distinct but rather as two cumulative conditions.⁶⁷ Two tests are, therefore, employed to ascertain that the aid has been granted through state resources: first, whether the measure is imputable to the state, and second, whether it inflicts a burden on that state's budget.⁶⁸

As introduced in *Stardust Marine*, the concept of imputability assesses the degree to which a measure originates from state decision-makers, thereby eliminating measures that do not.⁶⁹ The Court has consistently viewed imputability as a critical indicator of a measure's origin and the state's role in decision-making processes, including the requirements for state consent.⁷⁰ Imputability is established when a public authority grants an advantage to an undertaking through its legislative decisions within its realm of discretion.⁷¹ This applies even if the authority operates independently from other public authorities through legal autonomy or has nominated another public or private entity to oversee the measure on its behalf.⁷² Additionally, imputability may extend to the state in circumstances that involve public or private undertakings when a close connection between the undertaking and the public authority is exhibited, as it indicates the presence of a prospective risk that the undertaking is acting as an

⁶² Joined Cases 67, 68, and 70/85 *Kwekerij Gebroeders van der Kooy BV and others v Commission of the European Communities* [1988] ECLI:EU:C:1988:38.

⁶³ *Altmark* (n 40) para. 75.

⁶⁴ Säcker (n 27) ch. 2.

⁶⁵ C-482/99 *French Republic v Commission of the European Communities* [2002] ECLI:EU:C:2002:294, para. 24; T-351/02 *Deutsche Bahn AG v Commission of the European Communities* [2006] ECLI:EU:T:2006:104, para. 103.

⁶⁶ See for example: *ibid.*

⁶⁷ C-379/98 *PreussenElektra AG v Schlesweg AG, in the presence of Windparkt Reußenköge III GmbH and Land Schleswig Holstein* [2001] ECLI:EU:C:2001, para. 2.

⁶⁸ Säcker (n 27) ch. 2.

⁶⁹ *French Republic* (n 65); *Deutsche Bahn* (n 65); Säcker (n 27) ch. 2.

⁷⁰ Säcker (n 27) ch. 2.

⁷¹ Commission Notice C 262/01 (n 50); Joined Cases C-72/91 and C-73/91 *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* [1993] ECLI:EU:C:1993, paras. 20, 21.

⁷² Commission Notice C 262/01 (n 50).

intermediary.⁷³ However, in contrast to the direct connection made through public authorities, the imputability of measures related to public undertakings is calculated on a case-by-case basis with reference to the circumstances and the context at hand.⁷⁴

The subsequent test assesses whether the measure has imposed a burden on the state's budget, as introduced in *Sloman Neptun* and further developed in *Kirsammer-Hack*.⁷⁵ Thus, as a prerequisite, granting aid must, in some manner, deplete state resources compared to if the aid had not been granted.⁷⁶ The notion of exhaustion of state resources is subject to extensive interpretation and incorporates all resources within the public sector and resources of private entities under certain conditions.⁷⁷ Additionally, it extends to resources associated with public undertakings, provided the state has had some capacity to influence and direct their use.⁷⁸

2.2.1.1.1.3 Selectivity

The third and utmost essential condition for state aid demands that the aid is selective.⁷⁹ For aid to qualify as state aid, the advantage conferred through state resources must favor 'certain undertakings or [the] production of certain goods.'⁸⁰ In other words, to meet the selectivity requirement, the aid must benefit a specific undertaking or a set of comparable undertakings disproportionately compared to others, to ensure a differentiation between state aid and economic policies of universal application.⁸¹ The selectivity criteria are typically presumed fulfilled if the aid is granted to a sole undertaking. However, distinguishing selectivity becomes more challenging when the aid is extended to numerous undertakings more broadly. In such cases, it must be established that the concerned undertakings are in analogous legal and factual situations, a determination which has been classified by the Court as challenging and that may lead to uncertain outcomes.⁸² Therefore, to classify aid as selective, both geographical and material aspects are considered.

⁷³ *ibid.*

⁷⁴ *Firma Sloman* (n 71) paras. 20, 21.

⁷⁵ *ibid.*; C-189/91 *Petra Kirsammer-Hack v Nurhan Sidal* [1993] ECLI:EU:C:1993:907; Säcker (n 27) ch. 2.

⁷⁶ Ashurst (n 26).

⁷⁷ Commission Notice C 262/01 (n 50).

⁷⁸ *French Republic* (n 65) para. 38.

⁷⁹ *Altmark* (n 40) para. 75, 84.

⁸⁰ TFEU (n 2), Article 107(1); Commission Notice C 262/01 (n 50); Säcker (n 27) ch. 2.

⁸¹ Commission Notice C 262/01 (n 50); Säcker (n 27) ch. 1, 2.

⁸² C-379/98 *PreussenElektra AG v Schleswig AG, in the presence of Windparkt Reußenköge III GmbH and Land Schleswig Holstein* [2001] ECLI:EU:C:2000:585, Opinion of Advocate General Jacobs, para. 157.

Geographical selectivity implies that measures applicable across an entire territory of a Member State are excluded from its scope.⁸³ Nevertheless, not all measures that merely pertain to a specific region within a Member State are automatically selective.⁸⁴ According to established principles from tax measures, the Court has acknowledged three scenarios in which a measure is considered selective.⁸⁵ These include the central government opting to implement lower tax rates within a distinct geographical zone or where a symmetrical or asymmetrical devolution of tax powers exists.⁸⁶

On the contrary, material selectivity pertains to a particular sector within a Member State and assesses whether the measure has been applied to a specific group within that sector.⁸⁷ Material selectivity can be both *de jure* and *de facto* recognized. The former is determined by the legal criteria used to grant the measure and whether it is legally reserved for specific undertakings.⁸⁸ The latter examines the structure of the measure and evaluates whether it, irrespective of the formal criteria, affects a distinct group.⁸⁹ If a measure broadly applies to undertakings rather than being limited to a specific undertaking, it is necessary to pinpoint whether the measure deviates from the reference system and differentiates between economic operators in comparable situations.⁹⁰ If the measure does not differ, it must then be assessed whether it is permissible based on the nature of the system in place.⁹¹

2.2.1.1.1.4 *Competition Distortion and Effect on Trade*

The fourth and final requirement, entails an analysis of the effects of the aid, and the probability that it will distort competition and affect intra-EU trade.⁹² In contrast to the criterion for state origin, these two criteria, whilst two distinct elements of aid, are often considered together with each other in practice, due to

⁸³ Commission Notice C 262/01 (n 50).

⁸⁴ C-88/03 *Portuguese Republic v Commission of the European Communities* [2006] ECLI:EU:C:2006:511 para. 57ff

⁸⁵ *ibid.*

⁸⁶ Commission Notice C 262/01 (n 50).

⁸⁷ *ibid.*

⁸⁸ Joined Cases C-78/08 and C-80/08 *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. Coop arl* [2011] ECLI:EU:C:2011:550, para. 52.

⁸⁹ Joined Cases C-106/09 P and C-107/09 *European Commission and Kingdom of Spain v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland* [2011] ECLI:EU:C:2011

⁹⁰ Commission Notice C 262/01 (n 50).

⁹¹ *ibid.*

⁹² TFEU (n 2), Article 107(1); *Altmark* (n 40) para. 75; Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* [1980] ECLI:EU:C:1980:209, para. 11. See also; C-148/04 *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova I* [2005] ECLI:EU:C:2005:774, para. 56.

their close connection and interrelated nature.⁹³ However, it is essential to note that they are not analyzed within the same framework of conditions. Instead, the *ex ante* characteristics of their effects are examined for both.⁹⁴

As established in *Philip Morris*, a measure is considered to distort or potentially threaten to distort competition when it is liable to advance the competitive position of the recipient in contrast to other competing entities on the same market.⁹⁵ A measure is thus generally considered to distort or threaten to distort competition when it grants a financial advantage to an undertaking in a sector where competition exists or could potentially arise.⁹⁶ Drawing from previous case law,⁹⁷ the criteria for ascertaining distortion remain subject to broad interpretation, with the Commission focused on the *ex ante* characteristic of the effect, thereby reducing the threshold as no definite impact needs to be proven.⁹⁸

In its analysis, the Commission assesses whether the measure has placed the undertaking in a more favorable competitive position than it would have had without the aid being granted; however, it is not obligated to demonstrate that the distortion is significant or material in its effect.⁹⁹ This approach adopts a dynamic assessment of the effect by accentuating probable scenarios. Nonetheless, the Commission must thoroughly examine the circumstances that led to its decision to ensure that the likelihood of an effect is not merely theoretical.¹⁰⁰

Similarly to the analysis of liability to distort or threaten to distort competition, the Commission is under no obligation to determine an effect on trade that is tangible in nature, but rather the potential for such effects to occur.¹⁰¹ In the assessment of this impact, there is no requirement to define the market or conduct a detailed investigation into the measure's influence on competitive positions.¹⁰² Rather, emphasis is placed on the foreseeability of the measure's effects to determine why it poses a threat of distortion and is likely to affect intra-EU trade.¹⁰³ The latter situation typically arises when the measure is seen to

⁹³ Commission Notice C 262/01 (n 50); Joined Cases T-298/97, T-312/97 etc. *Alzetta Mauro and others v Commission of European Communities* [2000] ECLI:EU:C:2000:151, para. 81; Säcker (n 27) ch. 2.

⁹⁴ Bacon (n 35), 17-90.

⁹⁵ Commission Notice C 262/01 (n 50); *Philip Morris* (n 92) para. 11; Säcker (n 27) ch. 2.

⁹⁶ Commission Notice C 262/01 (n 50); *Alzetta* (n 93) paras. 141 – 147; *Altmark* (n 39).

⁹⁷ *Philip Morris* (n 92).

⁹⁸ Säcker (n 27) ch. 2.

⁹⁹ Commission Notice C 262/01 (n 50) para. 187-189.

¹⁰⁰ Commission Notice C 262/01 (n 50); *Altmark* (n 40), para. 79.

