

THE NEW NORMAL? THE EUROPEAN UNION'S TEMPORARY FRAMEWORKS FOR STATE AID

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ABSTRACT

It is widely agreed that the global economy has entered a phase of heightened uncertainty. Since all downturns and slowdowns involve low aggregate demand, the authorities typically step in by increasing their own spending to protect businesses and jobs. During the Covid pandemic the European Union has witnessed an unprecedented level of State aid measures, under the hastily adopted dedicated temporary framework. Temporary rules have also been adopted to facilitate State aid supporting companies affected by the Russian invasion of Ukraine, which are still in force today (March 2023). The common pattern of crisis responses in turn allows for a more general, non-event-specific, assessment of State aid measures taken to reduce economic disturbances.

Sufficient time has now passed for an attempt to take stock of these efforts. This paper therefore seeks to assess State aid measures designed to remedy serious economic disruptions, identify their weak points and recommend improvements. The analysis, preceded by a succinct description of the European Union's State aid toolbox for crisis aid, will focus on the previously identified potential problem areas: How to determine whether an aid measure is indeed capable, in itself, of

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remedying the serious disturbance in the economy, especially when it is granted to a single undertaking, and how to ensure the effectiveness of State aid control. The paper will conclude with a set of recommendations.

I. INTRODUCTION

Although the initial economic shock of Covid has subsided, the Russian invasion of Ukraine has upended the fragile economic recovery, triggering increasing food, commodity and energy prices and globally exacerbating inflationary pressures, necessitating yet another dedicated temporary framework for State aid.¹ The global economy has entered a phase of heightened uncertainty. This by itself is not unusual. Alternating periods of recessions and booms, even Black Swans, must be viewed as a natural occurrence in market economies.² Such episodes are typically associated with significant increases in government spending, both through macroeconomic stimulus packages as well as through sectoral or individual subsidies.³ The observable pattern of crisis responses in turn allows for a more general, non-event-specific assessment of State aid measures undertaken to address market disturbances.

The situation with State aid at the beginning of the pandemic can be described by paraphrasing (somewhat hyperbolically) the old adage *inter arma silent leges*. The magnitude and rapidity of the economic hardships caused by lockdowns and other containment measures made the need for immediate funding—under a specially adopted framework—supersede other considerations such as the impact on competition or other traditional compatibility criteria.⁴ For this reason Covid responses cannot serve as an easily implementable template for future, less

¹ Carlos Cuerdo, 'Economic Recovery in the Age of COVID-19' [2022] *Intereconomics* 57, 5-7; Johannes Emmerling et al., 'Will the Economic Impact of COVID-19 Persist? Prognosis from 21st Century Pandemics' (2021) IMF Working Paper 119; United Nations, *World Economic Situation and Prospects as of Mid-2022* (United Nations 2022) regarding State Aid Communication from the Commission Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia [2021] OJ C426/1 (Crisis Temporary Framework).

² Christian Bjørnskov, 'Economic freedom and economic crises' [2016] 45 *Eur. J. Political Econ.* 11-23; Gerd Gigerenzer, *Reckoning With Risk: Learning to Live With Uncertainty* (Gardners Book, 2003).

³ Cf. Alberto Alesina, 'Austerity in 2009-13' [2015] 30 *Econ. Policy* 383-437 with Massimo Motta & Martin Peitz, 'State Aid Policies in Response to the COVID-19 Shock: Observations and Guiding Principles' [2020] 55 *Intereconomics* 219-222.

⁴ Communication from the Commission on Temporary Framework for State Aid Measures to support the economy in the current COVID-19 outbreak (Covid Temporary Framework). The last consolidated version available at: https://competition-policy.ec.europa.eu/system/files/2021-11/TF_consolidated_version_amended_18_nov_2021_en_2.pdf [accessed 22.11.2022]. See Andrea Biondi, 'Governing the Interregnum: State Aid Rules and the

‘cataclysmic’, disruptive events. Nevertheless, interpretive trends revealed during the pandemic provide a boundary reference point of how a lenient approach to the State aid assessment can be adopted *in extremis*. It is perhaps due to this urgency that the question of how specific State aid provisions can effectively address economic disturbances, rather than just rubberstamping spending for the sake of spending, has garnered relatively little attention in the academic debate (which focused on questions around the legitimacy of soft-law rulemaking).⁵

In this context, the purpose of this paper is to take stock of the temporary aid measures. The intent is to identify the strengths and weaknesses in the current approaches to approving the State aid measures in light of their effectiveness and accountability of expenditure, and to formulate recommendations for improving future event-specific State aid frameworks, which may be needed for extended but less extreme economic difficulties. The analysis will follow a line of inquiry that commences with a synoptic overview of the basic Treaty-based framework for providing crisis responses through State aid. It will then delve into the specific mechanisms and interpretive approaches introduced by the crisis-related temporary framework. Building upon this foundational understanding, scrutiny will shift towards identifying potential problem areas associated with these mechanisms, particularly concerning their effectiveness in ameliorating serious disturbances in the economy and preventing wasteful spending.

II. THE EUROPEAN UNION’S STATE AID CRISIS RESPONSE TOOLBOX

The European Union (EU, the Union) State aid law Treaties’ toolbox of ‘crisis aid’ comprises two components – Article 107(2)(b) and 107(3)(b) TFEU. The former is a narrow tool limited to compensation for losses already incurred.⁶ Since aid having aims specified in Article 107(2)(b) TFEU is automatically compatible with the Internal Market while at the same time is an exemption from the general prohibition of State aid, the provision must be interpreted narrowly.⁷ The need for such narrow interpretation is especially emphasised for Article

COVID -19 Crisis’ [2020] 4 MCLR 2; Delia Ferri, ‘The Role of EU State Aid Law as a ‘Risk Management Tool’ in the COVID-19 Crisis’ [2020] 12 EJRR 1, 2.

⁵ See e.g. Mariolina Eliantonio & Oana Ștefan, ‘The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU’ [2021] 12 EJRR 1; Oana Ștefan, ‘COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda’ (2021) European Papers 5.

⁶ Franz-Jürgen Säcker & Frank Montag (eds.), *European State Aid Law: a commentary* (C.H. Beck, Hart, Nomos, 2016) 245-246.

⁷ Cases C-278/00 *Greece v Commission* EU:C:2004:239 para 81; C-73/03 *Spain v Commission* EU:C:2004:711 para 37; C-346/03 & C-529/03 *Atzeni and Others* EU:C:2006:130 para 79.

107(2) TFEU because the European Commission (EC, the Commission) have no discretion as to whether or not to authorise the aid (aside from aid schemes covered by GBER), thus there is the risk that Member States will abuse the rules to the advantage of their own economies.⁸ According to the current restrictive interpretation there must be the direct causal link between exceptional occurrences and the damages endured.⁹ The provision, therefore, cannot be used to compensate for losses caused by lingering effects of a short-time event such the subsequent decline in demand and, broadly speaking, economic aftershocks.¹⁰ It is also purely reactive. It cannot be put to use to deal with ongoing cash flow problems. For these reasons, Article 107(2)(b) TFEU is of limited utility.

