

**CHANGED UTTERLY:
CONCEPTUAL STRETCHING AND THE
IMPACT OF THE TAX CASES ON EU STATE
AID LAW**

Volume I

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DECLARATION

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Christopher McMahon

ABSTRACT

Article 107(1) TFEU was originally designed to regulate the grant of subsidies by Member States but it has been applied increasingly in recent years to regulate tax measures. Attempts to apply the State aid rules in this way have been met with controversy as they have been applied in unpredictable ways that have introduced significant changes to the existing tests in the case law for identifying State aid. These changes include a broader interpretation of the concept of selectivity, one of the criteria that has been developed by the case law to identify State aid. This thesis uses primarily doctrinal legal research methods to examine how the developments in the interpretation of Article 107(1) TFEU arising from cases dealing with fiscal measures affect the application of EU State aid law to non-fiscal measures.

To that end, this thesis first analyses the development of the State aid rules and the doctrinal changes that have emerged from cases involving their application to tax measures. It will also be argued that the use of these rules to control taxation has reoriented the priorities and objectives of EU State aid law. This thesis will go on to argue that these developments have the potential to influence and increase enforcement against non-fiscal measures. The robustness of these findings will then be evaluated by reference to proposals for tax harmonisation in the EU and other potential legal developments. The thesis will then consider possible improvements to the law to contain the expanding definition of the notion of aid within principled limits. These include a more systematic account of the selectivity criterion based on the discrimination standard and a more rigorous application of the criteria in Article 107(1) TFEU on distortions of competition and effects on trade between Member States.

SUMMARY

Article 107(1) TFEU prohibits EU Member States from granting aid to private businesses without approval from the Commission. While the State aid rules were originally designed to regulate the grant of subsidies and similar measures, they are increasingly applied to a wider range of State interventions by the Commission and the CJEU, including fiscal measures. These attempts to apply the prohibition on State aid to fiscal measures have been met with controversy and have seen changes to the tests used to identify aid. This thesis examines the question of how developments in the interpretation of Article 107(1) TFEU arising from cases dealing with fiscal measures affect the application of EU State aid law to non-fiscal measures.

This thesis adopts doctrinal research methods to answer this question. This involves the consultation of publicly available primary legal materials in the form of EU Treaties, secondary legislation, case law and Commission decisions together with secondary sources, including guidance from the EU institutions and academic commentary. These materials are synthesised to provide a coherent and systematic account of the relevant law, project future legal developments and propose reforms capable of implementation through judicial interpretation of the existing law.

In order to evaluate the application of the State aid rules to tax measures, this thesis assesses the objectives of State aid control. It is argued that while State aid control serves different objectives, the application of the rules to tax measures has changed the dynamics of competition between Member States such that the State aid rules can be better understood as managing regulatory competition between Member States. This thesis goes on to provide an account of the developments in the law defining aid that have emerged from cases dealing with fiscal measures. The most prominent of these is the reorientation of the selectivity criterion around the discrimination standard. This

development increases the breadth of the notion of aid and the prohibition in Article 107(1) TFEU. There are also few effective tools available to insulate these developments to prevent them from having an impact on non-fiscal measures.

This thesis then considers the nature of the impact of these developments from cases on fiscal measures on other forms of State intervention. The discrimination standard could be applied to increase enforcement of the State aid rules against general aid schemes. Further, the application of the discrimination standard to certain types of aid granted through market rules will likely increase enforcement against such measures. This thesis also tests the impact of these trends against future developments on tax harmonisation that may limit the need for enforcement of the State aid rules against tax measures. These developments will not undermine the importance of the trends identified in this thesis to any significant extent.

This thesis goes on to advance a more systematic and coherent approach to the selectivity criterion that will help to address the concerns identified in the literature about the incoherence of the selectivity criterion and the expansion of the notion of aid. It concludes that adopting the discrimination standard directly and clearly defining the limits on the objectives that can justify differential treatment is the best available approach. It proposes the notion of solidarity between Member States as an interpretive tool to define those objectives. This thesis proposes a further reform in the adoption of a more rigorous interpretation of other criteria for identifying aid: the distortion of competition and the effect on inter-state trade. These criteria should be applied separately and the relevant thresholds for identifying aid should be raised considerably. This change will prevent the excessive expansion of the notion of aid caused by the application of the discrimination standard, ensuring that an appropriate balance is struck between the interests of the Union and the autonomy of Member States over economic policy.

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TABLE OF ABBREVIATIONS

BEFIT	Business in Europe: Framework for Income Taxation
CCCTB	Common Consolidated Corporate Tax Base
CJEU	Court of Justice of the European Union
Commission	European Commission
ECSC	European Coal and Steel Community
ECSC Treaty	European Coal and Steel Community Treaty
EU	European Union
FSR	Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/1
GBER	General Block Exemption Regulation - 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 [2014] OJ L187/1
OECD	Organisation for Economic Co-ordination and Development
Procedural Regulation	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
SGEI	Service of General Economic Interest
TCA	Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L149/10
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organisation

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1. INTRODUCTION

1.1. State Aid and Fiscal Measures

In 2016, the Commission's investigation into Apple's tax affairs in Ireland concluded and a decision was issued.¹ This decision found that the technology multinational had been allowed to underpay tax for more than two decades, paying an effective tax rate as low as 0.005% on its European profits in 2014.² The Commission held that this was unlawful State aid and ordered Ireland to recover more than €13 billion in unpaid taxes from Apple. While both Apple and Ireland were successful in their appeals against this decision in the General Court, a further appeal remains pending before the CJEU at the time of writing and Apple's €13 billion sits in a vast escrow account awaiting the outcome.³ While this represents the largest sum subject to a recovery decision, the Apple case is not unique, with many other large, well-known multinationals also being implicated in decisions of this type.⁴

This is the most controversial aspect of EU State aid law, which is increasingly being enforced by the Commission against national tax policies in the past few decades. These enforcement patterns have targeted the direct taxation of large, multinational companies which are alleged to be paying less than their fair share of tax and relying on 'sweetheart deals' by co-operative Member States in the form of complicated advance rulings from tax

¹ *Aid implemented by Ireland to Apple* (Case SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP)) Commission Decision (EU) 2017/1283 [2017] OJ L187/1. This was overturned on appeal in Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338 but a further appeal remains pending before the CJEU.

² See Commission, 'State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion' (Press Release, 30 August 2016) <https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2923> accessed 25 July 2022.

³ Appeal brought on 25 September 2020 by European Commission against the judgment of the General Court (Seventh Chamber, Extended Composition) delivered on 15 July 2020 in Joined Cases T-778/16 and T-892/16, *Ireland and Others v Commission* [2021] OJ C35/22; Joe Brennan, 'Irish officials expect hearings on Apple tax appeal in autumn' *The Irish Times* (Dublin, 18 July 2022) <<https://www.irishtimes.com/business/economy/2022/07/18/irish-officials-expect-hearings-on-apple-tax-appeal-in-autumn/>> accessed 25 July 2022. This is an appeal against the decision in Joined Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338.

⁴ *Aid granted by Luxembourg to Fiat* (Case SA.38375 (2014/C ex 2014/NN)) Commission Decision (EU) 2016/2326 [2016] OJ L351/1; *Aid implemented by Luxembourg to Amazon* (Case SA.38944 (2014/C) (ex 2014/NN)) Commission Decision (EU) 2018/859 [2018] OJ L153/1, recital (599); *Aid implemented by the Netherlands to Starbucks* (Case SA.38374 (2014/C ex 2014/NN)) Commission Decision (EU) 2017/502 [2017] OJ L83/38.

authorities on their often opaque and intricate tax arrangements.⁵ While the Commission's authority in this area is controversial, so too is the response of the Member States. The beneficent Member State governments involved often contest the allegations of unlawful aid as vigorously as the objects of their generosity, and cringe as national public debate looks incredulously at the State arguing that the money belongs to someone else.⁶ As the Commission tries to limit tax competition between Member States, the State aid rules appear to be an increasingly useful tool.

At first glance, the State aid control regime might not appear a likely candidate for this task. Article 107(1) TFEU prohibits 'aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, [...] in so far as it affects trade between Member States'. If a measure is aid, it may be permitted if it comes within specific derogations outlined in the Treaties.⁷ Absent an express legislative exemption,⁸ all aid must be notified to the Commission and approved by that institution before it is implemented.⁹ If not, the aid must be repaid to the Member State concerned.¹⁰ This is the case whether it is the result of a deliberate attempt to evade the rules or a mistaken view that

⁵ See for example *Aid granted by Luxembourg to Fiat* (Case SA.38375 (2014/C ex 2014/NN)) Commission Decision (EU) 2016/2326 [2016] OJ L351/1; *Aid implemented by Ireland to Apple* (Case SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP)) Commission Decision (EU) 2017/1283 [2017] OJ L187/1; *Aid implemented by Luxembourg to Amazon* (Case SA.38944 (2014/C) (ex 2014/NN)) Commission Decision (EU) 2018/859 [2018] OJ L153/1, recital (599); *Aid implemented by the Netherlands to Starbucks* (Case SA.38374 (2014/C ex 2014/NN)) Commission Decision (EU) 2017/502 [2017] OJ L83/38.

⁶ See for example Marie O'Halloran and Michael O'Regan, 'Dáil Apple debate: Government wins appeal motion' *The Irish Times* (Dublin, 7 September 2016) <<https://www.irishtimes.com/news/politics/dail-apple-debate-government-wins-appeal-motion-1.2782484>> accessed 25 July 2022; Dáil Deb 7 September 2016, vol 920, col 6.

⁷ The most important of these are contained in Article 107(2)-(3) TFEU.

⁸ Such as those contained in 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 [2014] OJ L187/1; Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1.

⁹ Article 108(3) TFEU; 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/, article 2.

¹⁰ 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, article 16.

the measure is not aid. Broadly speaking, the rules are designed to remove trade barriers within the internal market and preserve competition between undertakings on the internal market.¹¹ This thesis will also suggest that they play an important role in managing regulatory competition.¹²

These rules, first drafted in their current form in the 1950s in the Treaty of Rome, might appear to have more to do with direct grants or subsidies than the subtleties of international taxation. However, early judgments from the CJEU indicated that the notion of aid was broader than this and could extend as far as fiscal policy.¹³ Determined enforcement of these rules against fiscal measures, particularly measures relating to direct taxation, is nevertheless a much more recent phenomenon.¹⁴ The academic literature and public debate on the matter have cast doubt on the legitimacy of using the rules against this target and have questioned whether this regime is the best way of controlling international tax competition.¹⁵ The latter point has also likely contributed to the move in favour of an international agreement on minimum levels of corporate taxation and the appropriate method for allocating taxable revenues of multinational companies to different jurisdictions for the purposes of taxation.¹⁶ It is difficult to see this enforcement pattern entirely in isolation from other areas of law governing the EU's internal market that seek to take a more rigorous approach to regulating the activities of large, multinational companies, many of whom operate in the technological and digital sector of the economy. Many of the same companies

¹¹ See Sections 3.2-3.3.

¹² See Section 3.6

¹³ Case 173/73 *Italy v Commission (Italian Textiles)* ECLI:EU:C:1974:71, [1974] ECR 709, para 13.

¹⁴ Juan Jorge Piernas López, 'The Evolving Nature of the Notion of Aid under EU Law' (2016) 15 *European State Aid Law Quarterly* 400, 408.

¹⁵ See for example Emily Forrester, 'Is the State Aid Regime a Suitable Instrument to be Used in the Fight Against Harmful Tax Competition' (2018) 27 *EC Tax Review* 19; Alan Beattie, 'The European Commission is right to play hardball on tax' *Financial Times* (London, 4 October 2017) <<https://www.ft.com/content/a696bfb6-a91e-11e7-93c5-648314d2c72c>> accessed 25 July 2022.

¹⁶ Organisation for Economic Co-operation and Development, 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy' (OECD, 8 October 2021).

whose tax affairs have been the subject of State aid investigations by the Commission have been the subject of high-profile competition law enforcement actions from the same institution¹⁷ and are likely to be classified as gatekeeper platforms under the EU's new regulations for the digital economy.¹⁸

However, the impact of the State aid rules is far broader and extends beyond taxation. Another current of public debate relating to large-scale government intervention, which appears to have come back into fashion, has highlighted the role of the State aid rules. As Member States restricted large sections of the economy in response to the Covid-19 pandemic, national governments also introduced comprehensive supports to keep businesses from collapsing and unemployment from rising. The Commission facilitated these responses through more liberal policies for the approval of aid.¹⁹ Elements of this approach can also be seen in the response to the Russian invasion of Ukraine, with the Commission again adopting a permissive attitude to supports designed to insulate consumers and businesses from energy and commodity price increases.²⁰

While the response to some of these crises may turn out to be relatively transient, there is also an acknowledgement that there are deeper causes and trends that are likely to

¹⁷ See Commission decisions such as *Google Search (Shopping)* (Case AT.39740) Commission Decision of 27 June 2017 C(2017) 4444 final; *Google Android* (Case AT.40099) Commission Decision of 18 July 2018 C(2018) 4761; *E-book MFNs and related matters (Amazon)* (Case AT.41053) Commission Decision of 4 May 2017 C(2017) 2876 final; Commission, 'Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook' (Press Release, 4 June 2021) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2848> accessed 25 July 2021.

¹⁸ See Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1; Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1. See also – 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC' COM (2020) 825 final; Commission 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)' COM (2020) 842 final.

¹⁹ Temporary Framework to support the economy in the context of the coronavirus outbreak [2020] OJ C911/1.

²⁰ Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia [2022] OJ CI 131/1.

drive a more active role for government in the longer term.²¹ There is a narrative that the EU should strive for ‘strategic autonomy’ such that the EU will not be dependent on third countries for access to essential resources and infrastructure.²² This has already led to proposals for a ‘European Chips Act’ which will facilitate the approval of State aid projects for the manufacture of microchips, which are regarded as essential for technologies that are critical to the EU’s security and environmental goals.²³ Energy supply is also an area where the need for strategic autonomy is felt to be particularly acute, with a consequently more substantial need for State intervention.²⁴ Strategic autonomy in energy is important not only because of the risks of reliance on energy supplies from Russia but also because it will involve increased reliance on renewable energy sources such that the EU’s goal of producing ‘net zero’ carbon emissions by 2050 can be achieved.²⁵ Subsidies for such technologies in other large economies may also put pressure on the EU to follow suit.²⁶ Further,

²¹ For the argument that government spending is likely to increase in wealthy countries over the next few decades, see Marc Robinson, *Bigger Government: The Future of Government Expenditure in Advanced Economies* (Arolla Press 2020). See also Delia Ferri, ‘The Role of EU State Aid Law as a “Risk Management Tool” in the COVID-19 Crisis’ (2021) 12 *European Journal of Risk Regulation* 249 for discussion of the roles of State aid in immediate crisis responses as well as longer term risk management.

²² Mario Damen, ‘EU Strategic Autonomy 2013-2023: From concept to capacity’ (European Parliamentary Research Service Briefing, July 2022) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733589/EPRS_BRI\(2022\)733589_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733589/EPRS_BRI(2022)733589_EN.pdf)> accessed 25 July 2022.

²³ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a framework of measures for strengthening Europe’s semiconductor ecosystem (Chips Act)’ COM (2022) 46 final. See also Christopher McMahon, ‘Ireland stands to gain from new EU policy on microchip production’ *The Irish Times* (Dublin, 28 February 2022) <<https://www.irishtimes.com/business/technology/ireland-stands-to-gain-from-new-eu-policy-on-microchip-production-1.4813619>> accessed 20 July 2022.

²⁴ See for example European Council, ‘Versailles Declaration’ (11 March 2022) paras 14-19, <<https://www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf>> accessed 25 July 2022; Céline Charveriat and Tim Gore, ‘The case for green strategic autonomy’ (European Council on Foreign Relations, 2 March 2022) <<https://ecfr.eu/article/the-case-for-green-strategic-autonomy/>> accessed 25 July 2022.

²⁵ Martin Sandbu, ‘The EU has a plan for a common energy policy – now it must deliver’ *Financial Times* (London, 22 May 2022) <<https://www.ft.com/content/f14e1c1b-9c2e-4e22-8040-1577b0dc7dc4>> accessed 25 July 2022. Céline Charveriat and Tim Gore, ‘The case for green strategic autonomy’ (European Council on Foreign Relations, 2 March 2022) <<https://ecfr.eu/article/the-case-for-green-strategic-autonomy/>> accessed 25 July 2022.

²⁶ See for example, Commission, ‘State aid: Commission consults Member States on proposal for a Temporary Crisis and Transition Framework’ (Press Release, 1 February 2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_513> accessed 5 February 2023. See also Sam Fleming, Henry Foy and Katie Martin, ‘EU makes green pitch to rival US subsidy splurge’ *Financial Times* (London, 17 January 2023) <<https://www.ft.com/content/4177cec6-7f93-41da-aa1e-028afb7601f8>> accessed 29 January 2023.

demographic changes in the EU are producing older populations, which is likely to increase the need for more State investment and support for healthcare.²⁷

An active role for the State has also been promoted by recent economic thinking on these issues. Mazzucato argues that robust but well-designed State intervention is vitally important for the innovation, research and development which will be necessary to pursue these goals.²⁸ She advocates for a ‘mission economy’ where the State actively articulates substantial goals, divides them into smaller tasks and remains in control of the overall process even when collaborating with the private sector.²⁹ These big projects organised and funded by the State are also made more politically defensible by modern monetary theory and the idea that public debt and deficit spending by governments are less problematic than previously thought.³⁰ While it is important to stress that not all public intervention will be captured by the State aid rules, it seems inevitable that a State pursuing this much more active style of industrial policy would be more likely to engage the general prohibition on aid. A more active industrial policy makes understanding the system that regulates State intervention much more important.

In this context, the contribution made by this thesis seeks to link the controversial developments in the cases on fiscal measures with the broader range of State interventions that are also covered and regulated by the rules. The recent pattern of enforcement of the State aid rules against fiscal measures and national tax policies has attracted considerable attention in the academic literature and indeed in public debate. This interface between State

²⁷ Marc Robinson, *Bigger Government: The Future of Government Expenditure in Advanced Economies* (Arolla Press 2020). State aid is also likely to have an important role to play in developing technologies to assist with the care of elderly cohorts in the population as well as promoting universal design and accessible technology which may also become more relevant in light of these demographic trends. See Delia Ferri, ‘Subsidising Accessibility’ (2015) 14 *European State Aid Law Quarterly* 51.

²⁸ Mariana Mazzucato, *The Entrepreneurial State: Debunking Public vs. Private Sector Myths* (Penguin 2018).

²⁹ Mariana Mazzucato, *Mission Economy: A Moonshot Guide to Changing Capitalism* (HarperCollins 2021).

³⁰ See for example Stephanie Kelton, *The Deficit Myth: Modern Monetary Theory and the Birth of the People’s Economy* (John Murray 2020); Barry Eichengreen, Asmaa El-Ganainy, Rui Esteves and Kris James Mitchener, *In Defense of Public Debt* (Oxford University Press 2021).

aid and tax law is controversial and many suggest that classifying certain tax rules and practices as State aid under Article 107(1) TFEU is inappropriate.³¹ There is a suggestion that the State aid rules are not a very good fit for this task, that they are being applied in creative but unconvincing ways.³² Much of the literature thus far has contended that the drive to classify certain fiscal measures as aid has required the standards used for this to be strained and contorted.³³ Much of the attention understandably focuses on what this means for the freedom of Member States to set their own tax policies and what it reveals about how the Commission and the CJEU will treat similar tax measures in the future.³⁴

However, it is unlikely that the consequences of such developments would stop there. This thesis seeks to look beyond this to consider the impact that the broader definition of aid, which has emerged from the cases dealing with fiscal measures, may have on non-fiscal measures. As the standards used in the case law are adapted to address the specificities of fiscal measures, there is a possibility that this may influence future cases that deal with non-fiscal measures. Indeed, this may be encouraged by the insistence by the CJEU that it cannot distinguish between measures based on their regulatory form or technique.³⁵ This unintended

³¹ See for example Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 *Journal of European Competition Law & Practice* 369.