¹⁰¹ Commission Notice C 262/01 (n 50); Joined Cases C-197/11 and C-203/11 *Eric Limbert and Others v Gouvernement flamand and All Projects & Developments NV and Others v Vlaamse Regering* [2013] ECLI:EU:C:2013, para. 76.

¹⁰² *Philip Morris* (n 92); *Alzetta* (n 93), para. 95

¹⁰³ Commission Notice C 262/01 (n 50); *Philip Morris* (n 92) para. 11; Bacon (n 35), 17-90.

strengthen the recipient's position in relation to other competitors within the intra-EU network.¹⁰⁴

2.2.2 Exemptions and Justifications

As previously noted, Article 107(1) TFEU prohibits market intervention through state measures unless such actions are proportionate to a legitimate aim. However, this general prohibition is not exhaustive, as there are exceptions that exclude certain forms of aid from its scope.¹⁰⁵ These are specified in Article 107(2) and Article 107(3) TFEU.

The derogations outlined in Article 107(2) TFEU are mandatory. Thereby mandating the Commission to approve the aid notified if the stipulated conditions are met.¹⁰⁶ This requirement is mirrored in the language used within the Article, which indicates that the aid listed 'shall' be integrated and compatible with the internal market.¹⁰⁷ This wording, inclusive of the obligation to assess solely whether the outlined conditions are fulfilled, imposes limited discretion bestowed upon the Commission in its review of notifications submitted by Member States.¹⁰⁸

In contrast, Article 107(3) TFEU allows the Commission to exercise greater flexibility in its interpretations by using the term 'may.' Unlike Article 107(2) TFEU, this wording grants the Commission broader discretion to determine whether notified aid aligns with common interests and is compatible with the internal market.¹⁰⁹ Nevertheless, the Commission is bound by certain guidelines in its evaluation; it must adhere to balancing the benefits of the aid against its potential adverse effects to reach its conclusion.¹¹⁰

In times of crisis, Articles 107(2)(b) and Article 107(3)(b)(c) TFEU have been of particular importance. Following the financial crisis of 2008, there was a notable shift in how Member States exercised their discretion regarding the legal basis used when notifying the Commission and in the Commission's responses.¹¹¹ This change in approach was similarly reflected during the COVID-19 pandemic regarding the roles of Member States and the Commission.¹¹²

¹⁰⁴ Commission Notice C 262/01 (n 50); C-518/13 *Eventech Ltd v The Parking Adjudicator* [2015] ECLI:EU:C:2015 para. 66

¹⁰⁵ TFEU (n 2) Article 107(2)(3).

¹⁰⁶ Bacon (n 35) 3-16.

¹⁰⁷ TFEU (n 2) Article 107(2).

¹⁰⁸ TFEU (n 2) Articles 107(2), 108(3); Säcker (n 27) ch. 2.

¹⁰⁹ Bacon (n 35) 3-16.

¹¹⁰ Säcker (n 27) ch. 2.

¹¹¹ TFEU (n 2) Article 108(3).

¹¹² Carole Maczkovic, 'How Flexible Should State Aid Control Be in Times of Crisis?' [2020] 19/3 European State Aid Law Quarterly <<https://www-jstor-org.ludwig.lub.lu.se/stable/48685809?seq=3>> accessed 20 May 2025.

3. Scope and Limitations of Discretion in EU State Aid Law

3.1 Role and Importance of Discretion in EU Law

Discretion is a technical term that embraces various dimensions, which proves it difficult to form a conclusive definition.¹¹³ On a broader spectrum, it refers to the allocation of powers between the EU and its Member States, as well as the freedom to choose in the adjudication of disputes or in the creation, application, or interpretation of legal rules.¹¹⁴ As a significant quality within EU law, discretion intertwines with numerous concepts related to the rule of law and public policy exceptions, which enhances the discretionary powers granted to Member States.¹¹⁵ It is further associated with the principle of proportionality, linked to the freedom to determine whether certain objectives justify certain means in the adjudication of substantive and procedural rights.¹¹⁶ While discretion operates on both EU and national levels, the latter will be examined in its relationship with free movement and public procurement to allow for a discussion on its extension to Member States in state aid during crises. This parallel is drawn in section six.

3.2 Procedural Steps – Role of the Commission and National Legal Frameworks

In accordance with Article 108(1)(2) TFEU, the Commission holds the primary responsibility within EU state aid law to ensure that aid granted is not misused and aligns with the internal market.¹¹⁷ This responsibility stems from the requirement to assess the compatibility of the proposed measures. This

¹¹³ Michiel Brand, ‘Discretion, Divergence, and Unity’ in Sacha Prechal and Bert van Roerund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2009).

¹¹⁴ Xavier Groussot, Jörgen Hettne, and Sanja Bogojević, ‘The ‘Age of Discretion’: Understanding the Scope and Limits of Discretion in EU Public Procurement Law’ [2018]; Hans Lindahl, ‘Discretion and Public Policy: Timing the Unity and Divergence of Legal Orders’ in Sacha Prechal and Bert van Roerund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2009).

¹¹⁵ Elona Bano and Edmond Ahmeti, ‘The discretionary power of EU member states and national public administration in according their citizenship (*ius pecuniae*)’ [2023] 13/1 Juridical Tribune <<https://www.tribunajuridica.eu/arhiva/An13v3/9.%20Bano,%20Ahmeti.pdf>> 13 May 2025; Roberto Caranta, ‘On Discretion’ in Sacha Prechal and Bert van Roerund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2009).

¹¹⁶ Caranta (n 115); Groussot Age of Discretion (n 114).

¹¹⁷ Simonse Donzelli and Bernadette Willemot-Nieuwenhuys, ‘New trends in State aid enforcement by national courts: damages claims and the State aid cooperation tools’ in Pier L. Parcu, Giorgi Monti, and Marco Botta (eds), *EU State Aid Law* (Edward Elgar Publishing Limited 2020) 142.

assessment, conducted in line with fundamental principles of EU state aid law, falls within the exclusive competence of the Commission as a supranational entity.¹¹⁸ Consequently, the Commission is obligated under Article 108 TFEU to assess all aid notified to determine its compatibility through a preliminary examination, and if necessary, a formal investigation.¹¹⁹ Decisions taken by the Commission are subject to judicial review by EU Courts; however, focus is then placed on whether the Commission has complied with procedural rules rather than on the social and economic assessment conducted.¹²⁰

To allow for effective assessment, cooperation between the Commission and Member States, in line with the procedural characteristics of state aid law, is necessary.¹²¹ This importance was highlighted during the financial crisis by Commissioner Kroes, in amongst other cases, *Northern Rock*, where it was stated that good communication between the two allows for quick reactions and legal certainty.¹²² The close cooperation between the Commission and Member States was further highlighted by Executive Vice-President Vestager during the pandemic.¹²³

The procedural obligations imposed on Member States are laid down in Article 108(3) TFEU, which establishes both a notification and a standstill obligation. To uphold their notification obligation, Member States are required to notify the Commission of their intention to grant or alter aid.¹²⁴ Following this, they must adhere to their standstill obligation and refrain from any implementation of aid prior to being granted authorization.¹²⁵ Member States are exempt from these obligations only when the measure falls below the threshold established in the ‘Regulation on the application of Articles 107 and 108 TFEU to *de minimis* aid’

¹¹⁸ TFEU (n 2) Article 3(1); Säcker (n 27) ch. 9; Hage (n 8) 44.

¹¹⁹ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) [2015] OJ L248/9 Recital 9, Articles 4, 6.

¹²⁰ E.g., *Philip Morris* (n 92) para. 86ff; C-56/93 *Kingdom of Belgium v Commission of the European Communities* [1996] ECLI:EU:C:1996:64, para. 11; T-171/09 *Regione autonoma della Sardegna v Commission of the European Communities* [2005] ECLI:EU:T:2005:219, para. 97; Compiled for Maastricht University, *European Union Substantive Law* Compiled for Maastricht University (2nd edn, Custom Publishing), compiled from Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (7th edn, Oxford University Press) 417.

¹²¹ Council Regulation 2015/1589 (n 119) Recital 6, Article 21; *Italian Republic* (n 39); Säcker (n 27) ch. 9.

¹²² European Commission, ‘State aid: Commission approves UK rescue aid package for Northern Rock’ (*European Commission Press Release* 2007) <https://ec.europa.eu/commission/presscorner/detail/en/ip_07_1859> accessed 14 May 2025.

¹²³ European Commission, ‘State aid: Commission approves 9.8 million Euro Belgian measure to recapitalize Brussels South Charleroi Airport in the context of the coronavirus outbreak’ (*European Commission Press Release* 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6777> accessed 14 May 2025.

¹²⁴ TFEU (n 2) Article 108(3); Council Regulation 2015/1589 (n 118) Recital 5, Article 2.

¹²⁵ *ibid.*

(‘*De Minimis* Regulation’), is covered by the Block Exemption Regulation, or is included within the scope of a previously authorized aid scheme.¹²⁶

4. The EU’s Regulatory Approach to Crisis in State Aid: The Financial Crisis

4.1 State Aid Pre-Financial Crisis

Prior to the collapse of the financial market in 2008, the EU’s state aid rules were governed by the ‘Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty’ (‘Rescue and Restructuring Guidelines’) in conjunction with Article 87 ‘Treaty Establishing the European Community’ (‘EC Treaty’) (now Article 107 TFEU).¹²⁷ Further, the legal basis used to approve aid as compatible with the internal market was limited to Article 87(3)(c) EC Treaty (now Article 107(3)(c) TFEU).¹²⁸ Accordingly, only aid that was deemed to ‘facilitate the development of certain economic activities [or] areas’ that “[did] not adversely affect trading conditions’ was seen as compatible.¹²⁹

However, as the Rescue and Restructuring Guidelines were directed towards normal market conditions, they remained ‘untested’ in situations of crisis.¹³⁰ As a result, it became evident, following the financial collapse, that the rules were not adept at tackling the accompanying challenges. This realization prompted the Commission to adopt a more lenient tactic to more effectively manage the circumstances at hand. In response, the Commission implemented new guidelines and communications, along with a temporary framework, that enabled Member States to serve as a safety net for the struggling market. By August 2013, the Commission had issued seven communications since the onset of the financial

¹²⁶ TFEU (n 2) Article 108(1); Joined Cases C-197/11 and C-203/11 *Eric Libert and Others v Gouvernement flamand and All Projects & Developments NV and Others v Vlaamse Regering* [2013] ECLI:EU:C:2013: 288, para. 81; Fernando Pastor-Merchante and Giorgio Monti, ‘The functions of national courts in the private enforcement of State aid law’ in Pier L. Parcu, Giorgio Monti, and Marco Botta (eds), *EU State Aid Law* (Edward Elgar Publishing Limited 2020) 121.