Conversely, the latter provision – Article 107(3)(b) TFEU – allow for more interpretative flexibility, because it enable to temporarily reduce the pressure on the cash flows.¹¹ In other words, the main advantage of Article 107(3)(b) TFEU aid over Article 107(2)(b) TFEU aid is that it can be used proactively in anticipation of future needs. In this respect, it must be pointed out that if cash flow problems would have led to the bankruptcy, then any subsequent compensation would have been irrelevant, and the economic disturbance would have not been addressed. For this reason both the Covid Temporary framework for State aid as well as the subsequent one, adopted to support the economy in the context of Russia's invasion of Ukraine has been primarily reliant on Article 107(3)(b) TFEU.¹²

Although there exist a large number of Commission's decisions adopted under temporary frameworks, they are generally positive and thus offer little interpretive guidance for problem cases. Consequently, there is also very little up-to-date case-law on Article 107(3)(b) TFEU aid. A series of cases initiated by Ryanair against decisions authorising State aid in the Covid-stricken airline sector comprise the entire most recent and pertinent acquis.¹³ The following lines

⁸ T-268/06 *Olympiaki Aeroporía Ypiresies v Commission* EU:T:2008:222 para 52.

⁹ *Atzeni and Others* (n 7) para 79; *Spain v Commission* (n 7) para 37.

¹⁰ Article 107(2)(b) TFEU was not used to compensate losses incurred due to the worsened economic conditions as a result of, inter alia, the bird flu outbreak in 1997, 9/11 terrorist attacks, or the SARS outbreak in 2003.

¹¹ Phedon Nicolaides, 'Application of Article 107(2)(b) TFEU to Covid-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence' [2020] 11 JECLAP 5-6, 238.

¹² COVID Temporary Framework (n 4) cf [6] with [17-20] and Crisis Temporary Framework (n 1) cf [25] with [35-36].

¹³ Cases T-238/20 *Ryanair v Commission (Sweden)* EU:T:2021:91; T-259/20 *Ryanair v Commission (France)* EU:T:2021:92; T-378/20 *Ryanair v Commission (SAS, Denmark)* EU:T:2021:194; T-379/20 *Ryanair v Commission (SAS, Sweden)* EU:T:2021:195; T-388/20 *Ryanair v Commission (Finnair I)* EU:T:2021:196; T-465/20 *Ryanair v Commission (TAP)* EU:T:2021:284; T-628/20 *Ryanair v Commission (Spain)* EU:T:2021:285; T-643/20 *Ryanair v Commission (KLM)* EU:T:2021:286; T-657/20 *Ryanair v Commission (Finnair II)* EU:T:2022:390; T-665/20 *Ryanair v Commission (Condor)* EU:T:2021:344; T-677/20

of argument developed there are of importance for later discussions: The Court asserted that the Member State must ensure that the aid measures adopted to remedy that disturbance are necessary for that purpose and appropriate and proportionate.¹⁴ Then those measures are presumed to be adopted in the interests of the European Union without the need to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition.¹⁵ The Court further stated that the fact that a Member State manages to remedy a serious disturbance in its economy can only benefit the European Union in general and the Internal Market in particular.¹⁶

As regards aid beneficiaries, initially – prior to the 2008 crisis – the exception for serious economic disturbances was interpreted very narrowly. Notably, the Commission took the view that aid benefiting only one undertaking or sector would fail to resolve difficulties affecting the economy as a whole.¹⁷ The need to provide bailouts to financial institutions affected by the 2008 crisis prompted reconsideration of this approach.¹⁸ The Commission accepted that a crisis affecting individual sectors or operators may have an immediate knock-on impact on the whole economy.¹⁹ Consequently, individual schemes may fall within the exception.²⁰ At the time, no one considered the choice of beneficiaries to be a salient factor, due to the financial sector's undeniable impact the other spheres of the economy. This interpretation has been 'automatically' adopted to Covid-era cases. With the wide range of undertakings and sectors that received Covid State

Ryanair v Commission (Austrian Airlines) EU:T:2021:465; T-111/21 *Ryanair v Commission (Croatia Airlines)* EU:T:2022:699. The line of reasoning used in these cases is identical in most aspects, therefore, for the sake of brevity, only single representative judgment will be quoted in the subsequent discussion.

¹⁴ *Ryanair v Commission (Spain)* (n 13) para 67.

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ E.g. *Volkswagen Group in Mosel and Chemnitz* Decision 96/666/EC [1996] OJ L308/46; *Crédit Lyonnais* Decision 98/490/EC [1998] OJ L221/28 para 64; *Northern Rock* (NN 70/2007) Decision of 5 December 2007 [nyr] para 38.

¹⁸ See, e.g., Paris Anestis and Sarah Jordan, 'The Handling of State Aid During the Financial Crisis: An Efficient Response or Trouble for the Future?' [2009] GC 10, 50-53; Rosa D'Sa, 'Instant' State Aid Law in a Financial Crisis – a U-turn?' [2009] 8 EStAL 2, 139-144; Damien Gerard, 'EC Competition Law Enforcement at Grips with the Financial Crisis: Flexibility on the Means, Consistency in the Principles' [2009] 1 Concurrences, 46-62; Thomas Jaeger, 'How Much Flexibility Do We Need, Commission Crisis Management Revisited' [2009] 1 EStAL 3.

¹⁹ See Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis [2013] OJ C216/1 [6].

²⁰ Case C-526/14 *Kotnik and Others* EU:C:2016:570 paras 47-51.

aid, the question pertaining to beneficiaries selection has gotten only glancing attention.²¹

Such a lenient approach to Article 107(3)(b) TFEU aid – essentially *carte blanche* – can be explained and perhaps justified by the sheer magnitude of Covid's economic impact.²² Nevertheless, the question remains open whether it could and should be adopted to less 'cataclysmic' economic disturbances. This is because the *acquis* failed to sufficiently explain how to assess that a measure can indeed appreciably contribute to ameliorating the overall economic situation, especially when disturbances are localised or affects different sectors of the economy differently.²³ In this context, aside from the question whether 'any' disturbance can justify forgoing the balancing test, which is beyond the scope of this paper, the 'pandemic approach' to Article 107(3)(b) TFEU does not provide guidance on the following issues: Under what conditions a measure will be able to address economic disturbances; who should receive support; and how to avoid wasteful spending. Each of these issues will be discussed in turn.

III. THE MECHANISM FOR REMEDYING A SERIOUS DISTURBANCE IN THE ECONOMY

The role of State aid in remedying a serious disturbance in the economy is broadly described by the Commission by using catchphrases 'reducing vulnerability' and 'increasing resilience'.²⁴ Both concepts are ill-defined and superfluous.