³² See for example Emily Forrester, 'Is the State Aid Regime a Suitable Instrument to be Used in the Fight Against Harmful Tax Competition' (2018) 27 *EC Tax Review* 19.

³³ See for example Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 *Journal of European Competition Law & Practice* 369; Phedon Nicolaides, 'State Aid Rules and Tax Rulings' (2016) 15 *European State Aid Law Quarterly* 416.

³⁴ See for example Ulrich Soltész, 'EU state aid law and taxation – where do we stand today?' (2020) 41 *European Competition Law Review* 18; Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 *Journal of European Competition Law & Practice* 369; Phedon Nicolaides, 'State Aid Rules and Tax Rulings' (2016) 15 *European State Aid Law Quarterly* 416; Saturnina Moreno González, 'State Aid and Tax Competition: Comments on the European Commission's Decisions on Transfer Pricing Rulings' (2016) 15 *European State Aid Law Quarterly* 556; Richard Lyal, 'Transfer Pricing Rules and State Aid' (2015) 38 *Fordham International Law Journal* 1017; Dimitrios Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016) 15 *European State Aid Law Quarterly* 428; Wolfgang Schön, 'State Aid in the Area of Taxation' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490; Claire Micheau, 'Tax selectivity in the European law of state aid: legal assessment and alternative approaches' (2015) 40 *European Law Review* 323. See in particular Sections 4.5-4.6.

³⁵ Case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, para 89; Case C-279/08 P *Netherlands v Commission (NOx)* ECLI:EU:C:2011:551, [2011] ECR I-7671, para 51; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom*

consequence of the cases dealing with fiscal measures would have a broad impact. It may affect not only the freedom of Member States to pursue tax policy but also their capacity to implement direct grants, subsidies, loan schemes, guarantees and certain forms of regulation without scrutiny from the Commission.³⁶ While legitimate questions have already been asked about the political legitimacy of the Commission and the CJEU developing the law in this way for fiscal measures,³⁷ the impact on non-fiscal measures may be even more troubling if it is provoked almost unintentionally by the interaction of a number of distinct developments in the law. This thesis seeks to explore the impact of the developments from the fiscal aid cases on State aid law more broadly and how it might shape what type of non-fiscal measures may be caught by the State aid rules.

As the foregoing discussion suggests, this thesis is largely concerned with the question of whether a measure constitutes aid within the meaning of Article 107(1) TFEU. Aid measures are not prohibited in all circumstances, and the Commission can approve aid measures as compatible with the internal market under derogations in the Treaties. Even with these derogations, the breadth of the notion of aid in Article 107(1) TFEU has significant consequences. The application of this provision is necessary before the issue of compatibility with the internal market under the derogations in the Treaties arises. It serves an important gate-keeping function, determining the circumstances in which the Commission has jurisdiction to review a measure. The fact that the CJEU has the final say on the interpretation

ECLI:EU:C:2011:732, [2011] ECR I-11113, para 87; Cases T-226/09 and T-230/09 *British Telecommunications and BT Pension Scheme Trustees v Commission* ECLI:EU:T:2013:466, para 42; Case T-251/11 *Austria v Commission* ECLI:EU:T:2014:1060, para 98; Cases T-516/18 and T-525/18 *Luxembourg and Engie v Commission* ECLI:EU:T:2021:251, para 351; Case C-15/14 P *Commission v MOL* ECLI:EU:C:2015:362, para 86. See Section 5.3.3.

³⁶ See Sections 6.2-6.3.

³⁷ See for example Dimitrios Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016) 15 *European State Aid Law Quarterly* 428; Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 *Journal of European Competition Law & Practice* 369; Tony Joris and Wout de Cock, 'Is *Belgium and Forum 187* a Suitable Source for an EU "At Arm's Length Principle"?' (2017) 16 *European State Aid Law Quarterly* 607.

of this provision also gives it an important role in structuring the inter-institutional dynamics of the EU in relation to State aid policy.

The definition of aid also determines the breadth of the obligation to notify measures to the Commission for approval. A broader definition of aid in Article 107(1) TFEU can dramatically constrain the ability of Member States to pursue their policies free from the oversight and scrutiny of the Commission, even if they could in principle be approved. A broader or more unpredictable interpretation of this provision may also incentivise Member States to notify measures that do not amount to aid in order to avoid the risk of granting unlawful aid inadvertently that might have to be recovered. The provision therefore plays an important role in conditioning the freedom of Member States to pursue economic policy and the relationship between national governments and the EU institutions. The interpretation of Article 107(1) TFEU and the standards used to identify aid are therefore crucial issues in any account of State aid law that merit the attention directed to them in this thesis.

1.2. Primary Research Question

The foregoing section has indicated a gap in the literature that will be explored in greater depth in subsequent chapters. The primary research question is directed at this niche. It asks how the developments in the interpretation of Article 107(1) TFEU arising from cases dealing with fiscal measures affect the application of EU State aid law to non-fiscal measures. By ‘fiscal measures’, the question refers to State interventions through the tax system. ‘Non-fiscal measures’ refer to State intervention in the market by any other means, including direct subsidies, grants, loans, guarantees and market rules.³⁸ An effective answer

³⁸ Both fiscal and non-fiscal measures can be construed as forms of regulation. This thesis adopts definitions of regulation provided by Robert Baldwin, Colin Scott and Christopher Hood, ‘Introduction’ in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press 1998) 1-

to this question will have to contain various components that will be outlined and justified in this section. This section identifies a number of different research objectives determined by this primary question, including descriptive, evaluative, theory-building and recommendatory objectives.³⁹

In order to examine the effect of the developments in the case law dealing with fiscal measures on the application of the rules to other forms of State intervention, this thesis must identify what developments have arisen from this case law. This sets a descriptive objective for the thesis which requires it to offer a systematic account of the case law applying Article 107(1) TFEU to fiscal measures and explain how the law has changed. Analysis of the changes in the law will not be limited to their specific doctrinal features and will also examine the way in which the emphasis on the task of regulating fiscal measures has reoriented the objectives or rationales of these rules. This objective seeks to contribute towards building a theory of what State aid law should seek to achieve. Drawing these connections between the doctrinal developments and the underlying objectives is necessary to obtain a more complete picture of the impact of these developments on the law and what form future developments might take. This analysis will also feature some evaluation of these developments and their coherence.

55, 3-4, who explain that regulation can generally be understood in the economic and legal literature as ‘the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with the rules’ (‘regulation in the narrow sense’ in this thesis). This will include fiscal measures, as well as non-fiscal mandatory rules governing the behaviour of undertakings on the market (‘market rules’ in this thesis). Baldwin, Scott and Hood also acknowledge another widely used definition of regulation that includes ‘all the efforts of State agencies to steer the economy’ and would therefore extend to most forms of aid, such as direct subsidies, grants, loans guarantees and market transactions (‘regulation in the broad sense’ in this thesis). These definitions include intentional acts on the part of the State. There are also broader definitions which extend to ‘all mechanisms of social control’ including social norms, unintentional acts and the independent behaviour of private actors, but such definitions are less instructive for the purpose of this thesis, which deals with rules governing State interventions. See also Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (2nd edn, Oxford University Press 2012) 3.

³⁹ For this typology, see Lina Kestemont, *Handbook on Legal Methodology: From Objective to Method* (Intersentia 2018) chapter 2.

Once these developments in the case law on fiscal aid have been identified, the research question requires consideration of the potential for these developments to have an impact on the application of the rules to other types of measure. This requires consideration of how the case law distinguishes between fiscal and non-fiscal measures to see if there are any tools available to the CJEU to limit the developments in the fiscal aid jurisprudence from having a broader impact on other measures. It will also examine if there are any elements of the doctrine that prevent the CJEU from developing different standards for fiscal measures, or particular types of fiscal measure. If there is potential for such an impact, this thesis must then proceed to examine precisely what form that impact will take. While this has an important descriptive aspect, it also has a normative component that will involve an evaluation of this impact.

Any such impact or potential impact must also be tested against the possibility that other developments may diminish their effect or make them irrelevant. It will be necessary to consider the possibility of tax harmonisation in the EU, for example, and evaluate whether reforms in that area would reverse or impede the changes or impacts identified in this thesis.⁴⁰ Other future developments which may intensify the impact of these changes or broaden their field of application must also be considered.⁴¹ This research question will then require an evaluation of these changes and the impact on non-fiscal measures and consideration of what, if anything, should be done to amend or improve the law in this area.

1.3. Structure of Thesis

⁴⁰ See Section 7.2.

⁴¹ See Sections 7.4-7.6.

The response to this primary research question outlined in this thesis is organised into nine chapters. This section will briefly review the structure of the thesis and the order in which different elements of the research question will be addressed. After this introductory chapter which sets out the research question, the structure of the thesis and an outline of the methodology employed, Chapter 2 will take the first steps towards answering the primary research question on the effect of the developments in the application of Article 107(1) TFEU to fiscal measures on the application of the State aid rules to non-fiscal measures by providing a brief outline of the basic features of the EU State aid control regime and its development. It will focus on highlighting distinctive features of the regime which are most important for the research question and the argument contained in this thesis. Chapter 3 will then give an outline of the different objectives that are thought to be served by the State aid control regime and will examine how the precise balance between these objectives has been reoriented in response to the challenge of regulating tax competition between Member States. Chapter 3 will make an original contribution by arguing that the increased application of the State aid rules against tax measures makes the largely neglected objective of managing regulatory competition a central rationale of the regime and will elaborate on this objective and its implications.

Chapter 4 will then proceed to consider the changes to the doctrine that have emerged from the growing body of case law and decisional practice applying the State aid rules to tax measures. These include the prohibition on reliance on increased tax revenues from inward investment as an argument that a tax exemption or subsidy is not aid, the stretching of the selectivity criterion and its reorientation around the discrimination standard and the emergence of the arm's length principle in the law on selectivity. Chapter 4 will also try to explain these doctrinal developments as being, in part, a result of the shift in the objectives of State aid control identified in Chapter 3. It will also consider the potential of these

developments to expand the range of measures that are classified as State aid. Chapter 4 will also review the responses to these developments in the academic literature, highlighting the lack of emphasis on the effects on non-fiscal measures which is the focus of this thesis.

The thesis will then move on to consider what impact these developments in the fiscal aid case law will have on the application of the rules to other forms of aid and non-fiscal measures adopted by Member States. Chapter 5 begins this analysis by considering to what extent the law treats fiscal measures differently from other forms of aid. It examines whether the existing jurisprudence provides any tools for or obstacles to such differentiation. Chapter 5 will suggest that there is little scope for such differentiation and that the potential for developments in the law on fiscal measures to have an impact on the treatment of non-fiscal measures is substantial. Chapter 6 will go on to consider what form that impact might take, suggesting that this is likely to have two primary implications for the treatment of non-fiscal aid. The first is that the reorientation of the selectivity criterion around the discrimination standard is likely to make it easier for the Commission to establish that a measure is selective and therefore aid. The second affects aid granted through market rules, especially where it takes the form of access rights to public infrastructure or resources, concessions, permits, licences or special or exclusive rights. It will be suggested that the discrimination standard is likely to interact with other developments in the treatment of such measures to conflate three of the criteria for identifying aid, making it easier again for the Commission to determine that a measure is aid. It further suggests that these unidentified consequences of the developments from the fiscal aid case law are undesirable and excessively constrain the freedom of Member States to pursue general economic policies.

Chapter 7 tests the robustness of these conclusions by identifying trends and factors that may mitigate the effects on the law identified in Chapter 6 or make the changes arising from the fiscal aid case law irrelevant, including proposals for tax harmonisation. It will

argue that these will not do much to prevent the consequences outlined in Chapter 6. Chapter 7 will also identify two developments which will extend the reach of these developments and the impact on non-fiscal aid in the form of a regulation on foreign subsidies and the new State aid and subsidy control arrangements arising from the UK's departure from the EU.

Chapter 8 builds on the largely negative evaluation provided in Chapter 6 of the effects on non-fiscal aid that are identified there and the persistence of these effects for reasons identified in Chapter 7. It goes on to propose two changes to the existing standards for the identification of aid that are achievable through incremental development of the case law. The first proposal seeks to reform the test for the selectivity criterion by adopting the discrimination standard as an alternative to the existing tests cited in the case law and the literature. Under this test, a measure should be regarded as selective when it differentiates between undertakings without being capable of justification as a proportionate response to a legitimate objective. It will be argued that this test should construe the range of legitimate objectives very broadly and may draw on the notion of solidarity between Member States as an organising principle in identifying these objectives. This will provide a more coherent framework for the identification of aid and will provide tools to the CJEU to narrow the scope of the notion of aid. The second proposal more directly contracts the definition of aid by arguing for more rigorous interpretation of the impact standards for identifying aid. These require that an aid measure must distort competition and affect trade between Member States. This chapter will make the case for distinguishing more clearly between these criteria, applying higher substantive thresholds and placing more demands on the Commission to motivate its decision. This would represent a principled method of containing the notion of aid in response to more expansive and easily satisfied criteria at other stages of the analysis. Chapter 9 will summarise the conclusions reached in the preceding chapters and will suggest avenues for future research.

1.4. Methodology

The methodology adopted by this thesis is primarily doctrinal in character. Doctrinal research has been described as a ‘research process used to identify, analyse and synthesise the content of the law.’⁴² A more comprehensive definition contends that doctrinal research is that ‘which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between [the] rules, explains areas of difficulty and, perhaps, predicts future developments’.⁴³ Another account identifies three key features of doctrinal research, arguing that it draws its arguments from authoritative legal sources broadly construed, that it presents the law as a coherent system and that it seeks to fit individual decisions into that system.⁴⁴ More simply, this type of research is often referred to as ‘black-letter law’.⁴⁵ The research undertaken by this thesis pursues a methodology that is broadly consistent with these accounts. This choice of method is unsurprising given the nature of the primary research question and the type of answer it requires. The question asks how developments in a line of legal doctrine that have arisen in response to one type of case (fiscal measures) might affect another type of case (non-fiscal measures). The interaction between these two lines of case law makes doctrinal methods the most obvious starting point

⁴² Terry Hutchinson, ‘Doctrinal Research: Researching the jury’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) 8-39, 13.

⁴³ Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service 1987) quoted in Terry Hutchinson, ‘Doctrinal Research: Researching the jury’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) 8-39, 15.

⁴⁴ Rob van Gestel and Hans-Wolfgang Micklitz, ‘Revitalizing Doctrinal Legal Research in Europe? What about Methodology?’ (2011) European University Institute Working Papers – Law 2011/05, 26 <https://cadmus.eui.eu/bitstream/handle/1814/16825/LAW_2011_05.pdf?sequence=1&isAllowed=y> accessed 28 July 2022.

⁴⁵ See for example, Mike McConville and Wing Hong Chui, ‘Introduction and Overview’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 1-15, 1, 3; Rónán Kennedy, ‘Doctrinal Analysis: The Real “Law in Action”’ in Laura Cahillane and Jennifer Scheppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 21-38, 22.

for this research as it is difficult to explain or critique this interaction without this type of inquiry.

However, this methodology is adopted with some caution and with acknowledgement of the scepticism towards such research in the academic literature. Some critics complain that it is impossible to dissociate the law from its effects on the outside world and therefore doctrinal analysis alone is somewhat limited in the conclusions it can draw.⁴⁶ However, there is a growing perception that doctrinal scholarship is capable of incorporating insights from other disciplines to address this concern.⁴⁷ Other lines of critique include the assertion that doctrinal legal scholarship has been reduced to ‘case-law journalism’ and is limited to relatively disjointed critique of judicial decisions that too readily adopts the language and perspective of those decisions.⁴⁸ It may also exaggerate the extent to which the law is neutrally applied to a set of facts.⁴⁹ It has been suggested that the method can often be too rigid, inflexible and focused on technicalities.⁵⁰ From the opposite direction, some authors claim that legal research is too often instrumentalised to advocate

⁴⁶ Roger Cotterrell, ‘Why Must Legal Ideas Be Interpreted Sociologically?’ (1998) 25 *Journal of Law and Society* 171.

⁴⁷ Christopher McCrudden, ‘Legal Research and the Social Sciences’ (2006) 122 *Law Quarterly Review* 632, 635; Rob van Gestel and Hans-Wolfgang Micklitz, ‘Why Methods Matter in European Legal Scholarship’ (2014) 20 *European Law Review* 292, 312; Irina Domurath, ‘The politics of interdisciplinarity in law’ in Marija Bartl and Jessica Lawrence (eds), *The Politics of European Legal Research: Behind the Method* (Edward Elgar 2022) 140-158, 153; Rónán Kennedy, ‘Doctrinal Analysis: The Real “Law in Action”’ in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 21-38, 34.

⁴⁸ Rob van Gestel and Hans-Wolfgang Micklitz, ‘Why Methods Matter in European Legal Scholarship’ (2014) 20 *European Law Review* 292, 298. These authors draw on a similar view expressed in relation to US legal scholarship by Pierre Schlag, ‘Spam Jurisprudence, Air Law and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)’ (2009) 97 *Georgetown Law Journal* 803.

⁴⁹ Shane Kilcommins, ‘Doctrinal Legal Method (Black-Letterism): Assumptions, Commitments and Shortcomings’ in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) 7-20, 17.

⁵⁰ Rob van Gestel and Hans-Wolfgang Micklitz, ‘Why Methods Matter in European Legal Scholarship’ (2014) 20 *European Law Review* 292, 293, 310-312.

for particular policy objectives in a way that might overprescribe the law as a solution to various social problems.⁵¹

This chapter cannot fully resolve the debate on the future of doctrinal research. However, it can offer a defence of the use of the doctrinal methodology employed in this thesis. Fundamentally, the primary research question posed asks about how the law works and how it might affect future cases. This requires the analysis to examine the law, at least to some extent, from an internal perspective that is guided by the norms and logic of the system of EU State aid control. It requires some attempt to synthesise and draw together different strands in the case law because this field of regulation is heavily dependent on the case law of the CJEU to make sense of relatively sparse legislative text. Providing a coherent account of the law in this area is worthwhile because, much like other worthy subjects of doctrinal analysis,⁵² the law is complex, uncertain and rapidly changing with significant consequences for European integration and the economies of the various Member States.

However, the analysis in this thesis goes beyond mere ‘case-law journalism’ in that it is not exclusively reactive in character. It does not just respond to the case law on the application of Article 107(1) TFEU to fiscal measures but seeks to consider novel arguments that might be made in future cases and consider how the law might respond to other forms of State intervention. Further, it seeks to evaluate these developments not only from the perspective of the State aid control regime itself, but also by drawing on economic and political science literature to understand the practical effects of this set of legal rules. It also uses these sources together with the case law and legislation to articulate criteria for evaluation of the State aid control regime that are not exclusively drawn from the doctrine

⁵¹ Rob van Gestel and Hans-Wolfgang Micklitz, ‘Why Methods Matter in European Legal Scholarship’ (2014) 20 *European Law Review* 292, 300-303.

⁵² Christopher McCrudden, ‘Legal Research and the Social Sciences’ (2006) 122 *Law Quarterly Review* 632, 648.

itself.⁵³ It also makes proposals for reform that draw on the legal sources themselves as well as the insights from other disciplines. However, in order for the arguments outlined in this thesis and the proposals for reform to be useful to litigants, officials and the Union courts, it must remain grounded in the doctrine itself at least to some extent. Moreover, this thesis does not uncritically prescribe the law as a solution to a particular social problem or a means of pursuing a specific political or policy goal. Instead, it identifies problems in the way the law has been applied, evaluates them and proposes reforms that might resolve them.