¹²⁷ Communication from the Commission – Community guidelines on State aid for rescuing and restructuring firms in difficulty [2004] OJ C 244/2 (Rescue and Restructuring Guidelines); Consolidated Version of the Treaty Establishing the European Community [2002] OJ C 325/33 (EC Treaty).

¹²⁸ Rescue and Restructuring Guidelines Article 19.

¹²⁹ EC Treaty (n 127) Article 87(3)(c).

¹³⁰ Elena Ghibellini, ‘Bank Crisis Management and State Aid in the EU: A comparative Law and Economics analysis of bank resolution, precautionary recapitalization and bank liquidation’ (DPhil thesis, Erasmus University Rotterdam 2021) 39; Patrick O’Sullivan, ‘State Aid Support to Financial Institutions and the Question of Systemic Importance in the 2008 Financial Crisis: Time for a New Approach?’ [2019] 30/3 *European Business Law Review* < <https://kluwerlawonline.com.ludwig.lub.lu.se/api/Product/CitationPDFURL?file=Journals\EULR\EULR2019030.pdf>> accessed 20 May 2025 723.

crisis to ensure alignment with its evolution, uncertainty, and volatility, not including the ‘Temporary Community Framework for state aid measures to support access to finance in the current financial and economic crisis’ (‘financial crisis Temporary Framework’, ‘Temporary Framework’, or ‘Framework’).¹³¹

Namely the:

- ‘Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis’ (‘the 2008 Banking Communication’)¹³²
- ‘Communication on the recapitalization of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition’ (‘the Recapitalization Communication’)¹³³
- ‘Communication from the Commission on the treatment of impaired assets in the Community banking sector’ (‘the Impaired Assets Communication’)¹³⁴
- ‘Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules’ (‘the Restructuring Communication’)¹³⁵
- ‘Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favor of banks in the context of the financial crisis’ (‘the Prolongation Communication 2011’)¹³⁶
- ‘Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favor of banks in the

¹³¹ Ghibellini (n 130) 3.

¹³² Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis [2008] OJ C 270/8 (2008 Banking Communication).

¹³³ Communication from the Commission – The recapitalization of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition [2009] OJ C 10/2 (Recapitalization Communication).

¹³⁴ Communication from the Commission on the treatment of impaired assets in the Community banking sector [2009] OJ C 72/1 (Impaired Assets Communication).

¹³⁵ Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules [2009] OJ C 195/9 (Restructuring Communication).

¹³⁶ Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises [2010] OJ C 329/4 (Prolongation Communication 2011).

context of the financial crisis’ (‘the Prolongation Communication 2012’)¹³⁷

- ‘Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favor of banks in the context of the financial crisis’ (‘the 2013 Banking Communication’)¹³⁸

4.2 State Aid in Response to the Financial Crisis

As held by Commissioner Kroes at the time, ‘state aid rules are part of the solution, not part of the problem.’¹³⁹ Consequently, in the wake of the financial crisis and its impact on the economy, the Commission set out guidelines and solutions to facilitate the application of state aid rules in response to the crisis. To allow for smoother application, the Commission adopted a more lenient approach and waived the previously strict application in favor of the financial stability caused by the crisis.¹⁴⁰ During which, the decision-making process was condensed, with many decisions taken within 24 hours, a stark contrast to the previously rather lengthy approval times. Further, as the formal investigation process was scaled back, the Commission reversed its previous policy by permitting Article 107(3)(b) TFEU as a legal basis. This shift altered the ability for Member States to justify measures and the conditions under which they are approved.¹⁴¹

4.2.1 Early Stages

In the early stages of the crisis, specifically until the beginning of 2009, Article 107(3)(b) TFEU and compatibility based on ‘serious disturbance[s]’ remained unused due to the shortage of clear guidelines on what a ‘serious disturbance’ constituted.¹⁴² A factor that was impacted by the limited number of state aid cases within the financial sector up until this point, during which the legal architecture of Article 107(3)(c) TFEU long served as a basis for the parameters of Member

¹³⁷ Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favor of banks in the context of the financial crisis [2011] OJ C 356/7 (Prolongation Communication 2012).

¹³⁸ Communication from the Commission on the application, from 1 August 2015, of State aid rules to support measures in favor of banks in the context of the financial crisis [2013] OJ C 216/1 (2013 Banking Communication).

¹³⁹ European Commission, ‘State aid: Commissioner Kroes briefs Economics and Finance Ministers on financial crisis measures’ (*European Commission Memo* 2008) <https://ec.europa.eu/commission/presscorner/detail/en/memo_08_757> accessed 17 May 2025.

¹⁴⁰ Phedon Nicolaides and Iona Eleonara Rusu, ‘The financial crisis and state aid’ [2010] 55/4 *The Antitrust Bulletin* <<https://journals-sagepub-com.ludwig.lub.lu.se/doi/pdf/10.1177/0003603X1005500404>> accessed 3 May 2025 776.

¹⁴¹ Rose M. D’Sa ‘Instant State Aid Law in a Financial Crisis – A U-turn’ [2009] 8/2 *European State Aid Law Quarterly* <<https://www-jstor-org.ludwig.lub.lu.se/stable/26683025?seq=1>> accessed 5 May 2025.

¹⁴² Nicolaides *Financial Crisis* (n 140) 776.

State notification and Commission aid examination.¹⁴³ As a result, at the onset of the financial crisis, the Commission had a tendency to grant aid in line with the Rescue and Restructuring Guidelines under Article 87(3)(c) EC Treaty (now Article 107(3)(c) TFEU) to address the urgent measures in its first phase in financial crisis resolution.¹⁴⁴ This approach is mirrored in the Commission's decisions taken in numerous cases, including, but not limited to *Northern Rock*,¹⁴⁵ and *Roskilde Bank*.¹⁴⁶ During these decisions, the Commission raised no objections to most of the measures notified by the Member States and highlighted the inapplicability of Article 87(3)(b) EC Treaty as a legal basis and applicability of Article 87(3)(c) instead.¹⁴⁷ This view was in line with the Danish authorities in *Roskilde Bank*, who argued for the applicability of Article 87(3)(c) EC Treaty and the Rescue and Restructuring Guidelines as well.¹⁴⁸

Nevertheless, in response to the uncertainty of the crisis, the Commission adjusted its approach by adopting a new crisis framework, under which new aid schemes were developed, and Article 107(3)(b) TFEU became the preferred legal basis. The first shift towards Article 107(3)(b) was seen in early 2008, when the Commission addressed the possibility of assessing aid under said legal basis in *Sachsen L.B*, basing its assessment on the Rescue and Restructuring Guidelines.¹⁴⁹ Despite the shift, a clear link is, however, notable to the initial steps taken in the early stages, as all state aid measures adopted by the Commission are grounded in core principles outlined in the Rescue and Restructuring Guidelines and Article 87(3)(c) EC Treaty: viability, burden-sharing, and competition.¹⁵⁰

¹⁴³ *Generale Bank / Crédit Lyonnais Bank Nederland* (IV/M.628) Commission Decision [1995] OJ C 289/10.

¹⁴⁴ Nicolaidis Financial Crisis (n 140).

¹⁴⁵ *United Kingdom Rescue aid to Northern Rock* (NN 70/2007) Commission Decision [2007] C(2007) 6127 final, para. 38, section 5; European Commission Northern Rock (n 112); European Commission, 'State aid: Commission approves UK rescue aid package for Northern – frequently asked questions' (*European Commission Memo* 2007) <https://ec.europa.eu/commission/presscorner/detail/en/memo_07_545> accessed 19 May 2025.

¹⁴⁶ *Roskilde Bank A/S* (NN 36/2008) Commission Decision [2008] C(2008) 4138 final paras. 39-41; European Commission, 'State aid: Commission approves Danish liquidation aid for Roskilde Bank' (*European Commission Press Release* 2008). <https://ec.europa.eu/commission/presscorner/detail/en/ip_08_1633> accessed 6 May 2025.

¹⁴⁷ *Northern Rock* (n 144) para. 38; *Roskilde* (n 145) paras. 39-42, 66,67; European Commission Northern Rock (n 121).

¹⁴⁸ *Roskilde* (n 145) paras. 39-42.

¹⁴⁹ *Germany Sachsen LB* (ex CP 244/07 and ex NN 8/08) Commission Decision [2008] C(2008) 711 def, paras. 75-77; *State Aid Implemented by Germany for Sachsen LB* (Notified under No C 9/2008 ex NN 8/2008, CP 244/2007) Commission Decision [2008] C(2008) 2269 final; Nicolaidis (n 139).

¹⁵⁰ Ghibellini (n 130) 6.