'Vulnerability' in the context of Article 107(3)(b) TFEU aid is generally understood as a situation when an undertaking is threatened by the loss of liquidity.²⁵ This may be the case when an undertaking records a significant decline in revenue (at least 25%) in any given month as compared with a preceding

²¹ Eg *RegimeQuadro – COVID 19* (SA.57021) Decision of 21 May 2020 [2020] OJ C198/1; *State loan for the Danish Travel Guarantee Fund as a result of COVID-19* (SA.56856) Decision of 02 April 2022 [2022] OJ C125/1 para 4. However see *COVID-19 Planned aid in favour of InnoGenerics* (SA.59021) Decision of 11 November 2020 [2021] OJ C317/1 paras 7-12.

²² Ferri (n 4) 10.

²³ See notably *COVID-19: Aid to the fireworks sector* (SA.62368) Decision of 21 September 2021 [2021] OJ C477/1 paras 4-6.

²⁴ Ferri (n 4) 8-9.

²⁵ E.g., *COVID-19: Repayable advance scheme for micro, small and medium-sized enterprises* (SA.56996) Decision of 27 April 2020 [2020] OJ C168/1; *COVID-19 – Irish Restart Grant* (SA.57509) Decision of 03 June 2020 [2021] OJ C240/1; *Luxembourgish solidarity fund for undertakings affected by the COVID-19 outbreak* (SA.57304) Decision of 29 May 2020 [2020] OJ C198/1.

month or an analogous month from a previous year in relation with the economic disruptions caused by a given event; when an undertaking have lost or is about to lose their capacity to produce goods, provide services, or to receive goods or services provided by contractors in relation to the unavailability of components and resources caused by event; when said operator is not receiving a significant portion (in excess of 25%) of the due amounts – sales payments etc. – and do not have access to the capital market or credit limits for new contracts due to financial market disruptions.²⁶

Whereas ‘resilience’ is understood as the capacity to recover and rebound immediately after the crisis.²⁷ Thus, the lack of resilience, as far as causes are concerned, can be broadly equated with ‘vulnerability’. The only real difference is that these negative effects are extended, lingering. In other words, the aim of increasing resilience focus on economic aftershocks. It stands to reason that the pace of recovery is likely to differ significantly from sector to sector. So markets are likely to experience significant knock on effects caused by supply chain disruptions – both upstream and downstream – as well as revenue loss associated with payment delays.²⁸

The rationale behind the two concepts referred to above is certainly defensible at the most rudimentary, nomothetic level of economic theory. However, finer points are still left to be clarified. When seen in the light of the underlying objectives of State aid control—primarily the avoidance of wasteful spending and the maintenance of a level playing field—the question arises whether, *primo*, reducing vulnerability and increasing resilience can be achieved by simple funding without additional conditions imposed on the aid beneficiary, and, *secundo*, whether indirect State aid should be a concern given the level of interdependence among affected businesses.

The relevance of the issue of additional compatibility criteria stems directly from the *ratio legis* of Article 107(3)(b) TFEU. Under the existing ‘pandemic’

²⁶ Covid Temporary Framework (n 4) [26 et seq] and Crisis Temporary Framework (n 1) [36, 41]. See example *COVID-19: Financial shield for large enterprises: Liquidity loans* (SA.57306) Decision of 25 May 2020 [2020] OJ C198/1 para 11. 25% referred to in the text should be regarded as a general indication rather than legal requirement.

²⁷ Importantly, the ‘resilience’ in the State aid context should not be confused with funding under the so-called Recovery and Resilience Facility, which is the EU fund and therefore outside the scope of Article 107 (See Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L51/17).

²⁸ See, e.g., Kaitano Dube, Godwell Nhamo & David Chikodzi ‘COVID-19 pandemic and prospects for recovery of the global aviation industry [2021] 92 JATM 5; Dmitry Ivanov, ‘Exiting the COVID-19 pandemic: after-shock risks and avoidance of disruption tails in supply chains’ [2021] Ann Oper Res.; Rajat Panwar, Jonatan Pinkse & Valentina De Marchi, ‘The Future of Global Supply Chains in a Post-COVID-19 World’ [2022] 64 Calif Manage Rev 2; Shih-Shuo Yeh, ‘Tourism recovery strategy against COVID-19 pandemic’ [2020] 46 TRR 2, 188.

approach beneficiaries are not required to adapt to new market conditions. Instead, they are expected to weather the storm under the implicit assumption that the situation will just return to pre-crisis conditions.²⁹ It goes without saying, however, that crises are inherently unpredictable and dynamic, especially in their early stages. Nevertheless, during a prolonged slowdown, after the initial shock, certain trends and patterns usually begin to emerge, in turn allowing for a more systematic planning process instead of a piecemeal, ad hoc reaction.³⁰ The unpredictability will always be a residual risk.

In this context, it can be argued that the adaptation to new market conditions is in every company's best interest, so no regulatory tools should be used to enforce it. In the market economy all businesses must constantly adapt to the changing environment in which they operate, if they do not want to be pushed off the market. This argument is broadly correct. It is, however, incomplete. When looking through the lens of State aid control, the fact that the State had already committed its resources becomes salient, first because these funds would have been wasted in case of subsequent bankruptcy, and second—although more arguably—aid could not have contributed to solving the economic problem.³¹ The Member States would have been faced with a sunk costs dilemma of the sort when a subsidised company emerges from a crisis with an immediate need for rescue and restructuring aid.³² For these reasons, additional requirements relating to adaptation (for example, cost-cutting measures) could have been helpful in reducing 'vulnerability' (but can never completely eliminate the uncertainty regarding future events).

As a corollary to the above, it may also be argued that Article 107(3)(b) TFEU aid should not be used to fund restructuring. The Court and the Commission consistently state that rescue and restructuring aid, together with operating aid, are among the most distorting types of State aid, as they allow artificial preservation

²⁹ See, e.g., *COVID-19: Contribution for economic and commercial activities in historic centres* (SA.59590) Decision of 03 December 2020 [2021] OJ C50/1 section 3.3; *COVID-19: Aid to Brussels Airlines* (SA.57544) Decision of 30 September 2020 [2020] OJ C397/1 section 2.13; *COVID-19: scheme for the IMM Prod* (SA.102828) Decision of 03 June 2022 [2022] OJ C242/1 section 3.

³⁰ Geoff Kenny and Julian Morgan, 'Some Lessons from the Financial Crisis to the Economic Analysis' (2011) European Central Bank Occasional Paper Series 130/2011. See also the relevant analogy provided by rescue and restructuring aid discussed by Geoffrey Mandami and Simone Ritzek-Seidl 'Rescue and restructuring' in Leo Flynn (ed.) *Claeys & Casteels EU Competition Law, Volume 4: State Aid* (C&C, 2016) 746.