The remainder of this section will outline the sources that have been relied upon in carrying out this research. The starting point for any analysis of the notion of aid will inevitably be the text of the relevant provisions of the EU Treaties, particularly Articles 107-109 TFEU. These rules must also be understood in the broader context of EU primary legislation including the TFEU as a whole and the TEU. However, the relatively laconic text pertaining to State aid in the Treaties gives an important role to the CJEU in interpreting those provisions, beyond its ordinary importance as the final arbiter of the meaning of the Treaties.⁵⁴ This is particularly the case in respect of the notion of aid in Article 107(1) TFEU, which is the primary focus of this research. As a result, this research features very close attention to the case law of the CJEU and the General Court. There is also some reference to secondary legislation produced by the EU institutions which are particularly important for procedural issues and exemptions from the obligation to notify aid.

However, this research is also supported by reference to a broader range of sources. For example, Commission decisions enforcing the State aid rules feature prominently in the analysis. There are three reasons for this. The first is that much of the State aid litigation before the Union courts is generated by actions for the annulment of these decisions and

⁵³ See Chapter 3.

⁵⁴ See Section 2.3.1 for more detail on this point.

therefore understanding precisely what the Commission has decided will often be an important element of such litigation. The Commission's argument about the correct interpretation of the law may also be more fully rehearsed in its initial decision. Second, Commission decisions reveal trends in State aid enforcement before those trends emerge in litigation. Third, not all questions about the application or interpretation of the State aid rules are the subject of litigation and so consulting these decisions expands the range of examples that interact with the argument of this thesis.

The Commission also produces a wide range of communications, reports and notices which were consulted extensively as part of this research. The Commission's guidelines are particularly important in relation to the question of the compatibility of aid under Article 107(3) TFEU, where the Commission has a broad discretion to determine this issue.⁵⁵ However, more relevant for this thesis are notices from the Commission explaining its interpretation of particular Treaty provisions which collate and systematise the case law of the CJEU. These guidelines and notices are binding on the Commission.⁵⁶ The Commission's public consultations on and evaluations of various aspects of the State aid rules have also provided useful material for this thesis.

Studying the law of the EU in depth is, much like the European project itself, a multilingual endeavour. While the primary and secondary legislation is available in English, it has occasionally been helpful to consult the texts of these instruments in other languages. The different language texts of the Treaties and the secondary legislation are equally

⁵⁵ Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:209, [1980] ECR 2671, paras 17, 24. See further discussion on these guidelines in Sections 2.3.5, 2.4.3.

⁵⁶ C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri v Commission* ECLI:EU:C:2005:408, [2005] ECR I-5425, para 211; Oana Stefan, 'Hybridity Before the Court: A Hard Look at Soft Law in the EU Competition and State Aid Case Law' (2012) 37 *European Law Review* 49. However, the Commission cannot bind itself to guidelines in the field of State aid that are not inconsistent with the Treaties. See Joined Cases C-75/05 P and C-80/05 P *Germany v Kronofrance* ECLI:EU:C:2008:482, [2008] ECR I-6619, para 65; Case C-288/11 P *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission* ECLI:EU:C:2012:821, para 38. See further discussion of the legal effects of the Commission's soft law at Section 2.4.3.

authentic,⁵⁷ and consulting other versions can sometimes assist in clarifying a point that is less than clear from the English version. Indeed, a similar interpretive process is employed by the Union courts in places.⁵⁸ Much of the case law is available in English or French, if not both. Unlike legislation, decisions of the Union courts do have a single authentic language.⁵⁹ The author has made efforts to consult the version in the language of the case in addition to any French or English translation on some occasions. This has been possible where the language of the case is Spanish, Italian or Portuguese.

This research has also considered a wide range of secondary sources and academic commentary. These include reference textbooks, monographs, edited collections and journal articles. While many journals which publish in the general field of EU law or competition law provided useful material, this research benefitted a great deal from the specialist and detailed treatment of issues relating to State aid law by work published in *European State Aid Law Quarterly*. While the secondary sources referred to are primarily drawn from the literature dealing specifically with State aid, the argument advanced by this thesis required the consultation of a wider range of sources. Literature on competition law has provided useful contrasts and comparisons with State aid law given the nature of the relationship between these areas. The thesis has also benefitted from a broader literature on EU law, particularly the rules governing the internal market.

⁵⁷ Article 55 TEU; Case 283/81 *CILFIT* ECLI:EU:C:1982:335, [1982] ECR 3415, para 18. See also Case 296/95 *EMU Tabac* ECLI:EU:C:1998:152, [1998] ECR I-1605, para 36.

⁵⁸ For a discussion of the different methods used by the CJEU to address discrepancies in different language versions, see Cornelis Baaij, 'Fifty Years of Multilingual Interpretation in the European Union' in Peter Tiersma and Lawrence Solan (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 217-231. See also Lawrence Solan, 'The Interpretation of Multilingual Statutes by the European Court of Justice' (2009) 34 *Brooklyn Journal of International Law* 277.

⁵⁹ Rules of Procedure of the Court of Justice [2012] OJ L265/1, article 41; Rules of Procedure of the General Court [2015] OJ L105/1, article 49. See also Karen McAuliffe, 'Language and Law in the European Union: The Multilingual Jurisprudence of the ECJ' in Peter Tiersma and Lawrence Solan (eds), *The Oxford Handbook of Language and the Law* (Oxford University Press 2012) 200-216, 202. The French language version also appears to have particular prominence because of its status as the working language of the CJEU; see Mattias Derlén, 'Multilingual interpretation of CJEU case law: rule and reality' (2014) 39 *European Law Review* 295.

While it is inevitable that a doctrinal work such as this will largely rely on legal sources, other disciplines also have useful lessons to offer.⁶⁰ The frame of this research has therefore extended beyond publications from lawyers and legal scholars. The State aid rules are a system of economic regulation and understanding the rationale for that system and the effects it is likely to have has required consideration of economic literature. Further, political science scholarship has proved useful in understanding the institutional dynamics at play in the enforcement of the State aid rules in which various different institutions play a role, including the Commission, the Union courts and the Council. Scholarship from the fields of economics and political science have also helped this research to address the role of the State aid rules in the broader context of the project of European integration. While much of the legislation, case law and materials referred to above are freely available on online databases maintained by the EU institutions, the secondary sources were made available to the author through the Library of Trinity College Dublin. Most of the secondary sources consulted are in English, with some published in other languages.

1.5. Conclusion

In summary, this chapter has explained the importance of the State aid law by placing it in its broader context. It has also highlighted the application of the State aid rules to fiscal measures as a worthwhile area of research. It has also gone some way towards explaining the niche within this topic that this research will explore: the impact of developments in the interpretation of Article 107(1) TFEU and the standards for identifying aid on the application of the rules to non-fiscal aid. This chapter has also provided an explanation of the primary

⁶⁰ Christopher McCrudden, *Legal Research and the Social Sciences* (2006) 122 *Law Quarterly Review* 632, 635; Rob van Gestel and Hans-Wolfgang Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20 *European Law Review* 292, 312; Irina Domurath, 'The politics of interdisciplinarity in law' in Marija Bartl and Jessica Lawrence (eds), *The Politics of European Legal Research: Behind the Method* (Edward Elgar 2022) 140-158, 153.

research question and has explained the structure that this thesis will follow in answering them. It has also provided an account of the methodology adopted in conducting this research. The next chapter will begin with some essential legal background to the first primary research question and indeed the thesis as a whole, by explaining the basic features of the State aid control regime.

2. ASSESSMENT OF LEGAL FRAMEWORK OF EU STATE AID CONTROL

2.1. Introduction

Before assessing the developments in the interpretation of the notion of aid that have arisen from the challenges posed by fiscal measures that are the focus of the primary research question, as well as the impact that these have on enforcement against non-fiscal measures, it is necessary to examine the basic features of the framework in which these developments take place. Section 2.2 will first examine the origins of EU State aid control as part of the European Coal and Steel Community (the ‘ECSC’) and important jurisprudential developments from that system that still influence the interpretation of the current rules. The chapter will then go on to consider the emergence of the modern regime in the Treaty of Rome and will give an overview of the main Treaty provisions and the case law that interprets them. Section 2.3 will assess the general prohibition on aid in Article 107(1) TFEU. Section 2.4 will consider the derogations from this prohibition in Article 107(2)-(3) TFEU. Section 2.5 will consider the procedural rules in Article 108 TFEU and relevant secondary legislation. Section 2.6 will then look at the legislative competences relevant to State aid law and examine the most significant types of secondary legislation exempting certain measures from the obligation to notify aid. This outline of the framework will provide a useful basis for the discussion of the objectives of State aid control which will follow in Chapter 3.

2.2. Origin of State Aid in European Coal and Steel Community Treaty

The ECSC is often described as a key starting point in the development of the European project,¹ and this is also true for European State aid control. The Treaty establishing the

¹ See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (7th edn, Oxford University Press 2020) 3.

European Coal and Steel Community (the “ECSC Treaty”) integrated the coal and steel markets of the Member States. This was accompanied by a system of State aid control. Article 4(c) of the ECSC Treaty declared that all ‘subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever’ relating to coal and steel were incompatible with the common market and directed that they were ‘abolished and prohibited within the Community’. While State aid control is often considered to be a relatively distinctive feature of the European project,² Piernas López identifies key characteristics of this system that bear some resemblance to international sector-specific rules controlling subsidies for sugar production, which may have influenced the development of this system.³ These features are an absolute prohibition on aid and subsidies in the relevant sector, a broad and flexible concept of subsidy and a supranational authority charged with enforcing these rules.⁴ The first two of these features offer interesting points of contrast and similarity with the modern system of State aid control.

The first of these is the absolute nature of the prohibition contained in Article 4(c) of the ECSC Treaty. The ECSC Treaty banned aids and subsidies for the coal and steel industries absolutely. In *Steenkolenmijnen*, the CJEU indicated how in relation to ‘everything that pertains to the pursuit of the common objectives within the common market, the institutions of the Community have been endowed with exclusive authority.’⁵ AG Lagrange went on to

² Michelle Cini and Lee McGowan, *Competition Policy in the European Union* (2nd edn, Palgrave Macmillan 2008) 162-163; Eiko Thielemann, ‘Institutional limits of a “Europe of the Regions”’: EC state-aid control meets German federalism’ (1999) 6 *Journal of European Public Policy* 399, 405; Verena Rošic Feguš, ‘The Legitimacy of EU Soft Law: Still Nothing New or a Turn for the Worse in the Field of State Aid?’ (2022) 21 *European State Aid Law Quarterly* 54, 57; Vincent Verouden and Pablo Ibáñez Colomo, ‘State Aid Control’ in Fabian Zuleeg and Larissa Brunner (eds), *Ensuring a post-Brexit level playing field* (European Policy Centre 2019) 67-94, 71-72.

³ Juan Jorge Piernas López, ‘The Evolving Nature of the Notion of Aid under EU Law’ (2016) 15 *European State Aid Law Quarterly* 400, 401.

⁴ *ibid* 401-402.

⁵ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority (Steenkolenmijnen)* ECLI:EU:C:1961:2, [1961] ECR 3, 22.

say that, in relation to the coal and steel industry, the ‘States have lost jurisdiction.’⁶ AG Lagrange explained the rationale for the absolute nature of this prohibition as being that ‘there is no real common market in an industry straddling several countries if one of those countries subsidizes its own industry’.⁷ This contrasts with the modern system of State aid control where the prohibition on aid in Article 107(1) TFEU is described as being qualified or conditional and allows for aid to be granted where it is deemed compatible with the internal market by the Commission.⁸

However, the prohibition on aid to the coal and steel industries in Article 4(c) of the ECSC Treaty was also much narrower in scope than the modern equivalent. It has been observed that ‘Article 4(c) only applies to the subsidies granted specially to the coal and steel industry’ while more general measures that have preferential effects for the coal and steel industries are outside of the scope of this prohibition, and are instead governed by Article 67 of the ECSC Treaty.⁹ Article 67 allowed the Commission to make recommendations to a Member State if more general measures adopted by that Member State had the effect of ‘substantially increasing differences in production costs otherwise than through changes in productivity, to provoke a serious disequilibrium’ in the common market for coal and steel.¹⁰ This clearly contrasts with the modern system of State aid control in which the prohibition on State aid applies to virtually all sectors of the economy, with

⁶ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1960:41, [1961] ECR 3, Opinion of AG Lagrange, 41.

⁷ *ibid* 41.

⁸ Article 107(2)-(3) TFEU; Case 77/72 *Capolongo v Azienda Agricola Maya* ECLI:EU:C:1973:47, [1973] ECR 611, Opinion of AG Roemer, 627; Case 74/76 *Ianelli v Meroni* ECLI:EU:C:1977:51, [1977] ECR 557, para 11; Case 78/76 *Steinike und Weinlig* ECLI:EU:C:1977:52, [1977] ECR 595, para 8; Phedon Nicolaides, “What should state aid control protect? A proposal for the next generation of state aid rules” (2019) 40 *European Competition Law Review* 276; Ulrich Schwalbe, ‘European State Aid Control – The State Aid Action Plan’ in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 161-192.

⁹ Case 59/70 *Netherlands v Commission* ECLI:EU:C:1971:77, [1971] ECR 639, Opinion of AG Roemer, 663.

¹⁰ Article 67(2) of the ECSC Treaty.

some narrow exceptions covered by sector-specific regimes.¹¹ As observed in *Steenkolenmijnen*,¹² the ECSC Treaty itself only envisaged partial market integration linked to a specific sector of the economy while the modern system of State aid control occurs in the context of a much more comprehensively integrated market.¹³

The absolute nature of the prohibition in Article 4(c) of the ECSC Treaty must also be understood in the context of the effectiveness of its enforcement. Ehlermann describes the prohibition as being ‘excessive and unenforceable in the real world’, and as being largely ignored.¹⁴ However, this weakness in the enforcement of State aid control under this provision may not be entirely the result of its ambitious objectives. It seems that levels of State aid remained very high in Member States until the late 1980s, long after new State aid rules were introduced in the Treaty of Rome in 1957.¹⁵

Despite these differences, there is one element of the ECSC Treaty regime that is very similar to the modern regime. Article 4(c) refers in broad terms to grants, subsidies and special charges that relate to coal and steel sectors. Much like the reference to aid in Article 107(1) TFEU, these terms were not defined in the ECSC Treaty and left considerable scope for interpretation by the Union courts. The continuity is also evident from the manner in which the earliest case law on the ECSC Treaty regime still sheds light on the interpretation

¹¹ These include aid for agriculture, transport and shipbuilding. For further discussion, see for example Petra Nemeckova, ‘Agriculture, Forestry and Fisheries’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 511-530; Tibor Scharf, ‘Transport’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 705-749; Piet Jan Slot, ‘Shipbuilding’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (5th edn, Sweet & Maxwell 2016) 797-808. See also Leigh Hancher and Francesco Maria Salerno, ‘Article 107(2) and Article 107(3)’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot, (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 131-182, paras 4-132 – 4-143.

¹² Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1961:2, [1961] ECR 3, 23.

¹³ *ibid.*

¹⁴ Claus-Dieter Ehlermann, ‘State Aid Control in the European Union: Success or Failure?’ (1994) *Fordham International Law Journal* 1210, 1216.

¹⁵ Umut Aydin, ‘Issue framing in the European Commission: State aid policy and the single market’ (2014) 12(2) *Comparative European Politics* 141, 144; Robert Ford and Wim Suyker, *Industrial Subsidies in the OECD Economies* (1990) OECD Department of Economics and Statistics Working Papers No. 74, <<https://www.oecd.org/economy/growth/35370703.pdf>> accessed 4 November 2022.

of Article 107(1) TFEU. In *Steenkolenmijnen*, the CJEU considered the application of Article 4(c) to a bonus paid for mining workers funded by the German government and considered that a ‘subsidy is normally defined as a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces.’¹⁶ The CJEU went on to hold that the concept of aid was broader than that of a subsidy and included not only positive benefits, but also any intervention that would reduce the charges normally included in an undertaking’s budget and which are similar to or have the same effect as subsidies.¹⁷ Quigley cites this proposition in describing the modern law on State aid control.¹⁸

This early case is also important in the way that the CJEU linked the interpretation of the notion of aid to the broader objectives of the regime. The CJEU observed that one of the key objectives of the ECSC Treaty stated at Article 2 was to create conditions that would ensure the most rational distribution of production and continuity of employment while avoiding disturbances in the economies of Member States.¹⁹ The objective of ensuring normal competitive conditions in the common market in Article 5 of the ECSC Treaty was also referred to.²⁰ The CJEU used this objective as justification for its interpretation of the concept of aid and the related concept of subsidy, suggesting that any payment for the production of a good that was not made by the consumer or purchaser would distort competition and would encourage a less than rational distribution of production and resources.²¹ It is also significant that while the judgment of the CJEU itself appears to identify the purpose of the prohibition on aids and subsidies as relating to economic

¹⁶ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1961:2, [1961] ECR 3, 19.

¹⁷ *ibid.*

¹⁸ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 14.

¹⁹ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1961:2, [1961] ECR 3, 19.

²⁰ *ibid.* 20.

²¹ *ibid.* 19-20.

efficiency and the promotion of competition, the comments of AG Lagrange also emphasise the impact of aid in market integration.²² This early case also provides evidence of the multiplicity of purposes served by this area of the law.²³

2.3. Modern State Aid Control: Article 107(1) TFEU

2.3.1. Modern Text of Treaty: From the Treaty of Rome to the TFEU

The State aid rules in their modern form came into force in 1958 in Articles 92-94 of the Treaty of Rome. These provisions are currently found, with very few changes in Articles 107-109 TFEU.²⁴ Article 107(1) TFEU provides a general prohibition on State aid, with Article 107(2)-(3) TFEU providing categories of aid that are or may be compatible with the internal market such that they can be implemented with prior notification and approval from the Commission. Article 108 TFEU gives a very general outline of the basic procedural rules that govern State aid control, including the requirement that all new aid be notified in advance to and approved by the Commission before it is implemented. Article 109 TFEU enables the Council to adopt secondary legislation relating to the implementation of Articles 107-108 and the exemption of certain categories of aid from notification requirements.

This section will begin to outline the basic features of the modern Treaty provisions, starting with Article 107(1) TFEU which is the primary focus of this thesis and the research question that it seeks to answer. This section will consider the general prohibition on State

²² Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1960:41, [1961] ECR 3, Opinion of AG Lagrange, 41.

²³ See Sections 3.2-3.6 for further discussion of these different objectives.

²⁴ These provisions have been renumbered on numerous occasions by Treaty amendments. Following the Treaty of Amsterdam amendment in 1997 these provisions could be found at Articles 87-89 EC. The State aid rules were renumbered to Articles 107-109 TFEU after the Lisbon Treaty amendments came into force in 2009. To avoid confusion, these provisions will be referred to using the current numbering system, ie 'Articles 107-109 TFEU'.

aid contained by this provision and will outline the conditions developed by the case law for the identification of aid within the meaning of this provision. Article 107(1) TFEU provides:

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

As indicated above, this provision outlines a general prohibition on aid by declaring aid to be presumptively incompatible with the internal market, subject to the exceptions elsewhere in the Treaties. This means that unlike the ECSC regime discussed above, the prohibition on aid is not absolute, but qualified and conditional.²⁵ While this provision could be said to be ‘striking for its brevity’,²⁶ it plays a very important role within the State aid control regime by determining whether a given measure is within its scope. This in turn determines whether a State is free to pursue certain policies without EU intervention or control. The importance of this provision, together with the sparse detail it provides, has placed great pressure on the Union judiciary to supplement this text and clarify its meaning by interpretation. The case law has therefore developed four broad conditions for the identification of aid which will each be considered in turn. These are the conditions that the measure: (1) is imputable to the State and granted through State resources; (2) confers an economic advantage on an undertaking; (3) is selective; and (4) distorts competition between undertakings and affects trade between Member States.²⁷ While there exist different formulae in the case law and

²⁵ Case 77/72 *Capolongo v Azienda Agricola Maya* ECLI:EU:C:1973:47, [1973] ECR 611, Opinion of AG Roemer, 627; Case 74/76 *Ianelli v Meroni* ECLI:EU:C:1977:51, [1977] ECR 557, para 11; Case 78/76 *Steinike und Weinlig* ECLI:EU:C:1977:52, [1977] ECR 595, para 8.