4.2.2 Crisis Framework Adopted

4.2.2.1 *Temporary Community Framework for State Aid Measures in the Financial Crisis*

As the crisis intensified and uncertainty grew, the Commission implemented a Temporary Framework as part of the European Economic Recovery Plan announced in November 2008.¹⁵¹ This Framework aimed to facilitate recovery through a coordinated effort based on shared community principles.¹⁵² This implementation afforded Member States with a manifold of opportunities to grant aid and public support, utilizing both existing provisions and new temporary measures, including higher limits on grants, credit guarantees, risk capital, and loans.¹⁵³ The primary goals of the Framework were to highlight the significance of companies and their access to financing and the promotion of a sustainable growth economy.¹⁵⁴

Pursuant to the Temporary Framework introduced, a notable shift in the legal basis is demonstrated.¹⁵⁵ The Commission underlined its previously strict interpretation of Article 107(3)(b) TFEU as a legal basis; however, it acknowledged the exceptional policy responses required.¹⁵⁶ Consequently, determining that it may be employed, albeit for a limited time period. Additionally, following the amendment of the Temporary Framework in February 2009, the obligation for Member States to show that the measures notified are necessary, proportionate, and appropriate to remedy such a serious disturbance and that all conditions were respected was introduced.¹⁵⁷

In addition to introducing the potential for a change in legal basis, the existing framework on *de minimis* aid saw a shift in the maximum amount for which aid

¹⁵¹ Communication from the Commission to the European Council of 26 November 2008 – ‘A European Economic Recovery Plan’ [2008] COM(2008) 800 final; Communication from the commission – Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis [2009] OJ C 83/1 (Financial Crisis Temporary Framework).

¹⁵² *ibid*; European Commission, ‘2894th Council meeting
 Economic and Financial Affairs
 Luxembourg, 7 October 2008’ (*European Commission Press Release* 2008) <https://ec.europa.eu/commission/presscorner/detail/en/pres_08_279> accessed 18 May 2025.

¹⁵³ Financial Crisis Temporary Framework (n 151) para. 1.4; Nicolaidis Financial Crisis (n 140).

¹⁵⁴ Financial Crisis Temporary Framework (n 151) para. 1.3.

¹⁵⁵ *ibid* section 4.

¹⁵⁶ *ibid* para. 4.1. See also: Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH v Commission of the European Communities* [1999] ECLI:EU:T:1999:326; *Crédit Lyonnais group* (98/490/EC notified under document number C(1998) 1454) Commission Decision [1998] OJ L 221, section 10.1; *Restructuring aid implemented by Germany for Bankgesellschaft Berlin AG* (2005/245/EC notified under document number C(2004) 327) Commission Decision [2005] OJ L 116, paras. 153 *et seq.*

¹⁵⁷ Financial Crisis Temporary Framework (n 151) para. 4.1.

could exceed.¹⁵⁸ Under the *De Minimis* Regulation, aid qualifies as *de minimis* if the total amount does not exceed 200.000 Euro over a period of three fiscal years, with the exception of the road sector.¹⁵⁹ In light of the financial crisis and the economic situation, the Commission revised the threshold, permitting the granting of up to 500.000 Euro in aid per undertaking as compatible under Article 87(3)(b) EC Treaty, subject to certain conditions.¹⁶⁰ The implications of which, through an analytical lens, show the first glimpse into the widening of the discretion awarded.

4.2.2.2 *The 2008 Banking Communication*

To prevent the distortion of competition and negative spillover effects, the Commission published the 2008 Banking Communication to establish general principles for the banking sector.¹⁶¹ This Communication was the first to be published under the financial crisis Temporary Framework and provides guidance on the application of support schemes and individual assistance.

It emphasized the general principles in accordance with Article 87(3)(b)(c) EC Treaty and reaffirmed the noted shift within the Temporary Framework towards Article 87(3)(b) EC Treaty as the legal basis for compatible aid.¹⁶² The Commission notably stressed that it may only be used ‘as long as the crisis justifies its application.’¹⁶³ It placed primary focus on how Member States could effectively support financial institutions by outlining eligibility criteria and the timeframe for the aid provided.¹⁶⁴ It furthermore reiterated that all aid measures must not exceed what is strictly necessary to remedy a serious disturbance, be proportionate to the circumstances, and minimize negative effects on competitors.¹⁶⁵ This shift and use of cumulative conditions was seen in *Fortis Bank/Fortis Bank Luxembourg*, where the Belgian, Luxembourgish, and Dutch authorities relied on Article 107(3)(b) TFEU and the Communication to declare their measure compatible with the internal market.¹⁶⁶ A view that was supported by the Commission, which, based on the notification and information provided

¹⁵⁸ Commission Regulation (EU) 2023/2831 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid [2023] OJ L 1/12 (De Minimis Regulation).

¹⁵⁹ *ibid* Article 2.

¹⁶⁰ Financial Crisis Temporary Framework (n 151) para. 4.2.2.

¹⁶¹ 2008 Banking Communication (n 132); Sarah Kim and Nefeli Filis, ‘State aid and the financial crisis – An assessment under the State aid rules for the banking sector’ [2012] <<https://www.maastrichtuniversity.nl/sites/default/files/2023-03/kim.pdf>> accessed 7 May 2025.

¹⁶² EC Treaty (n 127) paras. 6-16.

¹⁶³ 2008 Banking Communication (n 132) para. 12.

¹⁶⁴ State aid scoreboard – Spring 2009 update, Special edition on state aid interventions in the current financial and economic crisis (COM/2009/0164 final) Commission Report [2009].

¹⁶⁵ 2008 Banking Communication (n 132) para. 15

¹⁶⁶ *Restructuring aid to Fortis Bank and Fortis Bank Luxembourg* (NN 42/2008 Belgium, NN 46/2008 Luxembourg, NN 53/A/2008 Netherlands) Commission Decision [2008] C(2008) 8085, paras. 43, 68

therein, declared the aid compatible.¹⁶⁷ A similar response was taken in *Aegon*, which implicitly supports the Commission's leniency in assessing and adopting decisions in times of crisis.¹⁶⁸

The Communication further introduced general schemes such as guarantees and recapitalization options available to Member States and emphasized the importance of long-term viability in the Commission's assessment of the aid.¹⁶⁹ However, the Communication was deemed insufficient, as Member States sought further clarification on recapitalization, which led to the adoption of the Recapitalization Communication.¹⁷⁰

The 2008 Banking Communication was later replaced by the 2013 Banking Communication.¹⁷¹ This change was prompted by the increased divergence in economic recovery among Member States.¹⁷² In the adapted version, the Commission emphasizes the introduction of newer crisis rules that are aimed at promoting financial stability whilst limiting distortions to competition, to address weaknesses identified in the 2008 Banking Communication.¹⁷³ The main modifications include shifts in the restructuring process and the enhancement of the burden-sharing requirements.¹⁷⁴

4.2.2.3 *The Recapitalization Communication*

The main objective of the Recapitalization Communication is to offer additional guidance on recapitalization schemes to ensure financial stability and lending to the real economy.¹⁷⁵ Moreover, it serves as a sounding board in the development of appropriate responses to mitigate the risk of insolvency.¹⁷⁶ Within the Framework, the Commission addresses potential competition concerns and emphasizes that all measures taken must be proportionate and temporary, accentuating the importance highlighted in its previous communications.¹⁷⁷ Furthermore, it addresses principles governing recapitalization at current market rates and the temporary recapitalization of fundamentally sound banks as the

¹⁶⁷ *ibid* paras. 77, 78.

¹⁶⁸ European Commission, 'State aid: Commission approves Dutch emergency recapitalization of Aegon' (*European Commission Press Release* 2008) <https://ec.europa.eu/commission/presscorner/detail/en/ip_08_1822> accessed 20 May 2025.

¹⁶⁹ 2008 Banking Communication (n 132) paras. 13, 14, 31.

¹⁷⁰ *ibid* paras. 1, 3; Banking Communication para. 1, 3; Recapitalization Communication (n 133).

¹⁷¹ 2013 Banking Communication (n 132).

¹⁷² *Ibid* para. 13.

¹⁷³ European Commission, 'State aid: Commission adapts crisis rules for banks – frequently asked questions' (*European Commission Memo* 2013) <https://ec.europa.eu/commission/presscorner/detail/en/memo_13_886> accessed 19 May 2025.

¹⁷⁴ 2013 Banking Communication (n 132); *ibid*.

¹⁷⁵ Recapitalization Communication (n 133) paras. 4-6; Kim (n 161).

¹⁷⁶ *ibid*.

¹⁷⁷ Recapitalization Communication (n 133) para. 11. See also; Financial Crisis Temporary Framework (n 150) para. 4.1.

types of recapitalization available.¹⁷⁸ As demonstrated in *Commerzbank*, the 2008 Banking and the Recapitalization Communication both place primary focus on Article 107(3)(b) TFEU, further demonstrating a shift in the legal basis.¹⁷⁹

4.2.2.4 *The Impaired Assets Communication*

In March 2009, the Impaired Assets Communication was published, which addresses the implementation of asset relief measures, following announcements by Member States to enhance existing support measures with relief for impaired bank assets.¹⁸⁰ This Communication both provides guidance on asset relief and establishes criteria to ensure a level playing field through immediate effects.¹⁸¹ However, it evaluates long-term effects and viability similarly to previous communications of the same nature.¹⁸² This is done by obliging Member States to ensure that their notifications to the Commission are ‘subject to full *ex ante* transparency and disclosure’, which aims to minimize the risk of future interventions.¹⁸³ This means that the notification for aid mandates the inclusion of a disclosure of impairments conducted by independent experts to ascertain the amount of aid and incurred losses, as well as a viability review to assess prospects for future viability.¹⁸⁴

4.2.2.5 *The Restructuring Communication*

In 2009, the Commission published an additional communication, the Restructuring Communication, which again emphasizes the importance of financial stability in achieving long-term viability.¹⁸⁵ It aims to expand upon the principles established in the previous communications, all of which focus on the restoration of viability. However, in contrast to the previous communications, it centers on the Commission’s assessment of aid in furtherance of this objective. Consequently, it requires Member States to present a restructuring plan to outline how long-term viability is intended to be restored.¹⁸⁶

¹⁷⁸ Recapitalization Communication (n 133) sections 2.1, 2.2.

¹⁷⁹ *Commerzbank - Germany* (N 244/2009) Commission Decision [2009] C(2009) 3708 final, section 4.1.2.

¹⁸⁰ Impaired Assets Communication (n 134) paras. 3, 4.

¹⁸¹ *ibid.*

¹⁸² *ibid.*

¹⁸³ *ibid.* para. 20(a).

¹⁸⁴ *ibid.* para. 20(a)(b).

¹⁸⁵ Restructuring Communication (n 135).