³¹ There is no case law on the latter point. As to the latter point, although previously granted aid (strictly speaking) does not continue sunk costs in an economic sense—in a similar vein as the concept is used for the Market Economy Operator Test (See eg T-103/14 *Frucona Košice v Commission* EU:T:2016:152 para 255). Nevertheless, it is obvious that funds spent will be irrevocably lost in case of a project's failure.

³² Again, given the relatively short time elapsed since the pandemic, there is no *acquis*.

of failed companies.³³ These types of aid must thus be kept to the absolute minimum.³⁴ However, in the author's opinion, non-crisis conditions (to which these statements referred) are not comparable enough to the present situation to permit a direct analogy. Crises—Black Swans and prolonged, lingering slowdowns—affect all segments of the economy, and no one is specifically responsible for them. Therefore, comparisons cannot be drawn between a situation when all industries are (to a varying degree) affected by an exogenous factor and when a specific operator (for whatever reason) is in need of a lifeline during relatively stable economic conditions.³⁵ All crisis-driven aid measures can only be seen as a 'lesser evil' anyway. Under these distinctly suboptimal conditions the introduction of the adaptation requirement should be seen as an unavoidably imperfect step to better address the disturbance, on the one hand, and to mitigate risk of future spending, on the other. It is a modest step, but nevertheless a step forward.

The issue of indirect aid is not new in itself. According to well-established case law, such aid exists when a measure is granted directly to one undertaking, but also confers advantages unobtainable under normal market conditions to a second undertaking.³⁶ Both beneficiaries may be brought within the scope of the State aid rules.³⁷ There is the possibility, hinted at in earlier decisions but not pursued, that 'crisis measures' can also give rise to State aid to companies connected upstream, downstream, and sideways with the intended beneficiaries, as well as to financial institutions serving them.³⁸ The argument runs that since the recipients would be able to meet obligations in a timely manner, the operations

³³ Communication from the Commission—Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty [2014] OJ C249/1 [6]; C-323/82 *Intermills v Commission* EU:C:1984:345 para 39; T-371/94 & T-394/94 *British Airways and Others et British Midland Airways v Commission* EU:T:1998:140 para 209; T-123/97 *Salomon v Commission* EU:T:1999:245 paras 99-101.

³⁴ See, e.g., *Rescue aid in favour of Solon SE* (SA.33662) Decision of 20 December 2011 [2012] OJ C12/1; *Liquidation of P+S Werften GmbH* (SA.34920) Decision of 11 July 2012 [2012] OJ C263/1

³⁵ The causes for failure of the company are irrelevant for R&R aid (*Gooding Consumer Electronics/Grundig Creutzwald* Decision 2000/424/EC [2000] OJ L165/25) while for Article 107(3)(b) and 107(2)(2) TFEU aid a specific, a recognizable external factor is a must.

³⁶ Cases C-457/00 *Belgium v Commission (Verlipack)* EU:C:2003:387 para 52-61; T-81/07, T-82/07 & T-83/07 *KG Holding and Others v Commission* EU:T:2009:237 para 176.

³⁷ Cases C-275/10 *Residex Capital IV* EU:C:2011:814 para 37; C-672/13 *OTP Bank* EU:C:2015:185 para 47. If an undertaking is a mere vehicle for transferring an advantage to the beneficiary and does not retain any advantage itself, it should not be considered to be a recipient of State aid. Such a situation will not occur in the discussed scenarios.

³⁸ Cf, e.g., C-382/99 *Netherlands v Commission* EU:C:2002:363 para 62; T-34/02 *Le Levant 001 and Others v Commission* EU:T:2006:59 para 109 with Covid Temporary Framework (n 4) [29] e.g. *COVID-19: Liquidity guarantee scheme and rent relief* (SA.57143) Decision of 30 April 2020 [2020] OJ C168/1 para 51.

of their business partners will also not get disrupted, whereas all other operators will be affected with market-wide disruptions.³⁹

It is an open question whether such a positive effect indeed constitutes an economic advantage within the meaning of Article 107(1) TFEU, or whether it merely amounts to the so-called secondary economic effects, which, while undeniably beneficial, do not constitute State aid.⁴⁰ These secondary effects—often termed multiplier effects in economics parlance—are understood as general positive effects inherent in almost all State aid measures, such as a general increase in economic output stemming from spending of available outlays.⁴¹

Now it might be tentatively argued that Article 107(3)(b) TFEU aid will give rise, simultaneously, to indirect aid as well as to secondary economic effects. The former will occur for the recipients' direct business partners. Being (selectively) shielded from a major disruption in payments can in principle be regarded as an advantage unobtainable under normal market conditions.⁴² If these effects are selective, then they could be regarded as going beyond simple knock-on effects.⁴³ Yet their occurrence will largely depend on how much business comes from a specific partner-recipient. In other words, how important is this revenue stream?⁴⁴ This factor poses a serious practical problem for the Commission. In order to identify an indirect aid it would have been necessary to measure the level of trade across all the recipients' business partners, and assess their relative significance. This is something that is, according to the Court, explicitly not required for State aid evaluations.⁴⁵ Also, if introduced, such an assessment would have been relatively straightforward—both in terms of the ability to collect data as well as

³⁹ See per analogiam T-424/05 *Italy v Commission* EU:T:2009:49 para 108; *Viridian Growth Fund* (SA.12510) Decision of 24 July 2001 [2001] OJ L263/5.

⁴⁰ 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] OJ C262/1 (2016 Notice) [116]. Cf in this context *Italy v Commission* (n 39) where indirect aid existed with *Space Park Development GmbH & Co* Decision 2004/167/EC [2004] OJ L61/1 where direct aid resulted only in a 'positive economic reflex' to indirect beneficiaries.

⁴¹ Although the distinction between these two effects is highly case-specific, the decision *Compensation to Sardinian airports for public service obligations* (SA.33983) decision of 29 July 2016 [2016] OJ L268/1 provides a good template of the EC's approach.

⁴² Cf C-480/98 *Spain v Commission (Magfesa)* EU:C:2000:559; C-200/97 *Ecotrade v Altiforni e Ferriere di Servola* EU:C:1998:579; C-295/97 *Piaggio* EU:C:1999:313.

⁴³ Cf T-379/09 *Italy v Commission* EU:T:2012:422 para 47; T-287/11 *Heitkamp BauHolding GmbH v European Commission* EU:T:2016:60 paras 106-107 with C-39/94 *SFEI and Others* EU:C:1996:285 para 60; C-533/12 P & C-536/12 P *SNCM and France v Corsica Ferries France* EU:C:2014:2142 para 30.

⁴⁴ See per analogiam the line of reasoning in 789/79 & 790/79 *Calpak v Commission* EU:C:1980:159.

⁴⁵ Cases T-298/97 etc *Alzetta and Others v Commission* EU:T:2000:151 para 95; T-55/99 *CETM v Commission* EU:T:2000:223 para 102; T-58/13 *Club Hotel Loutraki and Others v Commission* EU:T:2015:1 para 88-89.

of the subsequent analysis methodology—only for those undertakings entirely dependent on the recipient's trade.⁴⁶ Therefore it would have been simpler to assume that all these indirect advantages constitute secondary economic effects, and to forego strict compatibility assessment.