²⁶ Stephen Weatherill and Paul Beaumont, *EU Law: The Essential Guide to the Legal Workings of the European Union* (3rd edn, Penguin 1999) 501 describe what is now Article 34 TFEU in the same terms.

²⁷ This structure of four main conditions is supported by the CJEU in Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* ECLI:EU:C:2006:403, [2006] ECR I-5293, para 28. A similar account of the relevant conditions is set out in the structure of Herwig Hoffmann and Claire Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2013) part II and 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. These commentators separate the requirement that the beneficiary of the aid be an undertaking from the economic advantage criterion. However, this author finds it more convenient to address those issues together. This also echoes the approach of Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)*

academic commentary that divide these conditions in different ways, this framework of four broad conditions will be used to structure the discussion that follows on the notion of aid within Article 107(1).²⁸

2.3.2. Imputability to the State and State Resources

2.3.2.1. Early Case Law

Article 107(1) TFEU applies its general prohibition to ‘aid granted by a Member State or through State resources.’²⁹ The State origin of the measures impugned by the State aid rules received little judicial treatment before the early 2000s. There are however a few earlier cases give some guidance on the meaning of this criterion. *Van Tiggele* establishes that this criterion is not satisfied when undertakings obtain a benefit from minimum pricing laws.³⁰ In *Steinike und Weinlig*, the CJEU determined that the Article 107(1) TFEU operated to prohibit aid irrespective of whether it was granted directly by the State or through a public or private undertaking appointed to administer the aid.³¹ Further, the fact that the aid was paid out from a fund which drew its resources from a compulsory levy imposed on private undertakings did not allow it to evade the prohibition.³² Similarly, the grant of aid in the

(4th edn, Hart 2022) 5-6 who emphasises the importance of distinguishing between economic advantage, selective advantage and competitive advantage.

²⁸ This formula strikes a reasonable balance for the purpose of this discussion between analytical precision on the one hand and the avoidance of repetition or confusion when dealing with tests that often overlap with one another. For alternatives, see for example Vincent Verouden and Philipp Werner, ‘Introduction – The Law and Economics of State Aid Control’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-62, 16 divide these into six conditions. Eugene Stuart and Iana Roginska-Green, *Sixty Years of EU State Aid Law and Policy: Analysis and Assessment* (Wolters Kluwer 2018) 10 also outline six conditions, one of which is ‘selective advantage’. For the author’s reservations on the use of the term ‘selective advantage’ and the conflation of the criteria of economic advantage and selectivity, see Section 5.4.2. Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 6 further subdivides these into nine separate conditions. Some cases see the CJEU adopt four conditions that are somewhat different to those listed above. See for example Case C-15/14 *MOL v Commission* ECLI:EU:C:2015:362, para 47; Joined Cases C-20/15 P and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981, para 53. In all cases, the basic rules and points of interpretation are the same.

²⁹ For discussion of this condition elsewhere in the thesis, see Sections 4.2.1, 6.3.3.

³⁰ Case 82/77 *Van Tiggele* ECLI:EU:C:1978:10, [1978] ECR 25, paras 23-26.

³¹ Case 78/76 *Steinike und Weinlig* ECLI:EU:C:1977:52, [1977] ECR 595, paras 17-18, 21.

³² Case 78/76 *Steinike und Weinlig* ECLI:EU:C:1977:52, [1977] ECR 595, para 22. It should also be noted that in circumstances where a charge such as this is hypothecated and used for the provision of aid, the charge is

form of preferential tariffs by a gas company partially owned and substantially controlled by a Member State was also held to be State aid in *Van der Kooy*.³³

The decision in *Sloman Neptun*³⁴ reiterates that the relevant phrase in Article 107(1) TFEU seeks to extend the definition of aid to advantages granted directly by the State and those granted by public or private undertakings designated by the State.³⁵ In that decision, the CJEU went on to hold that a German law which allowed shipping companies to refrain from applying German employment law to workers on German ships who were not based in Germany did not constitute State aid, notwithstanding that measure reduced the tax burden of the shipping companies because it relieved them of the obligation to pay German social security contributions and other taxes.³⁶ It was held that the reduction in the tax burden of the shipping companies was simply incidental to a more general measure and therefore was not aid.³⁷ This criterion is not satisfied where the loss of revenue is an incidental consequence of a measure regulating the conduct of private parties in general.³⁸

treated as an integral part of the aid measure itself. See Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 190-192; Case C-449/14 P *DTS Distribuidora de Televisión Digital SA v Commission* ECLI:EU:C:2016:848, para 68; Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* ECLI:EU:C:2006:403, [2006] ECR I-5293, para 46; Case C-333/07 *Régie Networks* ECLI:EU:C:2008:764, [2008] ECR I-10807, para 99. This also appears to apply to situations where there is an asymmetrical tax such that there are two categories of undertakings in competition with one another, one of which is subject to the tax while the other is not. In these circumstances, the tax itself will be regarded as part of the aid measure and subject to challenge. See Case C-526/04 *Laboratoires Boiron* ECLI:EU:C:2006:528, [2006] ECR I-7529, para 39; Case C-449/14 P *DTS Distribuidora de Televisión Digital SA v Commission* ECLI:EU:C:2016:848, para 75. However, it has been suggested by Helmut Brokelmann and Mariarosaria Ganino, ‘DTS v Commission: When is a Tax Measure State Aid?’ (2017) 8 *Journal of European Competition Law and Practice* 102 that the CJEU has been unwilling to extend the principle too far beyond the facts of *Laboratoires Boiron*.

³³ Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy v Commission* ECLI:EU:C:1988:38, [1988] ECR 219, paras 36-37.

³⁴ Joined Cases C-72/91 and C-73/91 *Sloman Neptun v Bodo Ziesemer* ECLI:EU:C:1993:97, [1993] ECR I-887.

³⁵ *ibid* para 19.

³⁶ *ibid* paras 21-22.

³⁷ *ibid* paras 21-22.

³⁸ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 59-60.

2.3.2.2. *PreussenElektra* and its Aftermath

This condition for the identification of aid became the subject of contention in later cases, beginning with *PreussenElektra*,³⁹ in which the CJEU held that a German scheme which obliged electricity suppliers to purchase a certain proportion of the electricity needs from local renewable energy producers at a price fixed by law below market value was not State aid. This decision establishes that the criterion that the aid must be ‘granted by a Member State or through State resources’ is not satisfied unless the aid is financed by State resources.⁴⁰ In essence, this means that this criterion can be divided into two cumulative conditions. The first is that the advantage must be conferred by a measure imputable to the State and the second is that it must be financed by State resources. In *PreussenElektra*, the impugned measure merely obliged private parties to fund the benefit conferred on renewable energy producers and therefore no State funds were engaged.

This precise location of the boundaries of the concept of State resources fixed by the CJEU in *PreussenElektra* was examined repeatedly in the years that followed, particularly in relation to parafiscal levies and renewable energy incentive schemes. In *Pearle*, it was held that a compulsory levy imposed on an industry by a public body on the initiative of a private sector organisation to fund an advertising campaign for the benefit of the undertakings subject to the levy was not granted through State resources.⁴¹ This was relied upon by the CJEU in *Doux Elevage* to hold that compulsory contributions to a fund undertaking activities for the benefit of the undertakings paying the contribution was not aid, even though a public entity was involved, because the funds were never really at the disposal of the State, even though being so temporarily would be sufficient.⁴² Where a Member State

³⁹ Case C-379/98 *PreussenElektra* ECLI:EU:C:2001:160, [2001] ECR I-2099.

⁴⁰ *ibid* para 58.

⁴¹ Case C-345/02 *Pearle* ECLI:EU:C:2004:448, [2004] ECR I-7139

⁴² Case C-677/11 *Doux Elevage and Coopérative agricole UKL-ARREE* ECLI:EU:C:2013:348, paras 32-36.

merely formalises or provides for an enforcement system for a private industry association, it appears that this criterion is not met.

The CJEU distinguished *Pearle* and *PreussenElektra* from the facts at issue in *Essent Netwerk Noord* in that the funds were collected from a charge imposed by the State as part of State policy, rather than for a strictly commercial purpose and the funds could only be used for purposes set out in legislation.⁴³ In *Association Vent de Colère*, the CJEU considered a scheme whereby certain companies were required to purchase wind energy at an inflated price but were compensated by a fund that was drawn from surcharges imposed on consumer electricity bills as determined by the relevant government minister.⁴⁴ As in *Essent Netwerk Noord*, the CJEU held that there was a burden on State resources in circumstances where the money was channelled through a public body and was required to be used for purposes set out in legislation.⁴⁵ It has been suggested that the decisions in *Essent Netwerk Noord* and *Association Vent de Colère* see the CJEU giving *PreussenElektra* a very narrow reading that is limited to its own very specific facts,⁴⁶ while others have argued that these decisions can be reconciled.⁴⁷ While this might have been interpreted as a prelude to a reconsideration of this contested decision, the CJEU has reaffirmed the doctrine arising from *PreussenElektra* in a judgment dealing with a similar renewable energy scheme in *Commission v Germany*.⁴⁸ This is particularly significant in light of frequent attempts by the

⁴³ Case C-206/06 *Essent Netwerk Noord* ECLI:EU:C:2008:413, [2008] ECR I-5497, paras 72-74.

⁴⁴ Case C-262/12 *Association Vent de Colère* ECLI:EU:C:2013:851. See also Joined Cases C-702/20 and C-17/21 *'DOBELES HES' SIA* ECLI:EU:C:2023:1.

⁴⁵ Case C-262/12 *Association Vent de Colère* ECLI:EU:C:2013:851, paras 22-37.

⁴⁶ Leigh Hancher, 'The General Framework' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 43-130, para 3-076.

⁴⁷ Rein Wesseling and Marieke Bredenoord-Spoek, 'State Measure' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 87-118, 109.

⁴⁸ Case C-405/16 P *Commission v Germany* ECLI:EU:C:2019:268. However, Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 54-55 suggests that three more recent decisions of the General Court find that the State resources criterion is satisfied in respect of essentially the same scheme in Case T-745/18 *Covestra Deutschland AG v Commission* ECLI:EU:T:2021:644, para 145; Joined Cases T-233/19 and T-234/19 *Infineon Technologies Dresden GmbH v Commission* ECLI:EU:T:2021:647, para 110; Case T-238/19 *Wepa Hygieneprodukte GmbH v Commission* ECLI:EU:T:2021:648, para 109. These judgments distinguish *Commission v Germany* based on the facts. The

Commission to bring the CJEU to diverge from the approach in *PreussenElektra*.⁴⁹ Bouchagiar helpfully synthesises the case law in light of *Commission v Germany* and the decision in *Achema*⁵⁰ to identify three circumstances where a measure will be held to be granted through State resources.⁵¹ These are where the State imposes a compulsory charge that finances a public initiative or policy, where the manager of the resources is under the control of the State and where price regulation is combined with the assumption of the burden of that price regulation by the State.⁵²

The decision in *PreussenElektra* has proved controversial, with many authors claiming that it took an approach that was unduly formalistic.⁵³ It has been suggested that it allows Member States to circumvent the State aid rules by changing the regulatory architecture through which the aid is granted while achieving the same substantive effect on the market.⁵⁴ On the contrary, it has been suggested that the decision serves two important purposes. The first is that it offers greater legal certainty to Member States.⁵⁵ The second is that it draws appropriate limits to the application of EU market law and prevents it being

difference appears to be based on the General Court's conclusion that the surcharge was a compulsory levy in circumstances where the CJEU determined that a very similar if not identical levy was not compulsory in character because it considered that, unlike the situation in *Commission v Germany*, distribution network operators were now obliged to pass on the surcharge to final consumers. These decisions are currently under appeal. The judgments make great efforts to explain why they are not inconsistent with *Commission v Germany* and it is not clear that they materially change the law, save that they suggest that they appear to attempt to give that decision, together with *PreussenElektra*, a relatively narrow reading.

⁴⁹ Juan Jorge Piernas López, 'The Evolving Nature of the Notion of Aid under EU Law' (2016) *European State Aid Law Quarterly* 400, 410.

⁵⁰ Antonios Bouchagiar, 'When Do Funds Become State Resources: The Notion of Aid in View of the Recent *EEG* and *Achema* Judgments' (2020) 19 *European State Aid Law Quarterly* 19, 25-28.

⁵¹ Case C-706/17 *Achema* ECLI:EU:C:2019:407.

⁵² Antonios Bouchagiar, 'When Do Funds Become State Resources: The Notion of Aid in View of the Recent *EEG* and *Achema* Judgments' (2020) 19 *European State Aid Law Quarterly* 19, 25-28.

⁵³ Julio Baquero Cruz and Fernando Castillo De La Torre, 'A Note on *PreussenElektra*' (2001) 26 *European Law Review* 489, 492; Christian Koenig and Jürgen Kühling, 'EC Control of Aid Granted through State Resources' (2002) 1 *European State Aid Law Quarterly* 7, 18; Andrea Biondi, 'Some Reflections on the Notion of State Resources in European Community State Aid Law' (2007) 30 *Fordham International Law Journal* 1426, 1446-1447.

⁵⁴ *ibid.*

⁵⁵ Andrea Biondi, 'Some Reflections on the Notion of State Resources in European Community State Aid Law' (2007) 30 *Fordham International Law Journal* 1426, 1447.

used as an instrument of excessive deregulation.⁵⁶ Neither of these positions are without difficulties. The charge of formalism levelled against *PreussenElektra* is clearly made from a perspective that views State aid law as a tool to preserve competition between undertakings.⁵⁷ This view regards the impact on competition to be the same irrespective of whether the measure is funded directly by the State or by payments from private actors pursuant to an obligation imposed by the State, making the distinction drawn in *PreussenElektra* irrelevant. However, this argument may be less compelling if State aid law is regarded as a tool for the integration of the internal market.⁵⁸ On this view, *PreussenElektra* may be regarded as following analogous developments in free movement law which seek to limit their deregulatory influence on national economies.⁵⁹

2.3.2.3. Imputability to the State

As indicated above, one of the significant developments in the law arising from the decision *PreussenElektra* is that the requirement that the measure originates from the State has been subdivided into two separate, cumulative conditions.⁶⁰ These are often described as requirements that the measure be imputable to the State and that it be granted from State

⁵⁶ Andrea Biondi, 'Some Reflections on the Notion of State Resources in European Community State Aid Law' (2007) 30 *Fordham International Law Journal* 1426, 1447; Joined Cases, C-5252/97, C-53/97 and C-54/97 *Viscido v Ente Poste Italiane* ECLI:EU:C:1998:78, [1998] ECR I-2629, Opinion of AG Jacobs, 2635; Case 379/98 *PreussenElektra* ECLI:EU:C:2000:585, [2001] ECR I-2099, Opinion of AG Jacobs, 2138.

⁵⁷ See for example Julio Baquero Cruz and Fernando Castillo De La Torre, 'A Note on *PreussenElektra*' (2001) 26(5) *European Law Review* 489, 494. '...since the objective of State aid rules is not the good management of public funds but rather that of preventing distortions of competition, there are no systemic reasons to interpret the State resources condition narrowly.' For further discussion of this view on the primary objectives of State aid control, see Section 3.3.

⁵⁸ For the view that State aid law primarily seeks to secure market integration see Andrea Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' (2010) 12 *Cambridge Yearbook of Legal Studies* 35. See discussion in Section 3.2.

⁵⁹ Andrea Biondi, 'Some Reflections on the Notion of State Resources in European Community State Aid Law' (2007) 30 *Fordham International Law Journal* 1426, 1438-1439. A similar point is made by Juan Jorge Piernas López, 'The Evolving Nature of the Notion of Aid under EU Law' (2016) 15 *European State Aid Law Quarterly* 400, 410. See discussion on the relationship between market integration and competition rationales for State aid law in Section 3.3.2.

⁶⁰ Rein Wesseling and Marieke Bredenoord-Spoek, 'State Measure' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 87-118, 87-88, 117.

resources.⁶¹ It is worth briefly considering the basic parameters of the law on the imputability of a measure to the State. While the law cited above in relation to the burden on State resources is primarily concerned with the degree of State control over the relevant funds, the imputability to the State is concerned with the extent to which the State can be said to control the decision to adopt the relevant measure. It is clear that a measure implemented by legislation or an act of the executive or public administration is imputable to the State.⁶² Measures implemented by public undertakings may also be imputable to the State, but this will depend on a very fact-sensitive inquiry into the level of control exercised by public authorities over the relevant decision.⁶³ The law does not require the Commission to prove the involvement of public authorities in the specific decision at issue, but only prove that the absence of State involvement is at least unlikely.⁶⁴ The Commission will consider a broad range of factors to determine whether a decision can be imputable to the State, including the extent of the integration of the undertaking into the public administration, organisational links to public authorities, the extent to which the public undertaking had to follow government directives or was subject to government supervision, the public undertaking's activities and its legal status.⁶⁵

⁶¹ 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, para 5; Rein Wesseling and Marieke Bredenoord-Spoek, 'State Measure' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 87-118, 87-88, 117.

⁶² See for example Case T-251/11 *Austria v Commission* ECLI:EU:T:2014:1060, para 87.

⁶³ See for example Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy v Commission* ECLI:EU:C:1988:38, [1988] ECR 219, paras 32-38; Case C-482/99 *France v Commission (Stardust Marine)* ECLI:EU:C:2002:294, [2002] ECR I-4397, paras 50-59.

⁶⁴ Case C-482/99 *France v Commission (Stardust Marine)* ECLI:EU:C:2002:294, [2002] ECR I-4397, paras 50-59.

⁶⁵ See 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, para 43. It was further held that this assessment may also consider the extent to which an official whose actions normally would be imputable to the State acted in excess of her powers and/or concealed the implementation of the measure and the likelihood that the public authorities would have blocked the decision if they had the opportunity to do so in Case C-242/13 *Comerz Nederland NV v Havenbedrijf Rotterdam NV* ECLI:EU:C:2014:2224.

While the imputability of a measure to the State is distinct from the requirement for a burden on State resources,⁶⁶ these two conditions are more closely related than might first appear. In many cases, these two conditions blur together.⁶⁷ Both conditions are concerned with assessing State control. It is likely that the same factors which might influence a decision on whether a given decision was taken subject to State control would also assist in determining whether the funds at issue were also under State control. Further, the most defensible interpretation of these two lines of case law views State control as a matter of degree, rather than a simple dichotomy. For example, the State resources criterion has been described as effectively amounting to a remoteness test, examining the strength of the link between the advantage and the commitment of public resources based on a range of indicators.⁶⁸ The reliance on a wide range of indicators has also been observed in the treatment of the imputability of a measure to the State.⁶⁹

2.3.3. Economic Advantage

2.3.3.1. Definition of Undertaking

The second condition for the identification of aid requires that an economic advantage is conferred on an undertaking. The first component of this condition to be considered is that the beneficiary of the measure must be an undertaking.⁷⁰ The definition of an undertaking is

⁶⁶ Leigh Hancher, 'The General Framework' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 43-130, paras 3-105 – 3-126.

⁶⁷ Marianne Clayton and Maria Segura Catalan, 'The Notion of State Resources: So Near and yet so Far' (2015) 14 *European State Aid Law Quarterly* 260, 260.

⁶⁸ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 114-115. See also See for example Case C-345/02 *Pearle* ECLI:EU:C:2004:145, [2004] ECR I-7139, Opinion of AG Colomer, paras 67-68.

⁶⁹ See Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 41; Case C-482/99 *France v Commission (Stardust Marine)* ECLI:EU:C:2002:294, [2002] ECR I-4397, paras 52-54.