¹⁸⁶ Impaired Assets Communication (n 134).

4.2.2.6 *The Prolongation Communication 2011 and 2012*

Following the crisis, the Commission issued the Prolongation Communication 2011, which set out the parameters for crisis-related assistance from 2011 onwards.¹⁸⁷ As economic recovery began to take shape, the Commission still deemed the approval of aid under Article 107(3)(b) TFEU necessary due to the remaining volatility and uncertainty in the market.¹⁸⁸ Consequently, it extended to temporal scope of the 2008 Banking Communication, the Recapitalization Communication, and the Impaired Asset Communication beyond the 31st December 2010.¹⁸⁹ In tandem, it also extended the scope of the Restructuring Communication to 31st December 2011.¹⁹⁰ Due to persistent tensions in the financial market, the Commission, in its Prolongation Communication in 2012,¹⁹¹ reaffirmed that the 2008 Banking Communication, the Recapitalization Communication, and the Impaired Asset Communication would remain in effect.¹⁹² Moreover, it extended the scope of the Restructuring Communication beyond 31st December 2011.¹⁹³

An initial observation of the communications adopted, coupled with the decisions taken, indicates a shift in the Commission's mindset towards a more comprehensive perspective in assessing state aid measures during crises.¹⁹⁴ This is evidenced by the Commission's newly found consideration of 'common European interests' and the need to 'remedy serious disturbances' in its compatibility assessments, rather than limiting itself to 'specific economic activities.'¹⁹⁵ A change that consequently opens the door for a broader interpretation of the compatibility requirements and heightens the ability for Member States to justify their measures and conditions under which they are approved.¹⁹⁶ An observation, which, when considered together with the Commission's adaptations during the COVID-19 pandemic, suggests a pattern of enforcement in crisis assistance and Member State involvement.

¹⁸⁷ Prolongation Communication 2011 (n 136).

¹⁸⁸ *ibid* paras. 5, 6.

¹⁸⁹ *ibid* para. 7.

¹⁹⁰ *ibid*.

¹⁹¹ Prolongation Communication 2012 (n 137).

¹⁹² *ibid* para. 4.

¹⁹³ *ibid*.

¹⁹⁴ Nicolaidis Financial Crisis (n 140).

¹⁹⁵ TFEU (n 2) Article 107(3)(b)(c).

¹⁹⁶ D'sa (n 141).

5. The EU's Regulatory Approach to Crisis in State Aid: The COVID-19 Pandemic

In the wake of the COVID-19 pandemic and yet another crisis,¹⁹⁷ the EU faced new challenges, of which state aid was no exception.¹⁹⁸ In light of the policy options and swift responses taken, it became evident that the Commission had drawn valuable lessons from the adaptations implemented during the financial crisis. Following the pandemic's outbreak, the Commission issued a communication on the 'Coordinated economic response to the COVID-19 Outbreak' ('Coordinated Economic Response Communication') to address potential socio-economic challenges and foster solidarity within the internal market.¹⁹⁹ Subsequently, the 'Communication on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' ('COVID-19 Temporary Framework', 'Temporary Framework', or 'Framework') was introduced.²⁰⁰

5.1 Coordinated Economic Response Communication

The Coordinated Economic Response Communication was issued in March 2020 to address the outbreak and outline strategies to tackle the ensuing crisis.²⁰¹ With reference to the section on state aid, various support measures available to Member States were mentioned, including the use of Article 107(3)(c) TFEU as a legal basis to help alleviate the adverse effects.²⁰² Ergo, in a similar vein to that in the context of the financial crisis, Article 107(3)(b) TFEU was not adopted until later. Additionally, a new development not seen during the financial crisis was the Commission's introduction of Article 107(2)(b) TFEU as a possible legal basis.²⁰³ The Communication also suggested the temporary relaxation of frameworks to alleviate pressure and enable rapid action at both national and EU levels.²⁰⁴ It soon became evident that the magnitude of the pandemic required the

¹⁹⁷ See for example: the financial crisis 2008.

¹⁹⁸ Werner (n 24).

¹⁹⁹ Communication from the Commission Coordinated economic response to the COVID-19 Outbreak [2020] COM/2020/112 final (Coordinated Economic Response Communication).

²⁰⁰ Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ CI 91/1 (COVID-19 Temporary Framework).

²⁰¹ Coordinated Economic Response Communication (n 199).

²⁰² *ibid* section 5.

²⁰³ *ibid*.

²⁰⁴ Michelle Marques Machado, Santiago del Rio, and Alejandro Garcia de Brigard, 'Post-Lockdown Antitrust: A Review of the COVID-19 Era and the Outlook for the Near Future' American Bar Association, International Law Section <https://www.bu.com.co/sites/default/files/2023-08/perspectives_postlockdown%20antitrust%202022.pdf> accessed 17 May 2025.

establishment of yet another temporary framework.²⁰⁵ To which, the frameworks adopted during the financial crisis served as a reference point for how lenient assessments and the range of derogations can be.²⁰⁶

5.2 The Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak

The various containment measures implemented by Member States to curb the spread of the virus, such as travel restrictions, had an immediate effect on global financial markets and contributed to an economic decline and a state of emergency.²⁰⁷ The publication of the Temporary Framework in March 2020, following the previously mentioned Communication,²⁰⁸ clearly indicated that the Commission had learned from the responses taken during the financial crisis and recognized the necessity for appropriate state aid measures at a coordinated level to address the resulting economic ramifications.²⁰⁹ This is further echoed by the direct triggering of Article 107(3)(b) TFEU as the legal basis, instead of Article 107(3)(c) TFEU, which led to an unprecedented number of state aid measures quickly being granted.²¹⁰ Moreover, the COVID-19 pandemic also saw the emergence of Article 107(2)(b) TFEU as a legal basis, a measure not referenced during the financial crisis due to its differing nature.²¹¹ The former is classified as both a ‘natural disaster’ and an ‘exceptional circumstance,’ while the latter is neither.²¹² Consequently, this development provided Member States with the possibility to employ two components of crisis aid, thereby indirectly extending

²⁰⁵ Jakub Kociubiński, ‘The New Normal? The European Union’s Temporary Framework for State Aid’ [2024] *Wroclaw Review of Law Administration & Economics* 2.

²⁰⁶ *ibid* 3; Delia Ferri, ‘The Role of EU State Aid Law as a ‘Risk Management Tool’ in the COVID-19 Crisis’ <<https://pmc.ncbi.nlm.nih.gov/articles/PMC7426606/#fn4>> accessed 20 May 2025.

²⁰⁷ Coordinated Economic Response Communication (n 199) para. 3; Ferri (n 206).

²⁰⁸ European Commission State Aid Cases (n 19); Coordinated Economic Response (n 199).

²⁰⁹ COVID-19 Temporary Framework (n 200) see for example: para. 10; European Commission, ‘The State Aid Temporary Framework’ (*European Commission*) <https://competition-policy.ec.europa.eu/state-aid/coronavirus/temporary-framework_en> accessed 20 May 2025; Małgorzata Agnieszka Cyndecka, ‘State aid and the financial sector: the crisis and beyond’ in Leigh Hancher and Juan J. Piernas López (eds), *Research Handbook on European State Aid Law* (Edward Elgar Publishing Limited 2021); Paula Riedel, Thomas Wilson, and Shane Cranley, ‘Learnings from the Commission’s Initial State Aid Response to the COVID-19 Outbreak’ [2020] 19/2 *European State Aid Law Quarterly* <https://www-jstor-org.ludwig.lub.lu.se/stable/48685977?searchText=&searchUri=&ab_segments=&searchKey=&refreqid=fastly-default%3Ab30c90412fdceb734980282096667a5c&initiator=recommender&seq=1> accessed 20 May 2025 116.

²¹⁰ COVID-19 Temporary Framework (n 199) paras. 6, 17-20; Kociubiński (n 204); Agnieszka (n 209); Maczkovic (n 112).

²¹¹ TFEU (n 2) Article 107(2)(b); Temporary Framework COVID-19 (n 200) paras. 6, 15.

²¹² *ibid*.

their discretion prior to the notification, as a choice between the two must be made.²¹³

During the initial phases of the pandemic, Member States appeared to gravitate towards Article 107(2)(b) TFEU as a legal basis.²¹⁴ This shift is evident, as the Commission, having classified the pandemic as an ‘exceptional occurrence’ in early March, began to assess all notified measures as both proportionate and directly linked to the crisis.²¹⁵ This assessment is linked to the Commission’s lack of discretionary power and obligation to consider aid compatible if there is a direct causal link between the occurrence and the resulting damage.²¹⁶ The use of Article 107(2)(b) TFEU as a possible legal basis provided a distinct advantage to Member States, as they were consequently able to utilize the strict interpretive nature in favor of certain sectors heavily impacted to compensate for losses. This was clearly demonstrated in the airline industry, which was heavily impacted by the temporary travel bans and limitations on free movement imposed.²¹⁷

The initial sway towards Article 107(2)(b) TFEU as a legal basis was evident in several decisions. One such decision was SA.56765, which addressed aid measures notified by France in the form of deferring payments of civil aviation and solidarity tax on airline tickets due to the effects of the pandemic.²¹⁸ In this instance, the Commission held that there was a causal link between the damage incurred and the harm associated with the scheme, which aimed to maintain liquidity until movement restrictions and prohibitions were lifted.²¹⁹ Additionally, the Commission raised no objections regarding the measure’s

²¹³ Kociubiński (n 205) 3.

²¹⁴ Phedon Nicolaidis, ‘Application of Article 107(2)(b) TFEU to COVID-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence’ [2020] 11/5-6 Journal of European Competition Law & Practice <<https://academic-oup-com.ludwig.lub.lu.se/jeclap/article/11/5-6/238/5857757>> accessed 20 May 2025.

²¹⁵ See for example: *DK Compensation scheme for cancellation of events related to COVID-19* (SA. 56685 2020/N) Commission Decision C(2020) 1689 final, para. 28-30.