Such a methodologically simplified approach is somewhat justifiable in light of the criteria set out in Article 107(1) TFEU, although the opposite interpretation is equally defensible. Said approach is, however, definitely justifiable at the *ratio legis* level of Article 107(3)(b) TFEU. Moreover, especially considering the Court's assertion in *Ryanair* cases that 'the fact that a Member State manages to remedy a serious disturbance in its economy can only benefit the European Union in general and the internal market in particular', it could be argued that these secondary effects are *sine qua non* for Article 107(3)(b) TFEU aid.⁴⁷ If State aid seeks to address large economic disturbances, the measure's impact should go beyond assisting individual recipients.⁴⁸ It can therefore be postulated that future 'crisis' aids and aid schemes should put greater emphasis on these secondary effects. Of course secondary economic effects are 'inherent in almost all State aid measures'; nevertheless, especially when budgets may be tight, it can be postulated to prioritise those businesses with the widest possible network of interdependent partners for State aid, so the effects in question can be amplified.⁴⁹ The issue of the wider knock-on effect will return as a factor in the next section.

IV. REMEDYING A SERIOUS DISTURBANCE IN THE ECONOMY THROUGH INDIVIDUAL AID

In order to constitute State aid within the meaning of Article 107(1) TFEU, a measure must be selective, that is, it must favour 'certain undertakings or the production of certain goods'.⁵⁰ Conversely, general measures applicable without

⁴⁶ Cf the line of reasoning in C-687/17 P *Aanbestedingskalender and Others v Commission* EU:C:2019:932 with C-138/11 *Compass-Datenbank* EU:C:2012:449.

⁴⁷ *Ryanair v Commission (Spain)* (n 13) para 67. Leaving aside for the moment the question of a potential distortion of competition and trade.

⁴⁸ Notably, it has been implicitly, but clearly, spelled out in pre-COVID acquis. See, e.g., *Crédit Lyonnais* (n 17); *Northern Rock* (n 17) and less clearly in C-301/96 *Germany v Commission* EU:C:2003:509 paras 103-110.

⁴⁹ From a practical standpoint it must be noted, however, that the postulate made in the main body of text is not easily implementable: It is directed primarily to the Member States, and the EC. The authorities' decision not to grant aid is not controllable at the EU level.

⁵⁰ Cases *Ecotrade* (n 42) para 40; *Piaggio* (n 42) para 39; C-172/03 *Heiser* EU:C:2005:130 para 40; C-148/04 *Unicredito Italiano* EU:C:2005:774 para 44; C-182/03 & C-217/03 *Belgium v Commission (Forum 187)* EU:C:2006:416 para 119; C-403/10 P *Mediaset SpA v European Commission* EU:C:2011:533 para 36.

distinction to all economic operators do not constitute State aid.⁵¹ In the context of aid measures designed to remedy serious disturbances in the economy of a Member State, the question then arises how to select aid recipients. In other words, how does one make sure that selective measures will have general impact? There are two aspects to this problem, both practical and legal in nature: The first is the issue of possible discrimination in both individual aid measures and aid schemes, and the second relates to the question of why selecting a particular beneficiary/sector can indeed help to solve a wider economic problem. These aspects will be discussed below.

According to ‘canonical’ interpretation, the principle of non-discrimination requires that comparable situations should not be treated differently and different situations should not be treated alike, unless such treatment is objectively justified.⁵² At the same time, since said principle forms an integral part of the general principles of EU law, it is therefore ‘binding on Member States where the national situation [...] falls within the scope of EU law’.⁵³ The principle of non-discrimination applies to all measures relating to State aid.

However, the main problem with applying a textbook interpretation to State aid cases stems from the fact that all State aids are discriminatory by definition.⁵⁴ The Court has stated, on multiple occasions, that Article 18 TFEU ‘applies independently only to situations governed by EU law for which the TFEU lays down no specific rules of non-discrimination’⁵⁵. On the one hand, Articles 107(2) & (3) TFEU are silent on non-discrimination between recipients and nonrecipients. On the other, discrimination underpins the twin criteria of selectivity and advantage encapsulated in Article 107(1) TFEU. State aid will always create a potentially distortive advantage, unobtainable under normal market conditions, that strengthens the position of an undertaking in relation to its competitors.⁵⁶ Whether Article 107(1) TFEU can be considered as ‘specific rules of non-discrimination’ is highly doubtful if those rules would be understood as conflict-

⁵¹ Although it must be noted that the notion of selectivity is arguably the most problematic aspect of the law on State aids, its detailed analysis goes beyond the scope of this paper. See generally Kelyn Bacon (ed.) *European Union Law of State Aid* (OUP 2017) 69-82; Juan Jorge Piernas López, *The Concept of State Aid Under EU Law: From Internal Market to Competition and Beyond* (OUP 2015) 103-144; Säcker & Montag (n 6) 188-228.

⁵² Cases C-619/17 *Ana de Diego Porras* EU:C:2018:936, para 60; C-788/18 *Stanleyparma and Stanleybet Malta* EU:C:2020:110 para 19.

⁵³ Case C-105/18 to C-113/18 *UNESA* EU:C:2019:935 para 49.

⁵⁴ Phedon Nicolaides, ‘The Limits of ‘Proportionate’ Discrimination’ (2021) 20 *EstAL* 384, 385

⁵⁵ Cases C-443/06 *Hollmann* EU:C:2007:600 para 28; C-388/19 *Autoridade Tributária e Aduaneira (Impôt sur les plus-values immobilières)* EU:C:2021:212 para 20.

⁵⁶ Cases 730/79 *Philip Morris v Commission* EU:C:1980:209 para 11; *Unicredito Italiano* (n 50) para 56; *Forum 187* (n 50) para 131.

of-law rules. The provision is merely declaratory in this regard. Nevertheless, in the author's opinion, the wording of criteria set out in Article 107(1) TFEU states that not only are the criteria *per se* sufficient to modify the approach to the principle of non-discrimination, but they necessitate it. In other words, Article 18 TFEU cannot disregard criteria set out in Article 107(1) TFEU.