⁷⁰ This section contains a brief overview of the definition of undertaking in EU law. For more substantive discussion, see Ariel Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases* (7th edn, Hart 2021) ch 1; Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021) 84-102.

the same as that employed in competition law and encompasses any entity insofar as it engages in an economic activity.⁷¹ Economic activities include offering goods or services on a market,⁷² although not necessarily the purchase of such goods or services.⁷³ This definition is functional and the classification of an entity as an undertaking is limited to the specific activity at issue.⁷⁴ The public or private status of an entity does not determine whether it is engaged in an economic activity.⁷⁵ Public bodies themselves can carry out economic activities.⁷⁶ So too can not-for-profit entities⁷⁷ and entities offering goods or services free of charge.⁷⁸ The legal status, corporate form or financing of an entity does not render it incapable of carrying out an economic activity.⁷⁹

While the definition of an undertaking is therefore a relatively broad and flexible one, there are limits to its reach. The case law has also identified certain activities which are not economic in character and in respect of which entities will not be classified as undertakings. These include the exercise of public powers in relation to such matters as

⁷¹ 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, paras 6-37; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 93; Case C-222/04 *Cassa di Risparmio di Firenze* ECLI:EU:C:2006:8, [2006] ECR I-289, paras 107-108; Joined Cases T-443/08 and T455/08 *Freistaat Sachsen and others v Commission* ECLI:EU:T:2011:117, [2011] ECR II-1311, para 117.

⁷² 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, para 12; Case 118/85 *Commission v Italy* ECLI:EU:C:1987:283, [1987] ECR 2599, para 7; Case C-35/96 *Commission v Italy* ECLI:EU:C:1998:303, [1998] ECR I-3851, para 36; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* ECLI:EU:C:2000:428, [2000] ECR I-6451, para 75.

⁷³ Case C-205/03 P *FENIN v Commission* ECLI:EU:C:2006:453, [2006] ECR I-6295, para 26 establishes that the purchase of goods on a market does not constitute an economic activity insofar as the goods are subsequently used for an activity that is not economic in character. It is also clear that passive investment and ownership of shares is not an economic activity. See Case C-222/04 *Cassa di Risparmio di Firenze* ECLI:EU:C:2006:8, [2006] ECR I-289, paras 111-113. This must be distinguished from specialised investment vehicles which are undertakings following Case T-445/05 *Associazione Italiana del Risparmio Gestito* ECLI:EU:T:2009:50, [2009] ECR II-289, paras 91-101.

⁷⁴ Case C-49/07 *MOTOE* ECLI:EU:C:2008:376, [2008] ECR I-4863, para 25; Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021) 86.

⁷⁵ Case C-74/16 *Congregación de Escuelas Pías Provincia Betania* ECLI:EU:C:2017:496, para 49;

⁷⁶ Case T-165/15 *Ryanair and Airport Marketing Services v Commission* ECLI:EU:T:2018:953, para 102.

⁷⁷ Case C-244/94 *Fédération Française des Sociétés d'Assurance* ECLI:EU:C:1995:392, [1995] ECR I-4013, para 21.

⁷⁸ Case C-74/16 *Congregación de Escuelas Pías Provincia Betania* ECLI:EU:C:2017:496, para 49; Case T-461/13 *Spain v Commission* ECLI:EU:T:2015:891, para 45.

⁷⁹ Case C-41/90 *Höfner and Elser v Macrotron GmbH* ECLI:EU:C:1991:161, [1991] ECR I-1979, para 21.

policing, defence,⁸⁰ air or maritime traffic control⁸¹ and environmental surveillance.⁸² Further, public services established on the basis of solidarity funded by social security contributions and general taxation and provided free of charge to users are not regarded as economic activities.⁸³ While much will depend on the details of how the public service is provided, the provision of public education,⁸⁴ healthcare⁸⁵ and social security⁸⁶ have been held to fall outside the definition of an economic activity in certain circumstances. Culture, heritage and nature conservation activities are similarly capable of falling outside of the definition of an economic activity where they are accessible to the public either free of charge or for a fee that is considerably lower than the true costs involved.⁸⁷

2.3.3.2. Economic Advantage

A measure must also confer an economic advantage on an undertaking in order to be classified as aid. The notion of economic advantage has been given a relatively broad reading by the CJEU and the Commission and encompasses any benefit to an undertaking that could

⁸⁰ *Aid to Forensic Science Services – United Kingdom* (Case SA.32820 (2011/NN)) Commission Decision of 7 December 2011 [2012] OJ C29/4, para 8; 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, para 17.

⁸¹ Case T-818/14 *Brussels South Charleroi Airport v Commission* ECLI:EU:T:2018:33, para 99; 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, para 17.

⁸² Case C-343/95 *Cali & Figli* ECLI:EU:C:1997:160, [1997] ECR I-1547, para 23; 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, para 17.

⁸³ Case T-319/99 *FENIN v Commission* ECLI:EU:T:2003:50, [2003] ECR II-357, paras 38-40, as affirmed by the CJEU in Case C-205/03 P *FENIN v Commission* ECLI:EU:C:2006:453, [2006] ECR I-6295.

⁸⁴ Case C-318/05 *Commission v Germany* ECLI:EU:C:2007:495, para 68; 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, paras 28-32.

⁸⁵ Case C-205/03 P *FENIN v Commission* ECLI:EU:C:2006:453, [2006] ECR I-6295, paras 25-28.

⁸⁶ Joined Cases C-159/91 and C-160/91 *Poucet* ECLI:EU:C:1993:63, [1993] ECR I-637; 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, paras 19-22.

⁸⁷ 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, paras 33-37.

not have been obtained under ordinary market conditions.⁸⁸ It has been described as referring only to the effect on the recipient undertaking.⁸⁹ This involves a comparison of the financial position of the undertaking after the measure was implemented with the circumstances that would have prevailed without the intervention.⁹⁰ As a result, an economic advantage can be conferred not only by a direct payment or subsidy to an undertaking, but also by relieving the undertaking from economic burdens or costs that it would normally have to bear as part of its budget, such as labour costs and social security charges,⁹¹ taxes,⁹² goods and services.⁹³ Similarly, a State guarantee can also confer an economic advantage on an undertaking even if the guarantee is not enforced.⁹⁴

While the requirement for an economic advantage might appear to be very easily satisfied, it has been made more demanding through the development of the market economy operator principle.⁹⁵ Under this principle, there is no economic advantage where a Member State participates in a commercial transaction in a manner comparable to a market economy

⁸⁸ 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, para 66; Case C-39/94 *SFEI* ECLI:EU:C:1996:285, [1996] ECR I-3547, para 60.

⁸⁹ 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, para 67; Case 173/73 *Italy v Commission (Italian Textiles)* ECLI:EU:C:1974:71, [1974] ECR 709, para 13.

⁹⁰ 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, para 66.

⁹¹ Case 173/73 *Italy v Commission (Italian Textiles)* ECLI:EU:C:1974:71, [1974] ECR 709.

⁹² Case C-387/92 *Banco Exterior de España* ECLI:EU:C:1994:100, [1994] ECR I-877, paras 13-14.

⁹³ Case C-39/94 *SFEI* ECLI:EU:C:1996:285, [1996] ECR I-3547, paras 60-62; Case C-126/01 *GEMO SA* ECLI:EU:C:2003:622, [2003] ECR I-13769, paras 28-31.

⁹⁴ Joined Cases C-399/10 P and C-401/10 P *Bouygues SA and Bouygues Télécom SA v European Commission and Others* ECLI:EU:C:2013:175.

⁹⁵ This can also be described, according to the context as the ‘private investor test’, ‘private creditor test’ or ‘private vendor test’ depending on the appropriate comparator. See 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, para 74; Giuseppe Conte and James Kavanagh, ‘Advantage’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 65-86, 70-71. Samuel Cornella, ‘The Market Economy Investor Principle to Evaluate State Aid: Latest Developments and New Perspectives’ (2015) 22 *Maastricht Journal of European & Comparative Law* 553 for an account of how the market economy operator principle is best thought of as an organising principle underlying distinct tests in the form of the private investor test, private creditor test, and private vendor test. For examples of this variation in language in the case law, see Case C-124/10 P *Commission v EDF* ECLI:EU:C:2012:318, para 78; Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria v Commission* ECLI:EU:T:2012:90, para 155; Case C-525/04 P *Spain v Commission* ECLI:EU:C:2007:698, [2007] ECR I-9947, para 51; Case T-332/06 *Alcoa Trasformazioni v Commission* ECLI:EU:T:2009:79, [2009] ECR II-29, para 122.

operator and any benefit accruing could have been obtained in the course of a transaction under normal market conditions.⁹⁶ Where a national government makes investments or injects capital into a company, it may avoid the application of Article 107(1) TFEU if it can be established that a private investor of a similar stature to the State would have made such an investment.⁹⁷ The mere fact that the company receiving the funds turns a profit does not prevent this being classified as aid.⁹⁸ Further, a Member State may subsidise a loss of a company in which it has a shareholding, provided that there is a prospect of returning to profitability.⁹⁹ The interpretation of this criterion appears to be more open to economics and quantitative evidence than the case law on other elements of Article 107(1) TFEU.¹⁰⁰ However, the analysis extends slightly further than strict economic analysis, with the CJEU acknowledging that a comparable market operator may also take into account ‘other considerations, such as a desire to protect the group's image or to redirect its activities.’¹⁰¹

2.3.3.3. Services of General Economic Interest

Another significant development emerged in this period in the standards applying to State funding of public services. It will be recalled that certain types of public services such as education and healthcare that are free at the point of access and provided on the basis of

⁹⁶ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 207-208; Case C-39/94 *SFEI* ECLI:EU:C:1996:285, [1996] ECR I-3547, para 60; 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, para 74.

⁹⁷ Case C-261/89 *Italy v Commission*, ECLI:EU:C:1991:367, [1991] ECR I-4437, para 8; Case C-142/87 *Belgium v Commission (Tubemeuse)* ECLI:EU:C:1990:125, [1990] ECR I-959, para 29; Case C-305/89 *Italy v Commission (ALFA Romeo)* ECLI:EU:C:1991:142, paras 18-19.

⁹⁸ Case C-261/89 *Italy v Commission*, ECLI:EU:C:1991:367, [1991] ECR I-4437, para 9.

⁹⁹ Case 234/84 *Belgium v Commission* ECLI:EU:C:1986:302, [1986] ECR 2263, para 15; Case C-303/88 *Italy v Commission* ECLI:EU:C:1991:136, [1991] ECR I-1433, paras 22-23.

¹⁰⁰ Francesco De Cecco, ‘The Many Meanings of Competition in EC State Aid Law’ (2006-2007) 9 Cambridge Yearbook of European Legal Studies 111, 114

¹⁰¹ Case C-303/88 *Italy v Commission* ECLI:EU:C:1991:136, [1991] ECR I-1433, para 21.

norms of solidarity are regarded as non-economic activities.¹⁰² To the extent it carries out such activities, an entity is therefore not considered to be an undertaking, and public subsidies granted to such an entity is not aid within the meaning of Article 107(1) TFEU.¹⁰³ However, the economic law of the EU recognises an intermediate category of activity known as a service of general economic interest ('SGEI') that is neither an ordinary market activity nor is it a non-economic activity.

SGEIs and their importance are expressly referred to in the Treaties. Article 14 TFEU affirms the importance of such services and requires Member States to ensure that they operate based on principles and conditions which allow them to achieve their purposes and allows for some EU legislation to define these principles and conditions. Article 106(2) TFEU disapplies the rules contained in the Treaties to undertakings that perform SGEIs to the extent that those rules would obstruct the performance of those tasks. It is important to note that the boundaries between economic activities, non-economic activities and SGEIs are reasonably fluid and will vary as Member State decisions and technological change bring private enterprise to compete with or entirely replace government provision of these services.¹⁰⁴ Indeed, the Commission has expressly acknowledged the general discretion of Member States to define activities as SGEIs in the absence of Union legislation, and the Commission will only interfere with the exercise of this discretion where there is a manifest error.¹⁰⁵

¹⁰² C-318/05 *Commission v Germany* ECLI:EU:C:2007:495, [2007] ECR I-6957, para 68; Case C-67/96 *Albany* ECLI:EU:C:1999:430, [1999] ECR I-5751, paras 71-79.

¹⁰³ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 72-73, 81-84; Leigh Hancher, 'The General Framework' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 43-130, para 3-017 – 3-023.

¹⁰⁴ Philipp Werner and Vincent Verouden, 'Services of General Economic Interest' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 439-465, 440.

¹⁰⁵ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C8/4, para 46; Case T-289/03 *BUPA v Commission* ECLI:EU:T:2008:29, [2008] ECR II-81, paras 166-169, 172; Case T-17/02 *Fred Olsen* ECLI:EU:T:2005:218, [2005] ECR II-2031, para 216.

The position of SGEIs in relation to State aid law is governed by the decision of the CJEU in *Altmark*,¹⁰⁶ where the referring court asked whether payments to a private bus operator to provide local public transport services was aid that was required to be notified under Article 108(3) TFEU. It was held that public money provided to an undertaking as compensation for performing public service obligations was not State aid within the meaning of Article 107(1) TFEU provided that four conditions were complied with.¹⁰⁷ First, the undertaking must be required to perform clearly defined public service obligations.¹⁰⁸ Second, the method of calculating compensation must be established objectively, transparently and in advance.¹⁰⁹ Third, the compensation must not exceed what is necessary to cover the relevant costs together with a reasonable profit.¹¹⁰ Fourth, the undertaking must either be selected through a public procurement procedure or the compensation must be calculated based on the costs that a typical well-run undertaking would have incurred in discharging the obligations.¹¹¹ This provides more detailed conditions for the application of the principle than had been outlined in previous case law.¹¹² It also marked a change from previous case law which tended to find such measures to be aid, albeit likely to be compatible under Article 106(2) TFEU.¹¹³

This decision was the subject of considerable debate over the extent to which it was consistent with previous case law.¹¹⁴ However, as *Altmark* has been repeatedly affirmed by

¹⁰⁶ Case C-280/00 *Altmark* ECLI:EU:C:2003:415, [2003] ECR I-7747.

¹⁰⁷ Case C-280/00 *Altmark* ECLI:EU:C:2003:415, [2003] ECR I-7747, para 95. However, it has been suggested that the last three of these four conditions are to a large extent interdependent. See Case T-125/12 *Viasat Broadcasting UK v Commission* ECLI:EU:T:2015:687, para 80.

¹⁰⁸ Case C-280/00 *Altmark* ECLI:EU:C:2003:415, [2003] ECR I-7747, para 95.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ Case C-280/00 *Altmark* ECLI:EU:C:2003:415, [2003] ECR I-7747, para 95.

¹¹² Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 294. Compare Case C-53/00 *Ferring v ACOSS* ECLI:EU:C:2001:627, [2001] ECR I-9067.

¹¹³ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 292-293. See for example Case C-174/97 P *FFSA v Commission* ECLI:EU:C:1998:130, [1998] ECR I-1303; Case T-46/97 *SIC v Commission* ECLI:EU:T:2000:123, [2000] ECR II-2125, para 82.

¹¹⁴ In particular, it was suggested that it was consistent with the judgment in Joined Cases C-83/01 P, C-93/01 P and C-94/01 P *Chronopost SA, La Poste v Commission* ECLI:EU:C:2003:388, [2003] ECR I-6993 which

the Union courts,¹¹⁵ another more important line of criticism has emerged regarding difficulties in its application. Some authors have suggested that it has not done much to clarify the practical application of the law in this area as it requires complicated economic assessments which may pose difficulties in particular for national administrations and national courts.¹¹⁶ It has also been suggested that the requirement that parameters for calculation of compensation be determined prospectively limits the flexibility of this exception and the ability of Member States to use it to respond to changing circumstances,¹¹⁷ as well as representing a relatively formalistic approach to the identification of advantage.¹¹⁸ Further, the uncertain and complicated nature of the calculations that must be made may dissuade Member States from relying on this exception, which may make it difficult for this rule to achieve its stated objectives.¹¹⁹

However, it is submitted that the Commission and the Union legislator has sought to address this concern by adopting more specific legislation and guidance in this field, most recently as part of the Almunia Package in 2012. To that end, the Commission has adopted regulations that provide for de minimis exemptions from the notification requirement for aid

was delivered shortly beforehand. See Adinda Sinnaeve, 'State Financing of Public Services: The Court's Dilemma in the Altmark Case' (2003) 2 European State Aid Law Quarterly 351, 358; Andreas Bartosch, 'Clarification or Confusion - How to Reconcile the ECJ's Rulings in *Altmark* and *Chronopost*' (2003) 2 European State Aid Law Quarterly 375, 375; Alessandra Fratini and Andrea Carta, '*Chronopost v. Ufex*: The Paradox of the Competing Monopolist' (2004) 24 Northwestern Journal of International Law and Business 773, 785-786.

¹¹⁵ See for example Case C-206/06 *Essent Netwerk Noord* ECLI:EU:C:2008:413, [2008] ECR I-5497, paras 80-85; Case C-140/09 *Fallimento Traghetti del Mediterraneo* ECLI:EU:C:2010:335, [2010] ECR I-5243, paras 36-40; Joined Cases C-66/16 P to C-69/16 P *Comunidad Autónoma del País Vasco v Commission* ECLI:EU:C:2017:999, paras 45-46.

¹¹⁶ Adinda Sinnaeve, 'State Financing of Public Services: The Court's Dilemma in the Altmark Case' (2003) 2 European State Aid Law Quarterly 351, 362; Erika Szyszczak, 'Financing Services of General Economic Interest' (2004) 67 Modern Law Review 982, 992; Erika Szyszczak, 'The *Altmark* Case Revisited: Local and Regional Subsidies to Public Services' (2017) 16 European State Aid Law Quarterly 395, 407.

¹¹⁷ Erika Szyszczak, 'Financing Services of General Economic Interest' (2004) 67 Modern Law Review 982, 992.

¹¹⁸ Frédéric Louis and Anne Vallery, '*Ferring* Revisited: the *Altmark* Case and State Financing of Public Service Obligations' (2004) 27 World Competition 53, 71.

¹¹⁹ Adinda Sinnaeve, 'State Financing of Public Services: The Court's Dilemma in the Altmark Case' (2003) 2 European State Aid Law Quarterly 351, 360.

granted to firms performing SGEIs in amounts not exceeding €500,000 over three years.¹²⁰ The Commission has also adopted a decision that presumes compatibility for aid to certain firms performing SGEIs if the amount is under €15 million or it is granted for hospitals or social housing and exempts the aid from the notification requirement.¹²¹ This has been accompanied by guidance on the application of the exemption in *Altmark* and on the assessment of the compatibility of aid granted for the performance of SGEIs where it does not satisfy the criteria in that decision.¹²² These measures have been regarded as improving legal certainty in the application of these rules and as simplifying the procedures for Member States.¹²³ While some pockets of uncertainty remain, it has been suggested that these measures, combined with the underlying jurisprudence of the CJEU, represent an area of State aid law which is particularly responsive to economic concerns and draws heavily on more sophisticated economic analysis.¹²⁴

2.3.4. Selectivity

A measure cannot constitute aid within the meaning of Article 107(1) TFEU unless its impact on competition occurs ‘by favouring certain undertakings or the production of certain goods’. This has been interpreted as a requirement that aid must be selective. Selectivity is

¹²⁰ Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest [2012] OJ L114/8.

¹²¹ Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L7/3.

¹²² Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C8/4; Communication from the Commission — European Union framework for State aid in the form of public service compensation [2012] OJ C8/15.

¹²³ Adinda Sinnaeve, ‘What’s New in SGE in 2012? – An Overview of the Commission’s SGEI Package’ (2012) 11 *European State Aid Law Quarterly* 347, 366-367.

¹²⁴ Philipp Werner and Vincent Verouden, ‘Services of General Economic Interest’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 439-465, 465.

among the most controversial criteria for identifying State aid.¹²⁵ This criterion captures the extent to which the measure is targeted towards specific undertakings or industries and distinguishes selective, targeted aid measures from general measures which do not constitute aid.¹²⁶ Therefore, measures granted to an individual undertaking can be presumed to be selective.¹²⁷ Measures which apply to all undertakings without distinction will not be selective.¹²⁸ However, this assessment is considerably more complex for measures that fall between these extremes. The CJEU has developed a three-stage test to identify selective measures in such cases.¹²⁹ The first stage of the test identifies the reference framework or normal regime in the context of which the alleged aid measure occurs.¹³⁰ Second, the test examines whether the impugned measure differentiates between undertakings who are in a comparable legal and factual situation from the perspective of the measure's objectives.¹³¹ If it does so, then the test continues to the third stage. If it does not, then the measure is not selective. The third step considers whether the differentiation between comparable

¹²⁵ This section provides a general overview of the relevant legal tests.