²¹⁶ *Joined Cases C-346/03 and C-529/03 Giuseppe Atzeni and Others, Marco Scalas and Renato Lilliu v Regione autonoma della Sardegna* [2006] ECLI:EU:C:2006:130, para. 79; Kociubiński (n 192) 3, 4.

²¹⁷ *Denmark Temporary targeted compensation scheme for companies affected by COVID-19 related prohibitions* (SA. 57930 2020/N) Commission Decision [2020] C(2020) 4883 final; *Moratoire sur le paiement de tax aéronautiques en faveur des entreprises de transport public aérien* (SA. 56765 2020/N) Commission Decision [2020] C(2020) 2097 final; European Commission, ‘State aid: Commission approves 550 million Euro German State-guarantee loan to compensate airline Condor for damage caused by coronavirus outbreak’ (*European Commission Press Release* 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_752> accessed 15 May 2025; European Commission, ‘State aid: Commission approves Danish public guarantee of up to 137 million Euro to compensate airline SAS for damage caused by coronavirus outbreak’ (*European Commission Press Release* 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_667> accessed 15 May 2025.

²¹⁸ *C-210/21 P Ryanair DAC v European Commission* [2023] ECLI:EU:C:2023:908, para. 3; *T-259/20 Ryanair DAC v European Commission* [2021] ECLI:EU:T:2021:92, para. 1; SA.56765 (n 204).

²¹⁹ *C-210/21 P Ryanair* (n 218) para. 6; *T-259/20 Ryanair* (n 218) para. 4.

compatibility with Article 107(2)(b) TFEU based on the commitments given and the extent of the damage indicated in the notification provided by France.²²⁰ This Decision was appealed by Ryanair, but upheld by both the General Court and the CJEU, who dismissed Ryanair's grounds.²²¹ The tendency to consider the COVID-19 pandemic as an 'exceptional circumstance' under Article 107(2)(b) TFEU was further reinforced in Decision SA.56795, the General Court's ruling in T-378/20,²²² and the Court's decision in *Ryanair DAC v Commission* (C-321/21P).²²³

However, invoking Article 107(2)(b) TFEU carried a high burden of proof and required Member States, in their notification, to quantify the exact amount of damage incurred and the methodology used to calculate such damages.²²⁴ Despite being a seemingly straightforward option, it has limited use, as the prerequisite of a causal link excludes the possibility of addressing economic aftershocks and the broader impact the pandemic may have on the economies of Member States.²²⁵ Consequently, it became evident that Article 107(3)(b) TFEU needed to be invoked to allow state intervention to mitigate disruptions in national economies and take preventative measures.²²⁶ Which, unlike Article 107(2)(b) TFEU, grants the Commission a wider array of discretion and interpretative flexibility, as evidenced during the financial crisis, as it can conduct a more nuanced assessment throughout the balancing test conducted.²²⁷

The transition to Article 107(3)(b) TFEU as a legal basis was clearly demonstrated in the airline sector through Commission Decision SA.56812.²²⁸ In

²²⁰ C-210/21 P *Ryanair* (n 218) paras. 5, 9.

²²¹ *ibid* para. 129; T-259/20 *Ryanair* (n 218) paras. 26, 89.

²²² T-378/20 *Ryanair DAC v European Commission* [2021] ECLI:EU:T:2021:194.

²²³ C-321/21 P *Ryanair DAC v European Commission* [2023] ECLI:EU:C:2023:713, para. 4; *ibid* para. 2.

²²⁴ Nicole Robins, Laura Puglisi, and Ling Yang, 'State Aid Tools to Tackle the Impact of COVID-19: What is the Role of Economic Financial Analysis' [2020] 19/2 *European State Aid Law Quarterly* <https://www-jstor-org.ludwig.lub.lu.se/stable/48685979?searchText=&searchUri=&ab_segments=&searchKey=&refreqid=fastly-default%3Ab30c90412fdceb734980282096667a5c&initiator=recommender&seq=5> accessed 20 May 2025 141.

²²⁵ Kociubiński (n 205) 3,4; European Commission Danish Guarantee (n 217).

²²⁶ Coordinated Economic Response Communication (n 199); European Commission Danish Guarantee (n 217); Hengeler Mueller, 'State aid during the Coronavirus crisis' (*Hengeler Mueller*) <<https://www.hengeler.com/en/service/newsletter/state-aid-during-the-coronavirus-crisis>> accessed 20 May 2025; E.g., as first seen in Italy and Spain and later applied to all Member State following an assessment on the impact and scale of the virus.

²²⁷ C-66/02 *Italian Republic v Commission of the European Communities* [2005] ECLI:EU:C:2005:768, para. 135; Alessandro Rosanò, 'Adapting to Change: COVID-19 as a Factor Shaping EU State Aid Law' [2020] <<https://www.europeanpapers.eu/europeanforum/adapting-to-change-covid-19-shaping-eu-state-aid-law>> accessed 19 May 2025; Mueller (n 224).

²²⁸ *Sweden COVID-19: Loan guarantee scheme to airlines* (SA. 56812 2020/N) Commission Decision [2020] C(2020) 2366 final, paras. 8,9.

this decision, the Commission raised no objections to a notification made by the Swedish authorities based on Article 107(3)(b) TFEU, which involved loan guarantees aimed at assisting airlines with a Swedish license in addressing disruptions caused by travel restrictions.²²⁹ While the Commission recognized that the measure constituted state aid,²³⁰ it deemed the support necessary, appropriate, and proportionate to remedy ensuing disturbances.²³¹ Subsequently, Ryanair sought to have the decision set aside, but the Commission's findings were upheld by the General Court.²³² The Decision was later reaffirmed in *Ryanair DAC v European Commission* (C-209/21 P), where the Court dismissed the appeal and upheld the Commission's assessment.²³³

This trend was further reflected in another decision appealed by Ryanair concerning a state guarantee for Finnair by the Finnish state, notified under Article 107(3)(b) TFEU.²³⁴ The Commission held that the measure constituted state aid under Article 107(1) TFEU; however, it also concluded that the aim of restoring Finnair's balance sheet position and liquidity was necessary, appropriate, and proportionate to remedy the serious disturbance caused.²³⁵ In their respective judgments, the Commission's assessment was once again upheld by both the General Court and the CJEU.²³⁶

Since its implementation, the Temporary Framework has undergone six amendments that feature targeted adjustments to mitigate the socio-economic impacts and damages caused effectively.²³⁷ In addition to being complemented by the Economic Response Communication, the Commission published eleven additional guiding templates on state aid to assist in clarifying the rules in place.²³⁸

5.2.1 Amendments: April, May, June, and October 2020, and January and November 2021

The first amendment to the Temporary Framework was adopted in April 2020 and extended the scope to allow Member States increased flexibility in expediting research, testing, and the production of products related to the outbreak, while

²²⁹ *ibid.*, para. 5, 8, 9, 37.

²³⁰ *ibid.* para. 37.

²³¹ *ibid.* para. 44

²³² T-238/20 *Ryanair DAC v European Commission* [2021] ECLI:EU:T:2021:91, para. 85.

²³³ C-209/21 P *Ryanair DAC v European Commission* [2023] ECLI:EU:C:2023:905, paras. 61, 79, 90, 103, 118, 121(1).

²³⁴ T-657/20 *Ryanair DAC v Commission* [2022] ECLI:EU:T:2022:390; *Finland COVID-19: Recapitalization of Finnair* (SA. 57410 2020/N) Commission Decision [2020] C(2020) 3970 final, para. 69.

²³⁵ SA.57410 (n 220) para. 3,4, 33, 59, 122.

²³⁶ C-588/22 P *Ryanair DAC v Commission* [2024] ECLI:EU:C:2024:935, para.147; T-657/20 *Ryanair* (n 220).

²³⁷ European Commission State Aid Cases (n 19).

²³⁸ *ibid.*

also protecting jobs and supporting the economy.²³⁹ It consequently furthered the goals initially set forth in the Framework and issued five new sets of aid in alignment with the newly amended goals.²⁴⁰ Additionally, in response to the catastrophic impacts of the pandemic, it built upon previously established measures to allow greater support for companies. Specifically, it raised the maximum aid limit to 800.000 Euro per company, and enabled Member States to provide ‘zero-interest loans, guarantees on loans covering 100% of the risk, or provide equity.’²⁴¹ Subsequently, it reflects the trend observed in the financial crisis Temporary Framework, as it increased the *de minimis* threshold to 1 million Euro per company to address urgent liquidity needs.²⁴²

The adoption of the second amendment further extended the scope to provide clearer guidelines on recapitalization and subordinated debt measures.²⁴³ It specifically allowed Member States to ‘purchase existing shares of companies at market price or *pari passu* with private shareholders,’ a concept that normally falls outside the ambit of the state aid framework.²⁴⁴ By broadening the scope of the Framework to include recapitalization and subordinated debt, the amendment also indirectly influenced the discretion awarded to Member States, as it enabled them to design national measures in support of other policy objectives freely.²⁴⁵

As the pandemic’s conditions and consequences continued to evolve, the Commission placed greater emphasis on supporting struggling micro, small, and start-up companies, as well as incentivizing private investments.²⁴⁶ Further, the Commission, recognizing the need for further economic support, extended the temporal scope of the Framework for an extra six months, until June 2021, in its fourth amendment.²⁴⁷ The recapitalization measures, however, were only

²³⁹ European Commission, ‘State aid: Commission extends Temporary Framework to enable Member States to accelerate research, testing, and production of coronavirus relevant products, to protect jobs and to further support the economy in the coronavirus outbreak’ (*European Commission Press Release* 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_570> accessed 20 May 2025.

²⁴⁰ *ibid.*

²⁴¹ *ibid.*

²⁴² *ibid.*

²⁴³ European Commission, ‘State aid: Commission extends Temporary Framework to recapitalization and subordinated debt measures to further support the economy in the context of the coronavirus outbreak’ (*European Commission Press Release* 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_838> accessed 20 May 2025; European Commission, ‘State aid: Commission extends Temporary Framework to further support micro, small, and start-up companies and incentivize private investments’ (*European Commission Press Release* 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1221> accessed 20 May 2025.