The relatively modest case law on 'crisis aid' seemed consistent with that line of reasoning. In the previously quoted series of Ryanair cases on Covid State aid, with regard to Article 107(2)(b) TFEU aid the Court responded to the plea alleging an infringement of the principle of non-discrimination by stating that the beneficiary 'is proportionately much more affected by [COVID restrictions] than the applicant' and that 'the difference in treatment in favour of [the recipient] is appropriate for the purpose of making good the damage resulting from those restrictions and does not go beyond what is necessary to achieve that objective.'⁵⁷ Whereas with regard to aid schemes authorised under Article 107(3)(b) TFEU, the Court held the eligibility criteria as defined by the fact that beneficiaries must hold an Air Operator Certificate issued by the granting State, and that they must at the same time operate regular flights in, to and from that State; these criteria were sufficient.⁵⁸

In the author's opinion, the Court has reached the right conclusion by using the wrong reasoning. The line of reasoning adopted in these cases attempts to 'force fit' textbook interpretation of the non-discrimination principle into the inherently discriminatory system of State aid. While it can be generally agreed that a flag carrier's role for the national economy is unique—so no general conclusions *pro futuro* can be drawn from this aspect—the statement about being affected more severely than other businesses is at the very least unverifiable.⁵⁹ Whereas the condition of holding a local certificate can very well be regarded as a discrimination on the basis of nationality, it must be noted that Regulation 1008/2008 (which regulates air carrier certificates) clearly set out a single license for the EU.⁶⁰ Since the EU liberalisation of air transport, which took place in the 1990's, European airlines are no longer specifically bound to any particular

⁵⁷ *Ryanair v Commission (SAS, Sweden)* (n 13) para 84.

⁵⁸ *Ibid.* para 85-86. See commentary Nicolaides (n 54) 392.

⁵⁹ Although there are industry-specific and company-specific data (see eg Pere Suau-Sanchez, Augusto Voltes-Dorta & Natàlia Cugueró-Escofet 'An early assessment of the impact of COVID-19 on air transport: Just another crisis or the end of aviation as we know it?' (2020) 86 JATM; László Kökény, Zsófia Kenesei & Gábor Neszveda 'Impact of COVID-19 on different business models of European airlines' (2022) 25 Curr. Issues Tour. 3, 458), none of those got brought up in this case.

⁶⁰ Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community [2008] OJ L293/3 art 2(8) in relation to ch II.

country in the legal sense.⁶¹ Formalistic eligibility criteria of this nature comes dangerously close to the well-known scenario where the use of seemingly objective criteria serves as a guise for achieving illegal discrimination where these are designed so only one undertaking can fulfil them.⁶² Operational links with a specific country—for any businesses, not only for airlines—is a different matter altogether. These types of criteria are much more justifiable from a non-discrimination perspective. However, their introduction would set a high bar (but not an excessive one) for the subsequent compatibility assessment.⁶³

Moreover, a broad, textbook interpretation of the principle of non-discrimination may lead to something resembling ‘the Right to State aid’. Throughout its case law, however, the CJEU has consistently held that any decision to grant state aid remains solely within the discretion of the Member States.⁶⁴ There no requirement under EU law that State aid be granted. In the same vein, the fact that some other company in a comparable situation received State aid cannot give rise to legitimate expectations for others of receiving analogous support.⁶⁵ Otherwise a highly intrusive system will be created. Some form of umbrella supervision over domestic economic policies will be needed, beyond the bounds of the permissible under the division of competences between the Union and the Member States.

The argument against grafting the unmodified, wide interpretation of the principle of non-discrimination onto State aid law can be further reinforced by referring to the objectives of Article 107(3)(b) TFEU. In the face of inevitable financial constraints upon Member States, the ability to successfully press claims

⁶¹ *ibid* art 15.

⁶² Cf e.g. C-15/96 *Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg* EU:C:1998:3; C-400/02 *Merida* EU:C:2004:537; C-427/11 *Kenny and Others* EU:C:2013:122 with C-15/14 P *Commission v MOL* EU:C:2015:362 paras 59-60.

⁶³ The presence (or at least the possibility) of distortive effect is required for a measure to fall within the ambit of art. 107(1) TFEU; while the extent of such effect is subsequently used to determine its compatibility with the Internal Market. It should be noted in this context that the assessment standard for the effect on trade and competition in State aid is often as perfunctory and not based on sufficient methodological rigour (see, e.g., Bacon (n 51) 15-16, 84-85; Säcker & Montag (n 6) 229-236). Since determining the beneficiaries’ economic position, including their business links with other undertakings, would have been used to assess the subsequent impact on trade and competition, the improvements in this field must be postulated at this point. One cannot realistically expect two divergent standards within one proceeding: Higher to determine secondary economic effects for the purpose of determining whether Article 107(3)(b) TFEU aid is capable of remedying the crisis, and lower to establish whether a measure in question can affect trade and competition. Therefore, the existing *acquis* with regards to impact on competition and trade should be seen as a risk factor, an obstacle to postulated changes.

⁶⁴ T-217/17 *FVE Holýšov I and Others v Commission* EU:T:2019:633 upheld in C-850/19 P *FVE Holýšov I s. r. o. and Others v European Commission* EU:C:2021:740.

⁶⁵ *RES support scheme in the Czech Republic* (SA.40171) Decision of 17.07.2017 [2017] C69/1 paras 91-92.

to extend *ratione personae* of aid measures to the increased number of recipients may dilute the effectiveness of State aid, rendering such aid incapable of fulfilling objectives of 'crisis aid'. It may even be speculated that the resulting too low (but above de minimis threshold) support for individual undertakings may in some cases be declared incompatible with the Internal Market. Such an aid would not be able to be well targeted and proportional (the principle of proportionality works in two ways). However, such considerations must remain purely speculative at present due to the lack of case law. Nevertheless, the interpretation presented above is defensible in the light of the existing *acquis*.⁶⁶

All this goes to show that the application of the principle of non-discrimination to State aid measures still remains a *terra incognita*. This topic received only perfunctory or partial attention until recently, when plaintiffs in Ryanair cases (perhaps inadvertently) constructed a line of reasoning implicitly equating selectivity with discrimination.⁶⁷ This issue remains without a satisfying answer when relying on the unmodified, wide interpretation of the principle of non-discrimination, despite the equally valid contention that there is no 'right to State aid'. The fact that a particular beneficiary is especially important to the economy of a Member State may serve as a counterweight to discrimination claims. Nevertheless, while it can be argued that this is indeed the case with flag airlines or other strategic blue-chip companies, it is less obvious for smaller undertakings and less interconnected sectors (for this reason Ryanair cases provide no suitable template). This is especially true considering that the link between supporting such non-strategic individual businesses (when taken in isolation) and addressing economic disturbances is tenuous.⁶⁸

This section can be concluded by reemphasising the point that all State aid is to a certain extent discriminatory. At the same time, no one can realistically expect that Member States will cease using selective measures to tackle crises, and will instead rely entirely upon general fiscal and monetary measures. One must wait for clarification to be developed by case law in the future. Until then, the potential infringement of the principle of non-discrimination poses an

⁶⁶ The reasoning is (arguably) justifiable in the light of the often repeated requirement for an aid to be 'well targeted'. Notably, a broadly similar line of argument has been formulated by the EC as early as 2005 in this State aid action plan: Less and better targeted state aid: a roadmap for state aid reform 2005-2009, COM(2005)0107 final.

⁶⁷ *Ryanair v Commission (Sweden)* (n 13), plea and reasoning at paras 25-67.