¹²⁶ Joined Cases C-72/91 and C-73/91 *Slooman Neptun v Bodo Ziesemer* ECLI:EU:C:1992:130, [1993] ECR I-887, Opinion of AG Darmon, paras 50-53; Case C-189/91 *Kirsammer-Hack v Sidal* ECLI:EU:C:1992:458, [1993] ECR I-6185, Opinion of AG Darmon, paras 58-69; Case C-374/17 *A-Brauerei* ECLI:EU:C:2018:1024, para 20; Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 90-91, 131; Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 119.

¹²⁷ Case C-15/14 P *MOL v Commission* EU:C:2015:362, para 60; Case C-15/14 P *MOL v Commission* EU:C:2015:362, Opinion of AG Wahl, paras 52-53; Case C-211/15 P *Orange v Commission* EU:C:2016:78, Opinion of AG Wahl, para 67; Case T-135/12 *France v Commission* ECLI:EU:T:2015:116, paras 43-44; 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, para 126. It also appears that this applies where a tax authority has a broad discretion to confer a particular tax benefit to individual undertakings, following Joined Cases C-649/20 P, C-658/20 P and C-662/20 P *Spain v Commission* ECLI:EU:C:2023:60, paras 38-49.

¹²⁸ Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365, paras 35-36; Case C-66/02 *Italy v Commission* ECLI:EU:C:2005:768, [2005] ECR I-10901, para 99; Case C-148/04 *Unicredito Italiano* ECLI:EU:C:2005:774, [2005] ECR I-11137, para 49; Case C-222/04 *Cassa di Risparmio di Firenze* ECLI:EU:C:2006:8, [2006] ECR I-289, para 135; Case T-399/11 *Banco Santander and Santusa v Commission* ECLI:EU:T:2014:938, para 69; Case T-219/10 *Autogrill España v Commission* ECLI:EU:T:2014:939, para 74; Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 120.

¹²⁹ This test appears to have emerged in Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365, para 41; Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, para 54.

¹³⁰ Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, paras 56-57.

¹³¹ Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365, para 41; Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, para 54.

undertakings is justified by the nature or general scheme or structure of the system in question, in which case it will not be selective.¹³² A Member State may therefore treat comparable undertakings differently in conferring an economic advantage from State resources insofar as it is consistent with the general purpose of the system, such as reduced environmental tax burdens on undertakings that cause a lesser degree of harm to the environment.¹³³

This aspect of the test has largely been developed in response to attempts to enforce the State aid rules against fiscal measures, which are the primary focus of this thesis and the research question that it seeks to answer. The difficulties that have arisen in the application of the State aid rules, including the selectivity criterion, to fiscal measures will be examined in greater detail in Chapter 4.¹³⁴ It is sufficient at this juncture to note that it is not obvious that fiscal policy was the primary target of the State aid rules when they were first drafted,¹³⁵ even if it was clear from early case law that the notion of aid was broader than that of subsidy.¹³⁶ However, it has been clear since the decision of the CJEU in *Italian Textiles* that Article 107(1) TFEU does not allow the form of a measure to determine whether it constitutes State aid.¹³⁷ Instead, it is said that State aid is defined in relation to its effects.¹³⁸ As a result, the fact that an advantage is conferred through the tax system does not prevent it from amounting to aid.¹³⁹ Nevertheless, enforcement against fiscal measures was much

¹³² Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365, para 42; Case C-88/03 *Portugal v Commission (Azores)* ECLI:EU:C:2006:511, [2006] ECR I-7115, paras 52-53.

¹³³ Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365.

¹³⁴ See Sections 4.3-4.6.

¹³⁵ Tracy Kaye, 'Corporate Blackmail: State Tax Incentives in the United States' in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 13-38, 21; Pierpaolo Rossi-Maccanico, 'Fiscal Aid Review and Tax Competition' in Alexander Rust and Claire Micheau (eds), *State Aid and Tax Law* (Wolters Kluwer 2013) 39-56, 39.

¹³⁶ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1961:2, [1961] ECR 3, 19.

¹³⁷ Case 173/73 *Italy v Commission (Italian Textiles)* ECLI:EU:C:1974:71, [1974] ECR 709, para 13.

¹³⁸ *ibid.* See further discussion in Section 5.3.

¹³⁹ *ibid.* Similarly, the mere fact that a measure relates to monetary policy will not allow it to evade the prohibition in Article 107(1) TFEU in itself. See Case 57/86 *Greece v Commission* ECLI:EU:C:1988:284, [1988] ECR 2855, paras 8-9.

less aggressive before the mid-1990s, when the Commission adopted a much more interventionist approach to such measures.¹⁴⁰ The interaction between the selectivity criterion and the expansion of the notion of aid to cover tax measures will be explored in greater depth throughout this thesis.

2.3.5. Distortion of Competition and Effect on Trade Between Member States

A measure is only considered aid insofar as it ‘distorts or threatens to distort competition’ and ‘affects trade between Member States’.¹⁴¹ These elements of the text have been interpreted as providing impact standards for the identification of aid which purport to require a measure to cause particular economic effects before it is classified as aid.¹⁴² While the language of Article 107(1) TFEU might appear to refer to two separate criteria, these have often been treated together in the case law,¹⁴³ with some exceptions.¹⁴⁴ The law on the requirement that aid distort competition is well settled.¹⁴⁵ The Commission does not have to

¹⁴⁰ Juan Jorge Piernas López, ‘The Evolving Nature of the Notion of Aid under EU Law’ (2016) 15 *European State Aid Law Quarterly* 400, 408.

¹⁴¹ Article 107(1) TFEU. This section provides a relatively brief overview of the relevant legal tests. See Section 8.3.4 for more detailed discussion that will propose a more demanding interpretation of these criteria as a solution to contain an excessively broad notion of aid in Article 107(1) TFEU.

¹⁴² The term ‘impact standards’ employed as a useful way to describe these elements of the legal tests for the identification of aid is drawn from Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 392-418.

¹⁴³ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 109; Leigh Hancher, ‘The General Framework’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 43-130, paras 3-186, 3-188; e.g. Case 248/84 *Germany v Commission* ECLI:EU:C:1987:437, [1987] ECR 4013, para 18; Case 57/86 *Greece v Commission* ECLI:EU:C:1988:284, [1988] ECR 2855, paras 14-16; Case 310/85 *Deufil v Commission* ECLI:EU:C:1987:96, [1987] ECR 901, paras 9-12; Case C-142/87 *Commission v Belgium (Tubemeuse)* ECLI:EU:C:1990:125, [1990] ECR I-959, paras 35-41; Case C-303/88 *Italy v Commission* ECLI:EU:C:1991:136, [1991] ECR I-1433, para 27.

¹⁴⁴ Joined Cases 67/85, 68/75 and 70/85 *Van der Kooy v Commission* ECLI:EU:C:1988:38, [1988] ECR 219, paras 58-59; Case 62/87 *Exécutif régional wallon v Commission* ECLI:EU:C:1988:132, [1988] ECR 1573, paras 11-19. For more recent examples, see Case T-728/17 *Marinvest and Porting v Commission* ECLI:EU:T:2019:325, paras 99, 106; Case T-582/20 *Ighoga Region 10 v Commission* ECLI:EU:T:2022:648 paras 138-222.

¹⁴⁵ However, some earlier remarks suggested a greater willingness to contemplate a measure failing to satisfy this criterion. See Case 40/75 *Produits Bertrand v Commission* ECLI:EU:C:1975:168, [1976] ECR 1, Opinion of AG Reischl, 16; Case 52/76 *Benedetti v Munari* ECLI:EU:C:1976:184, [1977] ECR 163, Opinion of AG Reischl, 190-191; Case 61/79 *Amministrazione delle finanze dello Stato v Denkavit italiana* ECLI:EU:C:1980:2, [1980] ECR 1205, Opinion of AG Reischl, 1235. It had been accepted that measures

prove the existence of any actual distortion of competition, but only that the measure is liable to distort competition.¹⁴⁶ The substantive threshold for a distortion of competition is very low, with even a very minor distortion of competition being capable of satisfying this condition.¹⁴⁷ The case law has repeatedly contrasted the ‘extremely broad definition’¹⁴⁸ of distortion of competition under Article 107(1) TFEU with the interpretation of similar wording in Article 101 TFEU and other areas of competition law which normally requires that the distortion of competition be appreciable in character.¹⁴⁹ Unlike in the application of Article 101 TFEU, there is no obligation on the Commission to carry out a detailed market definition or economic analysis.¹⁵⁰ In particular, it is clear that the small size of any grant of aid cannot exclude the possibility of a distortion of competition.¹⁵¹ Similarly, the relatively small size of the recipient undertaking and its market share cannot guarantee that this condition will not be fulfilled.¹⁵² In some limited circumstances in which the measure

designed to promote exports would distort competition in Joined Cases 6/69 and 11/69 *France v Commission* ECLI:EU:C:1969:51, [1969] ECR 523, Opinion of AG Roemer, 553. This earlier approach appears to have been superseded by the decision in Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:209, [1980] ECR 2671. See also Section 8.3.1.

¹⁴⁶ Case C-659/17 *Azienda Napoletana Mobilità* ECLI:EU:C:2019:633, para 29; Case C-494/06 P *Commission v Italy and Wam SpA* ECLI:EU:C:2009:272 [2009] ECR I-3639, para 50; Case C-222/04 *Cassa di Risparmio di Firenze* ECLI:EU:C:2006:8, [2006] ECR I-289, para 140; Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600-607/97, T-1/98, T-3/98, T-6/98 and T-23/98 *Alzetta v Commission* [2000] ECR II-2319, paras 76-80.

¹⁴⁷ Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:160, [1980] ECR 2671, Opinion of AG Capotorti, 2699; 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, para 189.

¹⁴⁸ Case C-385/18 *Arriva Italia Srl* ECLI:EU:C:2019:647, Opinion of AG Tanchev, para 120.

¹⁴⁹ Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:160, [1980] ECR 2671, Opinion of AG Capotorti, 2699; Case C-385/18 *Arriva Italia Srl* ECLI:EU:C:2019:647, Opinion of AG Tanchev, para 120. Compare the position in the interpretation of Article 101 TFEU in Case 5/69 *Völk v Vervaecke* ECLI:EU:C:1969:35, [1969] ECR 295, para 7; Case C-226/11 *Expedia Inc v Autorité de la concurrence* ECLI:EU:C:2012:795, para 16. See also a summary of the position in Communication from the Commission — Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union [2014] OJ C291/1; Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021) 145-148.

¹⁵⁰ Case C-385/18 *Arriva Italia Srl* ECLI:EU:C:2019:647, Opinion of AG Tanchev, para 120; Case C-494/06 P *Commission v Italy and Wam SpA* ECLI:EU:C:2009:272, [2009] ECR I-3639, para 58; Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:209, [1980] ECR 2671, paras 9-12; Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:160, [1980] ECR 2671, Opinion of AG Capotorti, 2700.

¹⁵¹ Case C-280/00 *Altmark* ECLI:EU:C:2003:415, [2003] ECR I-7747, para 81; 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, para 189.

¹⁵² Case C-280/00 *Altmark* ECLI:EU:C:2003:415, [2003] ECR I-7747, para 81; Case T-55/99 *CETM v Commission* ECLI:EU:T:2000:223, [2000] ECR II-3207, para 89; Commission Notice on the notion of State

benefits undertakings operating on a market that has not been liberalised or opened up to competition, the Commission considers that there is no competitive distortion.¹⁵³ Nevertheless, the threshold is incredibly low and will almost always be satisfied by any measure being assessed by the Commission or the Union judiciary.¹⁵⁴

The requirement that aid have an effect on trade between Member States has been given a similar interpretation and is also easily satisfied.¹⁵⁵ The Commission need only prove that a measure is liable to affect trade between Member States rather than an actual effect,¹⁵⁶ and no detailed economic analysis or evidence is required from the Commission.¹⁵⁷ The substantive threshold for this criterion is also very low. An effect on inter-state trade can arise where the payment is very small.¹⁵⁸ Even if the recipient undertakings conduct all or most of their trade with third countries, there may be a sufficient effect on trade between Member States.¹⁵⁹ However, the Commission has adopted a more demanding approach to the effect on inter-state trade criterion in its guidance and decisional practice that has led it

aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C262/1, para 189.

¹⁵³ 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 paras 187-188.

¹⁵⁴ Leigh Hancher, 'The General Framework' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 43-130, paras 3-186 – 3-189; Jacques Derenne and Vincent Verouden, 'Distortion of Competition and Effect on Trade' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Kluwer Law International 2017) 169-189, 188-189; Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International 2014) 216; Pietro Crocioni, 'Can State Aid Policy Become More Economic Friendly' (2006) 29 *World Competition* 89, 90; Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) 394. See further discussion in Section 8.3.1. See discussion in Section 8.3.3 on the deficiencies in the prevailing approach.

¹⁵⁵ See also Section 8.3.2. See discussion in Section 8.3.3 on the deficiencies in the prevailing approach.

¹⁵⁶ Case C-385/18 *Arriva Italia Srl* ECLI:EU:C:2019:647, Opinion of AG Tanchev, para 45.

¹⁵⁷ Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International 2014) 207; 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, para 194; Case T-211/05 *Italy v Commission* ECLI:EU:T:2009:304, [2009] ECR II-2777, paras 157-160; Joined Cases T-298/97, T-312/97 T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Commission* ECLI:EU:T:2000:151, [2000] ECR II-2319, para 95.

¹⁵⁸ Case C-518/13 *Eventech v The Parking Adjudicator* ECLI:EU:C:2015:9, para 68; 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, para 192.

¹⁵⁹ Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International 2014) 207; Case C-142/87 *Commission v Belgium (Tubemeuse)* ECLI:EU:C:1990:125, [1990] ECR I-959, para 35; Case C-494/06 P *Commission v Italy and Wam SpA* ECLI:EU:C:2009:272 [2009] ECR I-3639, para 62.

to find that this criterion is not satisfied in some cases and that it is distinct from the distortion of competition.¹⁶⁰ Under this approach, the Commission will conclude that there is no effect on trade between Member States if the recipient supplies goods or services only to a limited area within a Member State, the recipient is unlikely to attract customers from other Member States and the measure would not have any foreseeable, more-than-marginal effect on conditions of cross-border investment and establishment.¹⁶¹ While the Commission can bind itself using guidelines in this way such that the guidelines have legal effect,¹⁶² there is some debate on whether this particular change is consistent with the existing case law of the CJEU on Article 107(1) TFEU.¹⁶³

¹⁶⁰ 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, para 186, 196-197. For relevant decisions, see *Alleged State aid to medical center in Durmersheim* (Case SA.37904) Commission Decision of 26 May 2015 [2015] OJ C188/1; *Alleged aid to a specialised rehabilitation clinic for orthopaedic medicine and trauma surgery* (Case SA.38035) Commission Decision of 21 May 2015 [2015] OJ C188/1; *Funding to public hospitals in the Hradec Králové Region* (Case SA.37432) Commission Decision of 22 May 2015 [2015] OJ C203/1; *Alleged State aid to UK member-owned golf clubs* (Case SA.38208) Commission Decision of 8 June 2015 [2015] OJ C277/1; *Alleged State aid to Glenmore Lodge* (Case SA.37963) Commission Decision of 6 June 2015 [2015] OJ C277/1; *BLSV-Sportcamp Nordbayern* (Case SA.43983) Commission Decision of 25 October 2016 [2016] OJ C406/1; *Aid to local media published in the Basque language* (Case SA.44942) Commission Decision of 26 September 2016 [2016] OJ C369/1; *Aid to support the Valencian language in the press* (Case SA.45512) Commission Decision of 21 September 2016 [2016] OJ C369/1; *Investment in the port of Lauwersoog* (Case SA.39403) Commission Decision of 10 July 2015 [2015] OJ C259/1; *Investment for the Port of Wyk on Föhr* (Case SA.44692) Commission Decision of 1 August 2016 [2016] OJ C302/1; *Alleged unlawful State aid for the Städtische Projekt "Wirtschaftsbüro Gaarden" – Kiel* (Case SA.33149) Commission Decision of 26 May 2015 [2015] OJ C188/1. See Bernadette Zelger, 'The Effect on Trade Criterion in European Union State Aid Law: A Critical Approach' (2018) 17 European State Aid Law Quarterly 28 for a summary of these decisions.

¹⁶¹ 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, paras 196-197.

¹⁶² C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri v Commission* ECLI:EU:C:2005:408, [2005] ECR I-5425, para 211. See also Oana Stefan, 'Hybridity Before the Court: A Hard Look at Soft Law in the EU Competition and State Aid Case Law' (2012) 37 European Law Review 49. However, the Commission cannot bind itself to guidelines in the field of State aid that are not inconsistent with the Treaties. See Joined Cases C-75/05 P and C-80/05 P *Germany v Kronofrance* ECLI:EU:C:2008:482, [2008] ECR I-6619, para 65; Case C-288/11 P *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission* ECLI:EU:C:2012:821, para 38. See further discussion on administrative guidelines and soft law issued by the Commission at Section 2.4.3 below.

¹⁶³ Edwin Schotanus, 'Port of Izola: An Appreciable Twist in State Aid Law' (2019) 18 European State Aid Law Quarterly 359, 362, 365; Sebastiaan Cnossen and Georges Dictus, 'Big on Big, Small on Small: A Never Ending Promise?: A Critical Assessment of the Commission Decision Practice with Regard to the Effect on Trade Criterion' (2021) 20 European State Aid Law Quarterly 30, 32-34; Bernadette Zelger, 'The Effect on Trade Criterion in European Union State Aid Law: A Critical Approach' (2018) 17 European State Aid Law Quarterly 28, 41. See also Case T-728/17 *Marinvest and Porting v Commission* ECLI:EU:T:2019:325; T-582/20 *Ighoga Region 10 v Commission* ECLI:EU:T:2022:648. See also Section 8.3.2 for further discussion.

2.4. Modern State Aid Control: Compatibility and Article 107(2)-(3) TFEU

2.4.1. Exemptions from the Prohibition on Aid

As indicated above, the prohibition on aid in Article 107(1) TFEU has been described as qualified and conditional rather than absolute.¹⁶⁴ This observation derives from the fact that the Treaty provides for significant exemptions from this prohibition. While Article 107(1) TFEU declares aid to be generally incompatible with the internal market,¹⁶⁵ Article 107(2)-(3) TFEU establishes a range of derogations from this rule. This section will briefly consider these derogations and the general principles applicable to the assessment of aid for compatibility with the internal market.¹⁶⁶ Despite the broad language of the Treaties, the Union courts have consistently held that these derogations from the general prohibition in Article 107(1) TFEU must be interpreted narrowly.¹⁶⁷ Further, the lists of derogations provided in the Treaties are exhaustive.¹⁶⁸ Unlike the position under Article 107(1) TFEU under which the Commission must prove that a measure constitutes aid, a Member State seeking to rely on a derogation bears the burden of proof.¹⁶⁹ Member States also have a duty to cooperate with the Commission to assist it in determining that a derogation applies,

¹⁶⁴ Case 77/72 *Capolongo v Azienda Agricola Maya* ECLI:EU:C:1973:47, [1973] ECR 611, Opinion of AG Roemer, 627; Case 74/76 *Ianelli v Meroni* ECLI:EU:C:1977:51, [1977] ECR 557, para 11; Case 78/76 *Steinike und Weinlig* ECLI:EU:C:1977:52, [1977] ECR 595, para 8; Phedon Nicolaides, ‘What should state aid control protect? A proposal for the next generation of state aid rules’ (2019) 40 *European Competition Law Review* 276; Ulrich Schwalbe, ‘European State Aid Control – The State Aid Action Plan’ in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 161-192.