²⁴⁴ European Commission Extend Recapitalization (n 243).

²⁴⁵ *ibid.* Such as, the prevention of fraud, tax evasion, and green and digital transformation.

²⁴⁶ European Commission Expand Micro and Small Companies (n 243).

²⁴⁷ European Commission, ‘State aid: Commission prolongs and expands Temporary Framework to further support companies facing significant turnover losses’ (*European Commission Press Release* 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1872> accessed 20 May 2025.

prolonged for three.²⁴⁸ Additionally, the Commission further introduced additional guidelines on the support for uncovered fixed costs of companies, exit of the state from previously state-owned companies, and the temporary removal of countries from the ‘marketable risk’ list.²⁴⁹

In its semi-final amendment, the Commission further prolonged the Framework in light of the persistence of the pandemic, until the end of 2021 for all measures.²⁵⁰ This deadline was later pushed until June 2022.²⁵¹ Additionally, to address the continued uncertainty, the Commission doubled the previous aid ceilings for companies, raising them to 225.000 Euro for those in the primary production of agricultural products, and 1.8 million Euro for companies in other sectors.²⁵² To further accelerate recovery, two new aid measures were introduced in its final amendment issued in November 2021.²⁵³

As a result, it is evident that the adoption of yet another Temporary Framework in response to yet another crisis highlights a shift in the Commission’s approach to financial recovery during such periods. The experiences of both the financial crisis and the pandemic have shown that evolving frameworks reveal a transformation in the discretion exercised by both the Commission and the Member States regarding aid provided. With each new measure, additional forms of aid and opportunities were presented to deal with the crises at hand. While the discretion to Member States is not explicitly addressed in the Temporary Frameworks introduced during the financial crisis and the COVID-19 pandemic, it is nonetheless influenced by the actions taken by the Commission. This is clearly perceived in the Commission’s decisions and their willingness to approve notified aid.

²⁴⁸ *ibid.*

²⁴⁹ *ibid.*

²⁵⁰ European Commission, ‘State aid: Commission prolongs and further expands Temporary Framework to support economy in context of coronavirus outbreak’ (*European Commission Press Release 2021*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_261> accessed 20 May 2025.

²⁵¹ European Commission, ‘State aid: Commission sets out future of Temporary Framework to support economic recovery in context of coronavirus outbreak’ (*European Commission Press Release 2021*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6092> accessed 20 May 2025.

²⁵² European Commission Further Expands (n 250).

²⁵³ European Commission Sets Out Future (n 251).

6. Parallel with Free Movement and Public Procurement in Times of Crisis

In order to facilitate discussion and fill the gap in the research available on discretion and state aid law, this section combines an overview of the free movement and public procurement regimes during times of crises, with the abovementioned perceived patterns of enforcement and heightened perceptions of Member State discretion. Against this background, as briefly noted in section three, the primary focus of the analysis is placed on national-level discretion rather than discretion at the EU level. Free movement and public procurement as fields of law have been chosen due to their relevance to crises such as the outbreak of the COVID-19 pandemic, and their link to many of the grounds used in several of the abovementioned Commission decisions. Further, both the fields of free movement and public procurement are regulated and impose clearer ramifications on Member State discretion within their respective legal fields and application.²⁵⁴ The comparison of discretion within state aid law to these fields is conducted to articulate, through an analytical lens, whether the EU's regulatory approach and Temporary Frameworks introduced have, in fact, altered the approach to discretion and flexibility awarded towards the perceived relationship discussed above.

Public procurement law pertains to the acquisition processes undertaken via public contracts by contracting authorities from various economic operators.²⁵⁵ The principal legislative framework that governs public procurement law within the EU is 'Directive 2014/24/EU' ('Public Procurement Directive').²⁵⁶ In consideration of the critical importance of public buyers in the immediate responses taken to battle the impacts of the pandemic,²⁵⁷ the Commission, akin to its earlier responses taken in relation to state aid in crisis, issued guidance

²⁵⁴ See for example: Groussot Age of Discretion(n 114); Xavier Groussot, 'The precautionary and proportionality principles in emergency situations: an analysis of the concept of discretion in the context of the Covid-19 pandemic and EU/EEA law' [2024] <https://www.researchgate.net/publication/385423324_The_precautionary_and_proportionality_principles_in_emergency_situations_an_analysis_of_the_concept_of_discretion_in_the_context_of_the_Covid-19_pandemic_and_EUEEA_law?enrichId=rgreq-999d5b472e10ab358e2fb131f981a249-XXX&enrichSource=Y292ZXJQYWdlOzM4NTQyMzM4NDtBUzoxMTQzMTI4MTI4ODU2NzE2OEAxNzMwNzIxOTA0MDYw&el=1_x_2&_esc=publicationCoverPdf> accessed 20 May 2025.

²⁵⁵ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65 (Citizens' Rights Directive), Article 1(2); European Court of Auditors, 'Special Report, Public Procurement in the EU: Less competition for contracts awarded for works, goods, and services in the 10 years up to 2021 (2023)' <https://www.eca.europa.eu/ECAPublications/SR-2023-28/SR-2023-28_EN.pdf> accessed 20 May 2025.

²⁵⁶ *ibid.*

²⁵⁷ European Court of Auditors Public Procurement (n 255).

specifically tailored to the increased demand for rapid response.²⁵⁸ Through this, the Commission balanced the delicate line between immediate and comprehensive action and possible damages through the adoption of a more flexible stance on the alternatives available to Member States.²⁵⁹ This, through a higher degree of coherence, echoes the logic adopted by the Commission within the field of state aid during the financial crisis and the pandemic, ultimately reflecting a broader trend.²⁶⁰

Specifically, the adoption of the Guidance resulted in the shortening of deadlines imposed by Article 26(2) Public Procurement Directive for open and restricted procedures, and thereby facilitated shorter time frames for the submission of tenders.²⁶¹ Further, in instances characterized by extreme urgency, the Commission empowered Member States and their contracting authorities to award public contracts through a negotiated procedure, without the need for prior publication, provided that they are strictly necessary in response to an unforeseen, urgent event.²⁶² An avenue, thus similar to the notification procedure within state aid,²⁶³ as the responsibility to substantiate the application of the negotiated procedure rests with the contracting authority, which must evaluate whether the conditions for using the procedure are met.²⁶⁴ Accordingly, in the adoption of the Guidance in response to the COVID-19 pandemic as a public health crisis, the Commission implicitly delineates the parameters within which Member States may exercise their discretion in public procurement. Specifically, with regard to their ability to ensure that their public contracts are compatible with the negotiated procedure at the onset.²⁶⁵

As a matter of principle, this approach fundamentally aligns with the proportionality assessment employed by the Commission in its analysis of notified aid in accordance with Article 107 and 108 TFEU. Here, a parallel can be drawn between the discretion and the burden of proof allocated in public procurement and the notification obligations outlined in state aid law, as both accentuate the central role of proportionality. In particular, as the responsibility to incorporate all necessary information in their notifications fall on the Member

²⁵⁸ Communication from the Commission, Guidance on using the public procurement framework in the emergency situation related to the COVID-19 Crisis [2020] OJ 101 I/1 (Guidance Public Procurement), section 1.

²⁵⁹ *ibid.*

²⁶⁰ *ibid.*

²⁶¹ Guidance Public Procurement (n 258) section 2.1.1, 2.2.2; Noerr, ‘Public procurement in relation to the coronavirus pandemic’ (*Neurr* 2 April 2020) <<https://www.noerr.com/en/insights/vergabe-oeffentlicher-auftraege-in-bezug-auf-die-corona-pandemie>> accessed 20 May 2025.

²⁶² Guidance Public Procurement (n 258) section 2.3.

²⁶³ TFEU (n 2) Article 108(3).

²⁶⁴ Guidance Public Procurement (n 258).

²⁶⁵ *ibid* section 2.3.

States, which thereby bear the burden of proof and the discretion to choose which information to present.²⁶⁶

Another field that was significantly impacted by the COVID-19 pandemic and the bulk of countermeasures imposed as an aftermath was the fundamental right to free movement.²⁶⁷ Per ‘Directive 2004/38/EC’ (‘Citizens’ Rights Directive’), individuals have the right to move and reside freely within the territory of EU Member States.²⁶⁸ Restrictions on the right of free movement can only be justified on grounds of public policy or security, or public health, provided they comply with proportionality.²⁶⁹ The justification of public health was specifically impacted by the pandemic, in relation to the need to balance the objectives of restricting national measures aimed at protecting it, with their impact on free movement. A balancing test that, as established by the Court in *Nordic Info*,²⁷⁰ affords Member States a certain degree of discretion in their analysis of the appropriateness, necessity, and proportionality of an imposed measure.²⁷¹

Nordic Info concerned the interpretation of the Citizens’ Rights Directive and ‘Regulation (EU) 2016/399’ (‘Schengen Borders Code’) in the context of travel restrictions enacted by Belgium as a response to public health concerns associated with countries categorized as ‘red zones.’²⁷² In this instance, *Nordic Info B.V.*, a Belgian company, cancelled all travel arrangements to Sweden upon its designation as a ‘red zone’ under the imposed legislation.²⁷³ Whereupon shortly after, Sweden’s status was reclassified, and travel was no longer prohibited.²⁷⁴ In its judgment, the Court reiterated the prerogative of Member States to, upon sufficient justification, impose restrictions on free movement, consequently, awarding them with a high level of discretion in relation to restrictions, provided that the conditions are fulfilled.²⁷⁵ Crucially, the Court further reiterated the necessity of conducting a proportionality assessment to ensure that the restrictions imposed align with objectives of general interest, are strictly necessary, and not disproportionate to the pursued objectives.²⁷⁶ This principle was further underlined in *Vlaamse*, where the Court repeated the need

²⁶⁶ TFEU (n 2) Article 108(3).

²⁶⁷ Groussot COVID-19 Pandemic (n 254).

²⁶⁸ Citizens’ Rights Directive (n 252), Recital 1, 2, Article 1

²⁶⁹ *ibid* Article 27(1), 29(1).