⁶⁸ It is not contended that during a disturbance, when everyone is affected, any aid is somewhat helpful, at least from beneficiaries' subjective perspective. Nevertheless, objectively speaking from an economic standpoint, almost any individual aid can be challenged by the claim that, for example, a higher contributor to national GDP should have received support. Such a 'clinical' approach may be unacceptable politically and at least challengeable in terms of practicality as a hair-splitting. Yet these considerations are unavoidable (to an extent) if Article 107(3)(b) TFEU aid seeks to remedy the disturbance as a whole.

unquantifiable residual risk for the Member States. Small, by looking at the approach adopted in Ryanair cases, but nevertheless existing.

V. THE EFFECTIVE EX POST ASSESSMENT OF STATE AID

The ‘pandemic’ interpretation of Article 107(3)(b) TFEU with an absolute priority on maintaining positive cash flow over other considerations inevitably raises the question if it is even possible to determine that the aid has not been misused, and if yes, how to do it. This problem is salient because ex post control ensures that State aid objectives are fulfilled, and thus can provide a crucial safeguard against wasteful spending.⁶⁹

Misused aid refers to a situation where the aid has not been used in accordance with the decision of the State approving the measure, or where the Member State has failed to comply with the conditions imposed at the time of approval of State aid.⁷⁰ If misuse of aid is established, the Commission is required to order recovery of the aid plus interest.⁷¹ In principle, the aim of ordering recovery is to restore the previous situation and eliminate the distortion of competition and trade caused by the misused aid.⁷²

At this point, it can be argued that if recovery must be limited to the financial advantage *actually arising* (emphasis added) from the aid, then the compensatory nature of the measure essentially excludes the possibility of recovery.⁷³ This argument cannot be accepted in principle. A measure which does not confer a selective economic advantage would fall outside the scope of Article 107(1) TFEU.⁷⁴ Such an advantage occurs even if that measure compensates or offsets

⁶⁹ Nicola Pesaresi et al. (eds.), *EU Competition Law. Volume IV State Aid, Book One* (Elgar 2016) 9, 20-23.

⁷⁰ 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 [2015] OJ L248/9 art 1(g).

⁷¹ Ibid. art 16(1). Interest from the date when the aid was made available to the beneficiary until its recovery: C-199/06 *CELF II* EU:C:2008:79 paras 56-58 & 69. Subsequently fleshed out in Communication from the Commission — Commission Notice on the recovery of unlawful and incompatible State aid (2019 Recovery Notice) [2019] OJ C247/1 section 4.4.2.

⁷² C-310/99 *Italy v Commission* EU:C:2002:143 para 98; C-277/00 *Germany v Commission* EU:C:2004:238 para 76; *Residex* (n 37) para 34.

⁷³ T-308/00 *RENV Salzgitter v Commission* EU:T:2013:30 para 138; C-164/15 P & C-165/15 P *Commission v Aer Lingus* EU:C:2016:990 para 100.

⁷⁴ See, e.g., T-425/04 & T-444/04 *France and Others v Commission (France Télécom)* EU:T:2010:216 para 231.

specific negative effects.⁷⁵ However, the underlying reasoning behind said argument is logically defensible: If a company, along with a large group of other businesses, had received aid during the crisis—when everyone was affected—then determining the degree of distortion of competition and trade of a particular aid measure becomes problematic, thus making it impossible to calculate interest rates.⁷⁶

In addition, many crisis aid measures are subject to a contingency. This is especially the case with respect to various State guarantees, so prevalent during the pandemic.⁷⁷ Most State guarantees do not need to be activated. Thus the advantage within the meaning of Article 107(1) TFEU is not the payment but the enhanced credibility of a beneficiary among business partners and the ability to obtain credits either on more favourable terms than would otherwise be available, or where no credit would have been offered at all absent the State guarantees.⁷⁸ The scale of advantage arising from the State guarantee does not, therefore, equal the amount being guaranteed. In this sense, the advantage is generally ascertainable, but not readily calculable.⁷⁹

When looking at the most recent ‘crisis’ measures we see the relatively light-handed conditions imposed on aid recipients. Beneficiaries must refrain from using aid to cross-subsidise economic activities of integrated undertakings that were in economic difficulties; they cannot make dividend payments, nor nonmandatory coupon payments, nor buy back shares, and cannot acquire a more than 10% stake in competitors or other operators in the same line of business, including upstream and downstream operations.⁸⁰

⁷⁵ 6-69 & 11-69 *Commission v France* EU:C:1969:68 para 21; 173-73 *Italy v Commission* EU:C:1974:71 paras 12 & 17; *Heiser* (n 50) paras 52-54; C-71/09 P, C-73/09 P & C-76/09 P *Comitato ‘Venezia vuole vivere’ and Others v Commission* EU:C:2011:368 para 95. However, a measure which offsets a specific disadvantage by other competitors in the same Member State is not an aid (C-237/04 *Enirisorse* EU:C:2006:197 para 48). The latter line of reasoning is inapplicable to crisis situations due to the fact that all market participants are affected by an external, ‘abnormal’ factor.

⁷⁶ Cf Regulation 1589/2015 art 16(2) and Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (consolidated version) [2016] OJ L327/19 art 11 with C-75/97 *Belgium v Commission* EU:C:1999:311 para 66; *Italy v Commission* (n 72) para 99.

⁷⁷ List of cases is available at: https://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=3 [accessed 26 November 2022].

⁷⁸ T-154/10 *France v Commission* EU:T:2012:452 para 90; T-62/08 *ThyssenKrupp Acciai Speciali Terni v Commission* EU:T:2010:268 paras 234-235.

⁷⁹ Ascertainability is sufficient for a measure to fall within Article 107(1) TFEU: *Venezia vuole vivere* (n 75) 63; C-279/08 P *Commission v Netherlands* EU:C:2011:551 para 65; T-357/02 *RENV Freistaat Sachsen v Commission* EU:T:2011:376 para 31.

⁸⁰ Covid Temporary Framework (n 4) [71-78]. Analogous conditions are conspicuously absent in Crisis Temporary Framework (n 1).

This brings up the question of whether, apart from the explicit violation of these conditions, such aid can even be misused. The lenient, almost conditionless approach brings crisis aid close to operating aid. Operating aid is defined as aid which is granted without any specific condition, intended to relieve a beneficiary from the expenses which it would itself normally have had to bear in its day-to-day, usual activities.⁸¹ State aid that may be used to cover any expenses, by definition, cannot be misused.⁸² The only actionable assessment criteria set out in the recent frameworks for crisis aid exist with repayable forms of aid.⁸³ If a beneficiary fails to repay the loans or other forms of aid, then according to the literal interpretation, the aid in question has ‘not been used in accordance with the decision of the State aid approving the measure’.⁸⁴ Otherwise the assessment would almost inevitably degenerate into methodologically questionable, thus arbitrary, hair-splitting concerning whether or not a particular business decision contributed to the beneficiary’s ability to weather the economic storm.⁸⁵ The deeper the assessment goes, the more absurd dilemmas emerge; for example, whether a marketing campaign was too aggressive, whether purchases could have been made at a lower cost, and so on. All this goes to show that, apart from rare borderline cases where mismanagement is *prima facie* evident, determining whether crisis aid, as it currently functions, has indeed been misused is a highly problematic exercise.