¹⁶⁵ This has been understood to mean that aid is prohibited, particularly in light of the derogations that follow in Article 107(2)-(3) TFEU. See Joined Cases C-356/90 and C-180/91 *Belgium v Commission* ECLI:EU:C:1993:190, [1993] ECR I-2323, para 33; Case C-36/00 *Spain v Commission* ECLI:EU:C:2002:196, [2002] ECR I-3243, para 50.

¹⁶⁶ See further discussion of the compatibility assessment in Sections 5.5.2, 7.3.3.

¹⁶⁷ See for example Case C-301/96 *Germany v Commission* ECLI:EU:C:2003:509, [2003] ECR I-9919, para 71; Case T-348/04 *SIDE v Commission* ECLI:EU:T:2008:109, [2008] ECR II-625, para 62; Case T-68/15 *HH Ferries and Others v Commission* ECLI:EU:T:2018:563, para 142; Case T-385/12 *Orange v Commission* ECLI:EU:T:2015:117, para 81.

¹⁶⁸ See Case T-190/00 *Regione Siciliana v Commission* ECLI:EU:T:2003:316, [2003] ECR II-5015, para 131. However, Article 107(3)(e) TFEU contemplates the addition of further exemptions by decision of the Council on a proposal from the Commission.

¹⁶⁹ Case T-527/13 *Italy v Commission* ECLI:EU:T:2015:429, para 16; Case T-457/09 *Westfälisch-Lippischer Sparkassen- und Giroverband v Commission* ECLI:EU:T:2014:683, para 292. See Leigh Hancker, ‘The Role of Presumptions and the Burden of Proof in Recent State Aid Cases – Some Reflections’ (2019) 18 *European State Aid Law Quarterly* 470 for further discussion.

particularly by providing any relevant information.¹⁷⁰ If a Member State fails to cooperate in this way, the Commission may conclude that the derogation is not justified.¹⁷¹

2.4.2. Exemptions in Article 107(2) TFEU

Article 107(2) identifies three categories of aid measures as being compatible with the internal market. If aid falls within one of these categories, the Commission must conclude that it is compatible with the internal market.¹⁷² While the Commission will still likely make the decision in the first instance as to whether the aid is compatible, it does not have discretion in this regard and the review by the CJEU is more extensive than in respect of the derogations in Article 107(3) TFEU.¹⁷³ The first category comprises aid of a social character granted to individual consumers without discrimination in respect of the origin of the products.¹⁷⁴ This allows Member States to give supports directly to consumers even if there is an indirect benefit to undertakings supplying particular goods to those consumers.¹⁷⁵ However, the support must not be tied exclusively to the purchase of goods or services from a particular undertaking.¹⁷⁶ It also must be somewhat targeted towards social goals.¹⁷⁷ The second category covers aid to remedy the effects of natural disasters or similar

¹⁷⁰ Case C-364/90 *Italy v Commission* ECLI:EU:C:1993:157, [1993] ECR I-2097, para 20; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 147; Case T-139/09 *France v Commission* ECLI:EU:T:2012:496, para 52. Leigh Hancher, 'The Role of Presumptions and the Burden of Proof in Recent State Aid Cases – Some Reflections' (2019) 18 *European State Aid Law Quarterly* 470, 471 explains that the Commission relies to a large extent on Member States to produce much of the evidence which will be used to justify the Commission's assessment.

¹⁷¹ Case C-382/99 *Netherlands v Commission* ECLI:EU:C:2002:363, [2002] ECR I-5163, paras 77-80; Case T-139/09 *France v Commission* ECLI:EU:T:2012:496, para 52.

¹⁷² Case T-268/06 *Olympiaki Aeroporia Ypiresies v Commission* ECLI:EU:T:2008:222, [2008] ECR II-1091, para 51.

¹⁷³ Case T-268/06 *Olympiaki Aeroporia Ypiresies v Commission* ECLI:EU:T:2008:222, [2008] ECR II-1091, para 51. However, the CJEU will defer to the Commission to a greater extent in relation to complex economic assessments even when considering these provisions, following Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen v Commission* ECLI:EU:C:1999:326, [1999] ECR II-3663, para 169.

¹⁷⁴ Article 107(2)(a) TFEU.

¹⁷⁵ See Case C-403/10 P *Mediaset* ECLI:EU:C:2011:533, [2011] ECR I-117, para 81.

¹⁷⁶ Joined Cases C-442/03 P and C-471/03 P *P&O Ferries (Vizcaya) SA v Commission* ECLI:EU:C:2006:356, [2006] ECR I-4845, paras 119-135.

¹⁷⁷ Case T-445/05 *Associazione italiana del risparmio gestito and Fineco Asset Management v Commission* ECLI:EU:T:2009:50, [2009] ECR II-289, paras 181-183.

emergencies.¹⁷⁸ To rely on this category, Member States must ensure that the aid involves a reasonably precise assessment of the damage caused by the relevant event and that there is a direct link between the damage and the event.¹⁷⁹ The third category covers aid granted to remedy the economic imbalances caused by the division of Germany following reunification.¹⁸⁰ This provision covers aid that seeks to address harm that is a direct consequence of the division of Germany into two states, not aid seeking to address the consequences of the economic policies of the government of the German Democratic Republic before reunification.¹⁸¹

2.4.3. Exemptions in Article 107(3) TFEU

Article 107(3) TFEU identifies further categories of aid which may be declared to be compatible with the internal market. In determining whether or not a given aid measure should be exempt for falling into a category listed in Article 107(3) TFEU, the Commission exercises an exclusive competence and has considerable discretion.¹⁸² This contrasts with the position for the identification of State aid under Article 107(1) TFEU and the application

¹⁷⁸ Article 107(2)(b) TFEU.

¹⁷⁹ Case C-278/00 *Greece v Commission* ECLI:EU:C:2004:239, [2004] ECR I-3997, para 82; Case C-73/03 *Spain v Commission* ECLI:EU:C:2004:711, paras 36-37; Case T-268/06 *Olympiaki Aeroporia Ypiresies v Commission* ECLI:EU:T:2008:222, [2008] ECR II-1091, para 52.

¹⁸⁰ Article 107(2)(c) TFEU. It should be noted that the CJEU has held that this provision is capable of rendering aid compatible with the internal market notwithstanding that it is granted after the reunification of Germany following Case C-334/99 *Germany v Commission* ECLI:EU:C:2003:55, [2003] ECR I-1139, para 115-124; Case C-301/96 *Germany v Commission* ECLI:EU:2003:509, [2003] ECR I-9919, paras 64-65. This provision also expressly enables its own repeal by the Council on a proposal from the Commission at any time after the passage of five years from the entry into force of the Treaty of Lisbon.

¹⁸¹ Case C-334/99 *Germany v Commission* ECLI:EU:C:2003:55, [2003] ECR I-1139, para 120; C-301/96 *Germany v Commission* ECLI:EU:2003:509, [2003] ECR I-9919, paras 64-81; Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen v Commission* ECLI:EU:C:1999:326, [1999] ECR II-3663, paras 134-137.

¹⁸² Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:209, [1980] ECR 2671, paras 17, 24; Case C-93/15 P *Banco Privado Português and Massa Insolvente do Banco Privado Português* ECLI:EU:C:2015:703, para 60; Case C-574/14 *PGE Górnictwo i Energetyka Konwencjonalna* ECLI:EU:C:206:686, para 32. The CJEU emphasises the breadth of the discretion exercised by the Commission in Case C-143/99 *Adria-Wien* ECLI:EU:C:2001:598, [2001] ECR I-8365, para 30. This discretion, combined with the freedom of the Commission to set guidelines for the compatibility of aid supports the suggestion of Eiko Thielemann, 'Institutional limits of a "Europe of the Regions": EC state-aid control meets German federalism' (1999) 6 *Journal of European Public Policy* 399, 405 that the State aid control regime centralises considerable power in the hands of the Commission, and indeed the Commissioner responsible for competition.

of the derogations under Article 107(2) TFEU.¹⁸³ However, the Commission's exercise of discretion is subject to review by the Union courts, albeit to a more limited extent than under Article 107(2) TFEU.¹⁸⁴ The case law has defined certain limits on this exercise of discretion.¹⁸⁵ The first is that operating aid can generally not be considered compatible except in very limited circumstances.¹⁸⁶ The second is that the Commission must ensure that the aid has an incentive effect and is necessary and proportionate to the achievement of the objective defined in Article 107(3) TFEU.¹⁸⁷ The Commission also cannot approve aid that is inconsistent with general principles of EU law.¹⁸⁸ Further, in assessing any aid measure, the Commission must consider the impact of the aid on competition and trade across the EU, rather than at the level of a single Member State.¹⁸⁹

¹⁸³ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 255; Case T-308/00 *Salzgitter AG v Commission* ECLI:EU:T:2004:199, [2004] ECR II-1933, para 74; Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:209, [1980] ECR 2671, para 17. The law is clear that the Commission does not enjoy discretion in respect of Article 107(1) TFEU. See Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' v Commission* ECLI:EU:C:2011:368, [2011] ECR I-4727, para 132. Further, the Union courts will engage in a full review of the Commission's application of Article 107(1) TFEU except where complex economic assessments are required. See Case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515; Case T-487/11 *Banco Privado Português and Massa Insolvente do Banco Privado Português* ECLI:EU:T:2014:1077, para 46; Case C-486/15 P *Commission v France and Orange* ECLI:EU:C:2016:912, paras 88-89. The case law on Article 107(2) TFEU is less strident about the powers of the Union courts, but refers to the Commission's task as being limited to verifying whether the condition for a derogation are satisfied. This suggests more intense scrutiny than under Article 107(3) TFEU except where the Commission conducts complex economic assessments. See Case T-268/06 *Olympiaki Aeroporia Ypiresies v Commission* ECLI:EU:T:2008:222, [2008] ECR II-1091, para 51; Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen v Commission* ECLI:EU:C:1999:326, [1999] ECR II-3663, para 169.

¹⁸⁴ Decisions such as Case C-225/91 *Matra v Commission* ECLI:EU:C:1993:239, [1993] ECR I-3203, paras 23-25 and Case C-667/13 *Banco Privado Português and Massa Insolvente do Banco Privado Português* ECLI:EU:C:2015:151, para 67 explain the limited nature of the role of the Union judiciary in respect of Article 107(3) TFEU.

¹⁸⁵ See Massimo Francesco Orzan, 'General Theory on Compatibility of State Aid' in Herwig Hofmann and Claire Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016) 223-233, 225.

¹⁸⁶ See for example Case T-578/17 *a&o hostel and hotel Berlin GmbH v Commission* ECLI:EU:T:2019:437, para 77; Case C-288/96 *Germany v Commission* ECLI:EU:C:2000:537, [2000] ECR I-8237, paras 49, 90. Massimo Francesco Orzan, 'General Theory on Compatibility of State Aid' in Herwig Hofmann and Claire Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016) 223-233, 225.

¹⁸⁷ Case T-578/17 *a&o hostel and hotel Berlin GmbH v Commission* ECLI:EU:T:2019:437, paras 90-91; Case T-177/07 *Mediaset v Commission* ECLI:EU:T:2010:233, [2010] ECR II-2341, para 125.

¹⁸⁸ Case C-390/06 *Nuova Agricast* ECLI:EU:C:2008:224, [2008] ECR I-2577, para 51; Case T-137/10 *CBI v Commission* ECLI:EU:T:2012:584, para 95; Case T-259/20 *Ryanair v Commission* ECLI:EU:T:2021:92, para 30.

¹⁸⁹ Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:209, [1980] ECR 2671, para 24; Case C-225/91 *Matra v Commission* ECLI:EU:C:1993:239, [1993] ECR I-3203, para 24; Case C-142/87 *Belgium v Commission (Tubemeuse)* ECLI:EU:C:1990:125, [1990] ECR I-959, para 56

The categories of aid capable of being declared compatible with the internal market are identified in very broad and open-ended language in Article 107(3) TFEU. They include aid for the development of regions with high underemployment or a low standard of living, aid for the achievement of an objective of common European interest, aid to remedy a serious disturbance in the economy of a Member State, aid for the development of certain activities and economic areas that do not affect trading conditions in a manner inconsistent with the interests of the EU, and other categories of aid determined by the Council on a proposal from the Commission.

The Commission is free to supplement the open-ended language defining these categories in the Treaties with more detailed guidelines providing criteria for compatibility with the internal market.¹⁹⁰ The Commission is bound to apply the wide range of guidelines that it has adopted,¹⁹¹ unless it can point to economic developments that render those guidelines irrelevant¹⁹² or any provisions of the guidelines are inconsistent with the Treaties.¹⁹³ Following various initiatives to modernise the patchwork of different guidance documents available,¹⁹⁴ the Commission has adopted a set of common principles for the

¹⁹⁰ Case C-110/03 *Belgium v Commission* ECLI:EU:C:2005:223, [2005] ECR I-2801, paras 51-54. See also Massimo Francesco Orzan, 'General Theory on Compatibility of State Aid' in Herwig Hofmann and Claire Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016) 223-233, 226.

¹⁹¹ Case T-304/08 *Smurfit Kappa Group v Commission* ECLI:EU:T:2015:707, para 84; Case C-464/09 *Holland Malt v Commission* ECLI:EU:C:2010:733, [2010] ECR I-12443, para 47; Massimo Francesco Orzan, 'General Theory on Compatibility of State Aid' in Herwig Hofmann and Claire Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016) 223-233, 226.

¹⁹² Case C-464/09 *Holland Malt v Commission* ECLI:EU:C:2010:733, [2010] ECR I-12443, para 47.

¹⁹³ Case C-288/11 P *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission* ECLI:EU:C:2012:821, para 38.

¹⁹⁴ The two most significant developments in the compatibility assessment occurred as part of the State Aid Action Plan and the State Aid Modernisation programme. See Commission, 'State Aid Action Plan – Less and better targeted state aid: a roadmap for state aid reform 2005-2009' (2005) COM 107 final; Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU State Aid Modernisation (SAM)' COM (2012) 209 final. For a useful account of the development of these guidelines, see Leigh Hancker and Phedon Nicolaides, 'Compatibility of Aid – General Introduction' in Philipp Werner and Vincent Verouden, *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 193-220; Eugene Stuart and Iana Roginska-Green, *Sixty years of EU State Aid Law and Policy: Analysis and Assessment* (Wolters Kluwer 2018) 229-252. For further discussion, see Ulrich Schwalbe, 'European State Aid Control – The State Aid Action Plan' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 161-192; Conor Quigley, 'The European Commission's Programme for State Aid Modernization' (2013) 20 *Maastricht Journal of European and Comparative Law* 35.

assessment of compatibility that is incorporated into all revised guidelines¹⁹⁵ and considers these as part of a balancing test, weighing up the positive and negative effects of the aid.¹⁹⁶ These documents allow the State aid control regime to respond to changing economic conditions and competing political developments in a flexible manner.¹⁹⁷ This is particularly apparent from the various temporary frameworks that were adopted by the Commission to facilitate the swift approval of large amounts of aid in response to a number of different

¹⁹⁵ Leigh Hancher and Francesco Maria Salerno, ‘Article 107(2) and Article 107(3)’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 131-182, para 4-057. These require a Member State to establish that the aid (a) contributes to a well-defined objective of common interest; (b) is necessary; (c) is appropriate; (d) has an incentive effect; (e) is proportionate; (f) avoids undue negative effects on competition and trade between Member States; and (g) is sufficiently transparent.

¹⁹⁶ See Leigh Hancher and Phedon Nicolaides, ‘Compatibility of Aid – General Introduction’ in Philipp Werner and Vincent Verouden, *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 193-220, 197-198. However, there is some scepticism about the extent to which such a balancing test is properly carried out. See Phedon Nicolaides, “What should state aid control protect? A proposal for the next generation of state aid rules” (2019) 40 *European Competition Law Review* 276, 281; Phedon Nicolaides and Ioana Eleanora Rusu, ‘The “Binary” Nature of Economics of State Aid’ (2010) 37 *Legal Issues of Economic Integration* 25. It has also been suggested that a complete cost-benefit analysis of every measure would not be realistic given the constraints on the resources of the Commission. See Phedon Nicolaides, “What should state aid control protect? A proposal for the next generation of state aid rules” (2019) 40 *European Competition Law Review* 276, 280.

¹⁹⁷ However, many commentators suggest that even if some flexibility is desirable, too much flexibility may dilute the effectiveness of the State aid rules. See Thomas Jaeger, ‘How Much Flexibility Do We Need’ (2009) 8 *European State Aid Law Quarterly* 3, 3-4; Carole Maczkovics, ‘How Flexible Should State Aid Control Be in Times of Crisis?’ (2020) 19 *European State Aid Law Quarterly* 271, 282. Other commentators are sceptical about the legitimacy of ‘soft law’ and the adoption of changing guidelines in EU State aid control. See Verena Rošic Feguš, ‘The Legitimacy of EU Soft Law’ (2022) 21 *European State Aid Law Quarterly* 54.

crises that have affected the Union and its Member States, including the financial crisis,¹⁹⁸ the Covid-19 pandemic¹⁹⁹ and the Russian invasion of Ukraine.²⁰⁰

¹⁹⁸ See for example Communication of the Commission — Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis [2011] OJ C6/5; Commission Communication on the application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis [2010] OJ C329/7; Commission Communication on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis; 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. For further discussion, see Phedon Nicolaides and Ioana Eleanora Rusu, 'The Financial Crisis and State Aid' (2010) 55 *Antitrust Bulletin* 759; Christoph Arhold, 'Financial Sector' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 531-704; Marco Botta, 'Competition policy: safeguarding the Commission's competences in State aid control' (2016) 38 *Journal of European Integration* 265; Philip Marsden and Ioannis Kokkoris, 'The Role of Competition and State Aid Policy in Financial and Monetary Law' (2010) 13 *Journal of International Economic Law* 875, 887; Michael Reynolds, Sarah Macrory and Michelle Chowdhury, 'EU Competition Policy in the Financial Crisis: Extraordinary Measures' (2010) 33 *Fordham International Law Journal* 1670; Finbar Murphy, 'The Financial Crisis in Ireland and the Use of the State Aid Rules by the EU Commission: Observations' (2013) 12 *European State Aid Law Quarterly* 260; Andrea Gomes Da Silva and Mark Sansom, 'Antitrust Implications of the Financial Crisis: A UK and EU View' (2009) 23 *Antitrust* 24.

¹⁹⁹ Communication from the Commission – Temporary Framework to support the economy in the context of the coronavirus outbreak [2020] OJ C911/1. This has been amended on six occasions before its final expiry on 30 June 2022. Communication from the Commission - Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C112/1; Communication from the Commission - Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C164/3; Communication from the Commission - Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C218/3; Communication from the Commission - 4th Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance [2020] OJ C340/1; Communication from the Commission - Fifth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance [2021] OJ C34/6; Communication from the Commission Sixth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance [2021] OJ C473/1. For further discussion, see Paula Riedel, Thomas Wilson and Shane Cranley, 'Learnings from the Commission's Initial State Aid Response to the COVID-19 Outbreak' (2020) 19 *European State Aid Law Quarterly* 115; Nicole Robins and Laura Puglisi and Ling Yang, 'State Aid Tools to Tackle the Impact of COVID-19: What Is the Role of Economic and Financial Analysis?' (2020) 19 *European State Aid Law Quarterly* 137; Carole Maczkovics, 'How Flexible Should State Aid Control Be in Times of Crisis?' (2020) *European State Aid Law Quarterly* 271; Sophie Meunier and Justinas Mickus, 'Sizing up the competition: explaining reform of European Union competition policy in the Covid-19 era' (2020) 42 *Journal of European Integration* 1077; Marisa Álvarez Suárez, Javier Domínguez Viera and Pedro Garrosa Fernández, 'Ayudas de Estado y COVID-19: Nuevos Desafíos para el Mercado Interior' (2020) *Economía Industrial* 163; Raymond Luja, 'EU Fiscal State Aid Rules and COVID-19: Will One Survive the Other?' (2020) 29 *EC Tax Review* 147; Delia Ferri, 'The Role of EU State Aid Law as a "Risk Management Tool" in the COVID-19 Crisis' (2021) 12 *European Journal of Risk Regulation* 249. For an overview, see Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 583-596; Antonios Bouchagiari, 'State Aid in the Context of the Covid-19 Outbreak, Including the Temporary Framework 2020' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 1199-1270.