²⁷⁰ C-128/22 *Nordic Info BV v Belgische Staat* [2023] ECLI:EU:C:2023:951.

²⁷¹ *ibid* para. 80. See also: C-333/14 *Scotch Whisky Association and Others v The Lord Advocate and the Advocate General for Scotland* [2015] ECLI:EU:C:2015:845, para. 54, 55.

²⁷² *Nordic Info* (n 270) para. 1, 33.

²⁷³ *ibid* para. 35.

²⁷⁴ *ibid*.

²⁷⁵ *ibid* para. 53

²⁷⁶ *ibid* para. 76, 77; C-205/20 *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld* [2022] ECLI:EU:C:2022:168, para. 31; C-694/20 *Orde van Vlaamse Balies and Others v Vlaamse Regering* [2022] ECLI:EU:C:2022:963, para. 42.

for careful evaluation of the objectives and the seriousness of restrictions, with the extent of the interference with individual freedoms.²⁷⁷

The ruling in *Nordic Info*, therefore, established a baseline for understanding Member State discretion concerning free movement rights during crises. It underlines the varying degrees of discretion granted, depending on the interpretation and levels of protection that different Member States choose to award.²⁷⁸ The significance of the balancing and proportionality test within the field of free movement further illustrates the ongoing importance of Member State assessments in yet another field.

Through a reflection on the significance of the proportionality assessment required in all three fields through a broader concept, its vital role in the development of legal regimes can be pinpointed. The discussions on the financial crisis and the COVID-19 pandemic serve as a powerful reminder that measures imposed, regardless of whether it pertains to state aid, public procurement, or restrictions on free movement, mandates Member States to conduct legal evaluation for the application of the tools available. This reveals an observable pattern across the fields of law, allowing for parallels to be drawn in relation to the steps Member States can take to ensure their aid measures are compatible.

7. Conclusion

Over the past twenty years, the EU has experienced major crises and faced unparalleled challenges. These challenges have prompted rapid intervention from the Commission, through communications and guidelines, to avert further collapse.²⁷⁹ Within the field of state aid law, this has required the Commission to adopt new guidelines and frameworks to address the economic downturn and enable Member States to support businesses struggling to cope through otherwise prohibited state intervention.²⁸⁰ In parallel, the Commission has had to tread a delicate line to balance the integrity of the internal market against the potential adverse effects and competitive distortions that government intervention of that nature may trigger.²⁸¹ In its role as primarily responsible for upholding the state aid regime, the Commission has, in response to both the financial crisis and the COVID-19 pandemic, shifted its focus away from the internal market towards a more efficiency-oriented perspective. This shift is apparent in the increased flexibility and adaptability of state aid rules to the challenges faced.²⁸² Through a more lax approach and increased willingness to approve notified measures, the

²⁷⁷ *Nordic Info* (n 270) para. 77; *Vlaamse* (n 276) para. 42.

²⁷⁸ *Nordic Info* (n 270) para. 78.

²⁷⁹ See for example: Financial Crisis Temporary Framework (n 151); COVID-19 Temporary Framework (n 16)

²⁸⁰ TFEU (n 2) Article 107, 108.

²⁸¹ *Parcu* (n 29) 5; *Merola* (n 29) 40.

²⁸² See for example: the financial crisis and the COVID-19 pandemic.

Commission has, in its adoption of its crisis management mechanisms, enabled Member States more leniency in their ability to impact aid granted.

This thesis assessed the EU's regulatory approach to state aid with a focus on Member State discretion within the development of the field following the responses taken to the 2008 financial crisis and the COVID-19 pandemic. To ascertain whether a shift in the discretion awarded to Member States in the application of the conditions and requirements can be noted, it specifically focused on the crisis frameworks adopted during these two predicaments.

To achieve the aim, the following research question was addressed:

'Has the EU's regulatory approach and temporary state aid frameworks introduced in response to the 2008 financial crisis and the COVID-19 pandemic altered the approach to the discretion and flexibility awarded to Member States in their ability to grant aid?'

As established, the general stance within the EU state aid framework is one of prohibition, with a limited number of exceptions, whereby aid, despite initially being categorized as unlawful, may still be granted.²⁸³ A decision that is ultimately taken by the Commission following an *ex ante* assessment of the proposed aid measure and its compatibility with the internal market.²⁸⁴ At first instance, this might, due to the Commission's primary responsibility in the determination of aid, suggest that the involvement of Member States either in the application or interpretation of the legal rules is very limited.²⁸⁵²⁸⁶ Specifically, as all that their notification and standstill obligations require, is that they provide the necessary information and refrain from implementing aid without prior authorization.²⁸⁷ However, upon a closer examination of the development of the crisis frameworks, Commission decisions taken, and the use of discretion within free movement and public procurement, a new trajectory is revealed. Namely, a shift in the legal architecture and an increased leniency in the assessment of internal market compatibility. This shift has opened the door for Member States to adopt a broader understanding and exert greater influence over the content of their notifications in line with their obligation.

Prior to and during the early stages of the financial crisis, Article 87(3)(c) EC Treaty, in combination with the Rescue and Restructuring Guidelines, was the primary legal basis used to approve aid.²⁸⁸ This framework reflected a rather strict interpretation of internal market compatibility as the only aid approved was aid

²⁸³ TFEU (n 2) Article 107(2)(3); European Court of Auditors State Aid (n 3).

²⁸⁴ TFEU (n 2) Article 3(1), 108; *Italian Republic* (n 39) para. 13; *French Republic* (n 39) para. 20; European Court of Auditors State Aid (n 3); Säcker (n 27) ch. 9; Hade (n 8) 44.

²⁸⁵ Donzelli (n 117) 142.

²⁸⁶ Groussot The Age of Discretion (n 114); Lindahl (n 114).

²⁸⁷ TFEU (n 2) Article 108(3); Council Regulation 2015/1589 (n 109) Recital 5, Article 2.

²⁸⁸ Rescue and Restructuring Guidelines (n 127) Article 119.

that ‘facilitate[d] the development of certain economic activities [or] areas’ and ‘[did] not adversely affect trading conditions.’²⁸⁹ However, as the need to adopt a new framework to tackle the detrimental effects of the financial crisis became apparent, a more lenient approach within the toolbox for crisis assistance was adopted.²⁹⁰ Here, Article 107(3)(b) TFEU became the preferred legal basis, and a more flexible approach to the maximum aid allowed was introduced.²⁹¹ By shifting the use of the legal basis towards ‘common European interests’ and to help ‘remedy serious disturbances’, the Commission implicitly recognized a broader perception in its compatibility assessments. As a result, Member States were provided with more latitude in justifying their measures in line with the conditions used.²⁹²

This trend is further substantiated by the outbreak of the COVID-19 pandemic, during which both Article 107(2)(b) and Article 107(3)(c) TFEU were used, which enabled Member States to utilize the interpretative nature of these exceptions in their favor. This is mirrored in numerous Commission decisions, whereby no objections to the compatibility of aid under Article 107(2)(b) TFEU were raised, granted that the Member States provided all the necessary information.²⁹³ Similar to the financial crisis, the pandemic also prompted a shift towards Article 107(3)(b) TFEU with the adoption of the Temporary Framework and crisis response, which favored financial recovery in the face of the unparalleled challenges.²⁹⁴ The effects of this, following an initial observation into the evolution of the frameworks adopted, indicate a transformation in the opportunities available with each new measure. This observation, when coupled with the increased leniency in Commission approvals and the ability of Member States to influence the content of notifications, suggests a pattern of enforcement in Member State involvement in crisis assistance. An examination, which, after a comparative analysis of the dimensions of both free movement and public procurement and Member State discretion during similar crises, has revealed stronger parallels between the fields.

As can be seen in the discussion on the financial crisis and the COVID-19 pandemic, coupled with free movement and public procurement, the vital role of the principle of proportionality and legal evaluations rises to the forefront. While the proportionality assessments within the fields of free movement and public

²⁸⁹ EC Treaty (n 127) Article 87(3)(c).

²⁹⁰ See for example the introduction of: the 2008 Banking Communication (n 132); the Recapitalization Communication (n 132); the Impaired Assets Communication (n 134); the Restructuring Communication (n 134); the Prolongation Communication 2011 (n 137); the Prolongation Communication 2012 (n 135); the 2013 Banking Communication (n 139).

²⁹¹ See for example: Financial Crisis Temporary Framework (n 151).

²⁹² D’sa (n 141).

²⁹³ See for example: C-210/21 P *Ryanair* (n 218) para. 3; T-259/20 *Ryanair* para. 1; SA.56756 (n 217). See also: C-321/21 P *Ryanair* (n 223) para. 2; T-378/20 *Ryanair* (n 222).

²⁹⁴ COVID-19 Temporary Framework.

procurement are directly conducted by the Member States themselves rather than the Commission in state aid, a clear pattern emerges.

Through the adoption of communications, Temporary Frameworks, and decisions taken in response to the magnitude of both the financial crisis and the COVID-19 pandemic, it becomes evident that the Commission embraced a more flexible and lenient mindset in its analysis conducted. An observable pattern that is echoed in the shift in mindset seen in *Northern Rock* at the start of the financial crisis and the later approaches taken in the numerous *Ryanair* decisions upheld by both the General Court and the CJEU during the COVID-19 pandemic.²⁹⁵ This shift in leniency, in combination with the widening of the legal bases available to Member States within their notification procedures, has afforded Member States with a latitude in the steps taken to ensure the compatibility of their measures with the internal market prior to their notifications. This has, in turn, heightened the impression of increased discretion, as their ability to influence the content of the notifications has increased. Consequently, the regulatory approach and temporary state aid frameworks adopted have altered the discretion and flexibility awarded to Member States, albeit limited to crisis situations and via Commission decisions.

²⁹⁵ *Northern Rock* (n 145); SA.57410 (n 234); T-657/20 *Ryanair* (n 234); SA.56812 (n 228); T-230/20 *Ryanair* (n 232); C-209/21 *Ryanair* (n 232).

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