The following remarks may thus be made in conclusion: The introduction of additional criteria such as the ones discussed earlier, related to adaptation, can at least partially address the problem of the lack of meaningful *ex post* evaluation. However, there is an overarching concern (admittedly bordering on sophistry) that the very idea of *ex post* assessment of crisis aid is self-contradictory. If the recovery decision plunges the beneficiary into dire straits, then the economic

⁸¹ T-177/10 *Alcoa Trasformazioni v Commission* EU:T:2014:897 para 92. Such aid (together with R&R aid) is deemed to be particularly distortive and is in principle (with few exceptions) considered to be incompatible with the Internal Market: C-301/87 *France v Commission (Boussac)* EU:C:1990:67 para 50; C-86/89 *Italy v Commission* EU:C:1990:373 para 18; C-156/98 *Germany v Commission* EU:C:2000:467 para 30; T-348/04 *SIDE v Commission* EU:T:2008:109 para 99.

⁸² With the exception of borderline cases which might, conceivably, involve criminal offences—corruption, mismanagement, embezzlement, etc. Otherwise, the misuse of funds spent through legal and at least rudimentarily economically defensible managerial decision is debatable.

⁸³ See Covid Temporary Framework (n 4) section 3.11.5; Crisis Temporary Framework (n 1) [41, 42].

⁸⁴ Cf Regulation 1589/2015 art 1(g) with eg *Technologie Buczek Group* (C 23/06) Decision 2008/344/EC [2008] OJ L116/26; *Huta Częstochowa* (C 20/2004) Decision of 5 July 2005 [2005] OJ L366/1.

⁸⁵ Although partial recovery is, by itself, not unusual. See especially relevant C-622/16 P to C-624/16 P *Scuola Elementare Maria Montessori v Commission* EU:C:2018:873 paras 96-98.

disturbances would not have been remedied. If in the absence of the recovery decision that beneficiary would become bankrupt, then the economic disturbances would also not have been remedied. If, regardless of whether the funds were 'properly' expended or not, the beneficiary managed to weather the storm, then arguably, said disturbances are addressed because it remains unclear why helping that particular operator would have been more important for crisis mitigation than supporting any other business.

VI. CONCLUSIONS

In attempting to derive more general conclusions, one should bear in mind the context of distinctly suboptimal economic and political conditions in which State aid measures are adopted. Even relatively limited, non-crisis subsidies are the second-best option to achieve optimal allocation of resources. At the same time, downturns, slowdowns and even Black Swans are a normal part of the business cycle, which is a pattern of alternating economic growth and contraction. In this sense the deontological argument against stimulus spending, postulating doing nothing and accepting all free-market outcomes, is economically defensible (although still debatable). These more extreme views notwithstanding, the facts remain that States must learn to live with crises and plan with uncertainty about the details of the future, and that there is no consensus among economists about the ability of stimulus to boost the ailing economy, how subsidies should be targeted, and so on.⁸⁶

For these reasons the lenient approach to crisis State aid should be viewed primarily from a political angle. In times of economic crisis authorities usually take the more active economic stance to match claims in their manifestos and electorates' expectations. Therefore the decision on which companies/sectors should receive support is at least partially motivated by their perceived vulnerability. Failure to support businesses that the public is generally sympathetic to (small employers, local shop owners, etc.) may be too politically damaging, and therefore unacceptable, even though these businesses may not contribute significantly to the national economy and thus, rationally speaking, they should not be prioritised when budgets are tight.

Compatibility criteria for State aid thus reflects the dilemma of whether to allow companies to collapse. If Article 107(3)(b) TFEU aid would genuinely seek to address 'a serious disturbance in the economy of a Member State', then

⁸⁶ See, e.g. Adam Ambroziak, 'Forms of COVID-19 state aid by beneficiary size in Poland in 2020' (2022) 58 IJME 1, 44; Yacine Belghitar, Andrea Moro & Nemanja Radić, 'When the rainy day is the worst hurricane ever: the effects of governmental policies on SMEs during COVID-19' (2022) 58 SBE 943.

compatibility assessments should involve some kind of beneficiaries' selection on the basis of their significance to the national economy. Such an admittedly clinically callous approach might have made economic sense, but the inevitable consequence would have been that some undertakings would be ineligible for State aid. Article 107(2)(b) TFEU aid, due to the exclusive focus on compensation, then might come too late both for recipients and the economy. The feasibility, in a practical sense, of the postulate of beneficiaries' selection for Article 107(3)(b) TFEU aid will therefore hinge upon whether general economic measures could successfully substitute for State aid in creating an umbrella over crisis-stricken businesses whose support is driven by political rather than economic considerations.

The capacity of State aid control to adequately (from the economic standpoint) target Article 107(3)(b) TFEU aid is further limited by its inherent inability to assess whether a Member State has correctly refrained from granting aid to a particular undertaking/group of undertakings. For this reason, the economically sound postulate to prioritise support based on the level of contribution to GDP and on potential cross-sector linkages and synergies cannot be translated and embodied into normative criteria.

Arguments claiming that the Commission, and subsequently the Court, in Ryanair cases opened the floodgates to almost carte blanche subsidisation are usually countered by reasoning invoking the extreme nature of the Covid pandemic where the need for quick reactions superseded all other considerations. Such arguments can be accepted when referring to the earliest stages of the pandemic. In this sense, the severity of economic disruptions following the initial outbreak has warped the perception of Article 107(3)(b) TFEU aid because the extremely lenient 'pandemic approach' has been transplanted, in a mechanical manner, into a less 'cataclysmic' environment. Here, however, when economic conditions are unsteady, but when there is no single, short-term disruptive event, the interpretive approach referred to earlier cannot be accepted anymore.

Although under the current dynamic, a business and political environment with many turbulent components, the need for crisis aid can occur at any time at a moment's notice, nevertheless certain generalised improvements to State aid assessment have been proposed by the author in this paper. The first of these would be to abandon the discussed 'pandemic approach' to Article 107(3)(b) TFEU aid and make the balancing test a constitutive element of all State aid evaluations. Secondly, it is worth considering introducing additional compatibility criteria to Article 107(3)(b) TFEU aid relating to adaptation to new market conditions—for example, cost-cutting measures, organisational streamlining, and so on. In a somewhat similar vein—though much more tentatively proposed—it might be worth considering introducing a certain time period during which a recipient of Article 107(3)(b) TFEU aid will be ineligible to rescue and

restructuring aid. It will be up to economists to determine how long and how flexible this period may be. While these are by no means silver-bullet solutions, even a modest step towards greater discipline in spending limited public funds is generally desirable.

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