²⁰⁰ Communication from the Commission – Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia [2022] OJ C1131/1 as amended by

2.5. Modern State Aid Control: Article 108 TFEU, Enforcement and Procedure

2.5.1. Procedural Issues

Any assessment of the State aid rules cannot be undertaken without some evaluation of the methods through which they are enforced. This section will examine the procedural rules governing the enforcement of the prohibition in Article 107(1) TFEU and the derogations in Article 107(2)-(3) TFEU. First, the text of Article 108 TFEU, which gives a general outline of the system for enforcing the State aid rules and some of the case law that supplements it. While the case law remains important for determining the procedures that must be adopted by the Commission in reviewing and investigating State aid, the Union legislator has also produced secondary legislation that codifies these rules. Therefore, this section will move on to consider the adoption of 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 (the ‘Procedural Regulation’) and its predecessors which provide a more comprehensive synthesis of the case law and the relevant Treaty provisions.²⁰¹

First, it is necessary to consider the text of Article 108 TFEU itself. Article 108(1) TFEU provides that the Commission will keep all existing aid measures under review in cooperation with Member States and can propose measures for the adjustment of aid in light of the development of the internal market. Article 108(2) TFEU sets out a procedure for reviewing aid. Article 108(3) TFEU provides that the Commission must be notified of any plans to alter existing aid or grant new aid before those measures are implemented.²⁰² If the

Communication from the Commission – Amendment to the Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia [2022] OJ C280/1. For an overview, see Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 596-601.

²⁰¹ 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.

²⁰² This is seeks to ensure that only aid that is compatible with the internal market is implemented. See Case C-349/17 *Eesti Pagar* ECLI:EU:C:2019:172, para 84; Case C-510/16 *Carrefour Hypermarchés* ECLI:EU:C:2018:751, para 30.

Commission conducts an initial review of a measure and if it considers that the aid may be incompatible with the internal market, it must open the formal investigation procedure in Article 108(2) TFEU.²⁰³ Under this procedure, the Commission will allow the parties concerned to submit comments before deciding whether the relevant measure is aid and whether any such aid is compatible with the internal market.²⁰⁴ If the aid is found to be incompatible, the Commission must order the alteration or abolition of the aid.²⁰⁵ This will normally require the aid to be recovered by the Commission from the recipient undertaking save in exceptional circumstances.²⁰⁶ If a Member State refuses to comply with the Commission's directions, the Commission or any other Member State may refer the matter to the CJEU.²⁰⁷ Article 108(2) TFEU also provides for an exceptional procedure whereby a Member State may apply to the Council to determine whether or not a particular aid measure is compatible with the internal market 'if such a decision is justified by exceptional circumstances'.²⁰⁸ This application suspends the Commission investigation for up to three

²⁰³ Case C-367/95 P *Commission v Sytraval* ECLI:EU:C:1998:154, [1998] ECR I-1719, paras 35-36; Case C-204/97 *Portugal v Commission* ECLI:EU:C:2001:223, [2001] ECR I-3175, paras 29-30.

²⁰⁴ Article 108(2) TFEU.

²⁰⁵ Article 108(2) TFEU.

²⁰⁶ Case C-37/14 *Commission v France* ECLI:EU:C:2015:90, para 52; Case C-69/13 *Mediaset* ECLI:EU:C:2014:71, para 23. The Commission has no discretion and must order the recovery of any aid granted unlawfully without notification contrary to Article 108(3) TFEU following Case T-473/12 *Aer Lingus v Commission* ECLI:EU:T:2015:78, paras 86, 108-109. Only where recovery is impossible or contrary to the general principles of EU law such as legitimate expectations or legal certainty can recovery be prevented. See Case C-499/99 *Commission v Spain* ECLI:EU:C:2002:408, [2002] ECR I-6031, paras 36-46; Case C-390/98 *Banks* ECLI:EU:C:2001:456, [2001] ECR I-6117, paras 77-79; Case T-6/99 *ESF Elbe-Stahlwerke v Commission* ECLI:EU:T:2001:145, [2001] ECR II-1523, paras 188-189; *State Aid implemented by France for France Télécom* (Case C(2004) 3060) Commission Decision 2006/621/EC [2006] OJ L257/11, paras 262-263

²⁰⁷ Article 108(2) TFEU; Case 290/83 *Commission v France* ECLI:EU:C:1985:37, [1985] ECR 439, para 17.

²⁰⁸ Article 108(2) TFEU. See generally Piet Jan Slot, 'Administrative Procedure' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (5th edn, Sweet & Maxwell 2016) 1047-1095, para 29-071; Paul-John Loewenthal and Clemens Ziegler, 'Administrative Procedure' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 1033-1087, paras 25-188 – 25-192. See also Case C-110/02 *Commission v Council* ECLI:EU:C:2004:395, [2004] ECR I-6333; Case C-399/03 *Commission v Council* [2006] ECR I-5629; Case C-111/10 *Commission v Council* ECLI:EU:C:2013:785; Case C-117/10 *Commission v Council* ECLI:EU:C:2013:786; Case C-118/10 *Commission v Council* ECLI:EU:C:2013:787; Case C-121/10 *Commission v Council* ECLI:EU:C:2013:784. For examples of decisions of this type, see Council Decision of 16 July 2003 on the granting of aid by the Belgian government to certain co-ordination centres established in Belgium [2003] OJ L184/17; Council Decision of 16 July 2003 on the compatibility with the common market of an aid that the Italian Republic intends to grant to its milk producers [2003] OJ L184/15.

months, after which the Commission may proceed to reach a decision.²⁰⁹ The Council must act unanimously to exercise this power.²¹⁰ Decisions of the Commission pursuant to Article 108 TFEU can be challenged in an action for annulment pursuant to Article 263 TFEU.²¹¹

It is important to observe that most of the Treaty provisions on State aid are not capable of direct effect or private enforcement. The CJEU determined that the question of the compatibility of State aid with the internal market was not amenable to direct effect and did not create rights for citizens that could be invoked in national courts.²¹² National courts should not refer questions to the CJEU using the preliminary reference procedure in Article 267 TFEU on the issue of compatibility.²¹³ National courts cannot refuse to enforce existing aid measures without a decision from the Commission declaring that it is incompatible with the internal market.²¹⁴ Once there has been a more specific regulation or decision from the Commission or the Council on the compatibility of an aid measure or a category of aid measures with the internal market, litigants may use national courts to enforce that decision.²¹⁵ These rules serve to centralise power in the hands of the Commission, subject to the review of the Union courts.²¹⁶

Article 108(3) TFEU is an important exception to this.²¹⁷ While the obligations it places on Member States to notify the Commission of proposed aid and to refrain from

²⁰⁹ Case C-110/02 *Commission v Council* ECLI:EU:C:2004:395, [2004] ECR I-6333, paras 32, 43. This case also established that the Council may not take such a decision after a final decision from the Commission on the compatibility or otherwise of the aid.

²¹⁰ Article 108(2) TFEU.

²¹¹ Cases 31/77 R and 53/77 R *Commission v United Kingdom* ECLI:EU:C:1977:86, [1977] ECR 921, para 19. See 7.3.2 for further discussion of the nature of the review undertaken by the Union courts. See above at Section 2.4.1. While the Council intervenes less frequently and its power to approve aid is less constrained than the Commission, it is also possible to challenge such a decision by way of an action for annulment under Article 263 TFEU.

²¹² Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66, [1965] ECR 585, 596.

²¹³ Case 177/78 *Pigs and Bacon Commission v McCarren* ECLI:EU:C:1979:127, [1979] ECR 2161, Opinion of AG Warner, 2206.

²¹⁴ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 772.

²¹⁵ Case 78/76 *Steinike und Weinlig* ECLI:EU:C:1977:52, [1977] ECR 595, paras 10, 15.

²¹⁶ Francesco de Cecco, *State Aid Law and the European Economic Constitution* (Hart 2013) 45.

²¹⁷ See also Section 7.3.2.

implementing it until the Commission clears the aid evidently support the consolidation of power by the Commission, this provision also gives an important role to national courts. These obligations have been held to be directly effective and capable of being invoked before national courts.²¹⁸ While this might appear to give national courts a role in enforcing an ancillary procedural obligation, it gives an important role to these courts in requiring them to identify aid within the meaning of Article 107(1) TFEU. Further, it requires national courts to suspend aid that has been granted in breach of Article 108(3) TFEU.²¹⁹ This allows private litigants to restrain the disbursement of aid that has not been notified or approved by the Commission through national courts and even obtain compensation for harm arising from the unlawful grant of aid.²²⁰ This role played by national courts is supported by procedural rules that allow them to request information or opinions from the Commission on the State

²¹⁸ Case 120/73 *Lorenz GmbH v Germany* ECLI:EU:C:1973:152, [1973] ECR 1471; Case 121/73 *Markmann AG v Germany* ECLI:EU:C:1973:153, [1973] ECR 1495; Case 122/73 *Nordsee GmbH v Germany* ECLI:EU:C:1973:154, [1973] ECR 1511. This must be read together with the general requirement that national courts must disapply national rules or acts that are in breach of directly applicable provisions of the Treaties. See Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* ECLI:EU:C:1978:49, [1978] ECR 619, para 21. National courts may also refer questions for a preliminary ruling pursuant to Article 267 TFEU to the CJEU clarify the interpretation of Article 107 TFEU. See Case C-222/04 *Cassa di Risparmio di Firenze* ECLI:EU:C:2006:8, [2006] ECR I-289, paras 72-74; Case C-284/12 *Deutsche Lufthansa v Flughafen Frankfurt* ECLI:EU:C:2013:755, para 44.

²¹⁹ Case C-284/12 *Deutsche Lufthansa v Flughafen Frankfurt* ECLI:EU:C:2013:755, para 45. It may also order its recovery but is not obliged to do so until the Commission has investigated. The Commission considers that if a national court fails to fulfil its obligations under the Treaties in respect of State aid, it is possible for the Commission to initiate infringement proceedings against the relevant Member State pursuant to Article 258 TFEU. See Communication from the Commission – Commission Notice on the enforcement of State aid rules by national courts [2021] OJ C305/1, paras 140-142.

²²⁰ Communication from the Commission – Commission Notice on the enforcement of State aid rules by national courts [2021] OJ C305/1, paras 87-99. This guidance indicates that an action for damages can be brought against the Member State for a breach of Article 108(3) TFEU following the case law on State liability established by the CJEU in Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* ECLI:EU:C:1991:428, [1991] ECR I-5357; Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte Factortame Ltd* ECLI:EU:C:1996:79, [1996] ECR I-1029. The Commission indicates that a breach of Article 108(3) TFEU should generally be regarded as an infringement of a rule intended to confer rights and individuals and one that is sufficiently serious. Such actions will often face difficulties in establishing causation and in quantifying any damage. It is perhaps for this reason that such actions have rarely been successful. See Ypma P and others, *Study on the enforcement rules and decisions of State aid by national courts* (European Commission 2019) 8. Ranjana Andrea Achleitner, ‘The Interplay between the European Commission, National Authorities and National Courts in State Aid Law’ (2022) 21 *European State Aid Law Quarterly* 173, 179 proposes a harmonised framework on aid quantification by national courts as a solution to this.

aid rules.²²¹ The Commission may also make non-binding observations to national courts on State aid issues and may request information from the court for the purpose of preparing these submissions.²²² While it is important not to overstate the import of this process,²²³ there is evidence that attempts to enforce the State aid rules are becoming more frequent.²²⁴

2.5.2. Procedural Regulation

2.5.2.1. Disagreement before Adoption of Regulation

The preceding paragraphs have referred to case law in which the CJEU has elaborated on the procedure and enforcement regime briefly described in Article 108 TFEU. This case law was of great importance for a very significant portion of the history of the State aid rules in part because of the brevity of Article 108 TFEU for the complex subject which it regulates and because of the refusal of the Union legislator to adopt more detailed secondary legislation in this area. Article 109 TFEU enables the Council to adopt secondary legislation on the application of Articles 107-108 TFEU. However, the Council refused to adopt such a regulation, despite requests to do so from the Commission until the late 1990s.²²⁵ It has been

²²¹ 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, article 29(1). See also Communication from the Commission – Commission Notice on the enforcement of State aid rules by national courts [2021] OJ C305/1, paras 104-130.

²²² 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, article 29(2). These observations are not binding on the national court. See Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 760. The Commission may also make its observations orally before the national court with the permission of that court under article 29(2).

²²³ Fernando Pastor-Marchante, 'The Protection of Competitors under State Aid Law' (2016) 15 *European State Aid Law Quarterly* 527, 534; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 44-45. These commentators suggest that the inquiry into the notion of aid by national courts is made ancillary or instrumental to the Commission's supervision. There are also concerns that national courts may lack the required expertise to effectively adjudicate on some of the criteria in Article 107(1) TFEU. See Patricia Ypma and others, *Study on the enforcement rules and decisions of State aid by national courts* (European Commission 2019) 102-103.

²²⁴ Patricia Ypma and others, *Study on the enforcement rules and decisions of State aid by national courts* (European Commission 2019) 88-90.

²²⁵ Claus-Dieter Elhermann, 'State Aid Control in the European Union: Success or Failure?' (1994) *Fordham International Law Journal*, 1210, 1214-1215; Umut Aydin, 'Issue Framing in the European Commission: State aid policy and the single market' (2014) 12 *Comparative European Politics* 141, 148. See Mitchell Smith 'How

suggested that the Commission used the impetus from the completion of the single market and the Economic and Monetary Union in favour of tighter regulation of market rules to secure the approval of the Council for regulations governing the procedure for State aid enforcement and allowing for exemptions from the notification requirement.²²⁶

The adoption of the first regulation on State aid procedure in Council Regulation (EC) No 659/1999 is therefore significant as one of relatively few significant legislative interventions in this area.²²⁷ However, its significance must be qualified by the reality that it was to a large extent intended to codify part, but not all of, the existing case law rather than completely redesigning the existing procedural framework.²²⁸ Indeed, this secondary legislation can only make provision within the limits of the relevant Treaty provisions and some of the case law interpreting those provisions.²²⁹ However, some changes to the procedural requirements in the case law can and have been made.²³⁰ Council Regulation (EC) No 659/1999 has been amended on a handful of occasions. After two very minor

Adaptable is the European Commission? The Case of State Aid Regulation' (2001) 21 *Journal of Public Policy* 219 for an exploration of the Commission's motivations in trying to procure this secondary legislation as a means of limiting the demands on its own resources from private parties. See discussion in Section 2.6.1 on the relevant legislative competence.

²²⁶ Umut Aydin, 'Issue Framing in the European Commission: State aid policy and the single market' (2014) 12(2) *Comparative European Politics* 141, 153. Imelda Maher, 'Competition Law Modernization: An Evolutionary Tale?' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press 2011) 717-741, 727 suggests that this phase in the development of EU competition law (broadly construed) can be characterised as focusing on developing rules to regulate State interventions in the market, including State aid, public procurement and State monopolies.

²²⁷ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union [1999] OJ L083/1.

²²⁸ Andreas Bartosch, 'The Procedural Regulation in State Aid Matters' (2007) 6 *European State Aid Law Quarterly* 474, 474; Piet Jan Slot, 'Administrative Procedure' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (5th edn, Sweet & Maxwell 2016) 1047-1095, para 29-003; Paul-John Loewenthal and Clemens Ziegler, 'Administrative Procedure' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 1033-1087, para 25-002. The previous case law still plays a role in defining the relevant procedure. See Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 606.

²²⁹ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 606.

²³⁰ Andreas Bartosch, 'The Procedural Regulation in State Aid Matters' (2007) 6 *European State Aid Law Quarterly* 474, 474; Adinda Sinnaeve and Piet Jan Slot, 'The New Regulation on State Aid Procedures' (1999) 36 *Common Market Law Review* 1153, 1154; Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 606.

amendments,²³¹ a substantive amendment was made in 2013²³² that was quickly followed by a consolidated version of these regulations in the Procedural Regulation.²³³

2.5.2.2. Clarity on Procedural Rules

The first matter clarified by the Procedural Regulation is the process for the notification of new aid. Article 2 of the Procedural Regulation requires a Member State to notify the Commission of its intention to implement aid and provide sufficient information to enable the Commission to reach a decision on the aid.²³⁴ The Member State must also refrain from implementing the aid until the Commission has cleared it.²³⁵ The Regulation provides for a preliminary assessment to be carried out within 2 months which will conclude with the Commission either clearing the measure or, if the Commission has serious doubts as to the measure's compatibility with the internal market, the opening of the formal investigation.²³⁶ The Commission may request further information from the Member State concerned.²³⁷ Under the formal investigation procedure provided by article 6 of the Regulation and Article

²³¹ Two amendments updated the definition of 'existing aid' to include aid granted by new Member States before their accession to the EU. See Council Regulation (EC) No 1791/2006 of 20 November 2006 adapting certain Regulations and Decisions in the fields of free movement of goods, freedom of movement of persons, company law, competition policy, agriculture (including veterinary and phytosanitary legislation), transport policy, taxation, statistics, energy, environment, cooperation in the fields of justice and home affairs, customs union, external relations, common foreign and security policy and institutions, by reason of the accession of Bulgaria and Romania [2006] OJ L363/1; Council Regulation (EU) No 517/2013 of 13 May 2013 adapting certain regulations and decisions in the fields of free movement of goods, freedom of movement for persons, company law, competition policy, agriculture, food safety, veterinary and phytosanitary policy, transport policy, energy, taxation, statistics, trans-European networks, judiciary and fundamental rights, justice, freedom and security, environment, customs union, external relations, foreign, security and defence policy and institutions, by reason of the accession of the Republic of Croatia [2013] OJ L158/1.

²³² Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L204/15.

²³³ 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.

²³⁴ The discussion that follows will use the numbering provided by the Procedural Regulation while indicating where certain provisions were introduced after the adoption of Council Regulation (EC) No 659/1999.

²³⁵ 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, article 3.

²³⁶ *ibid* article 4.

²³⁷ *ibid* article 5.

108(2) TFEU, the Commission will invite comments from interested parties and the relevant Member State and will give the Member State a right of reply to other submissions. The Commission is subject to a general time limit of 18 months in carrying out the formal investigation and may either clear the aid, clear it subject to conditions or prohibit it.²³⁸

These investigation powers have been bolstered by provisions added in 2013 that allow the Commission to require the provision of information as part of the formal investigation process from other Member States and undertakings,²³⁹ together with powers to impose fines and periodic penalty payments for non-compliance.²⁴⁰ While article 7(1) requires the Commission, when deciding to use these powers, to consider the ‘principle of proportionality, in particular for small and medium-sized enterprises’, it has been suggested that this provision allows the Commission to place a considerable burden on undertakings, particularly in light of what are thought to be deficient procedural protections for such undertakings as beneficiaries, competitors of beneficiaries and complainants.²⁴¹ The Commission can also compel the provision of information from Member States and undertakings in support of its powers granted in 2013 to conduct sector investigations into aid in the economy more generally.²⁴²

The Procedural Regulation also clarifies the procedure for investigation into unlawfully granted aid. The Commission has the same powers to request information from Member

²³⁸ *ibid* article 9.

²³⁹ *ibid* article 7.

²⁴⁰ *ibid* articles 8-9.

²⁴¹ Preslava Dilkova, ‘The new procedural regulation in state aid: whether “modernisation” is in the right direction?’ (2014) 35 *European Competition Law Review* 88, 91.

²⁴² 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, article 25. To date the Commission has exercised these powers only once to launch an investigation into aid to electricity producers. See Philip Torbøl and Alessandro di Mario, ‘First Ever State Aid Sector Investigation: Electricity Producers Targeted by the European Commission’ (2015) 6 *Journal of European Competition Law & Practice* 656. This process does not give any formal powers to the EU to take action arising from the sector investigation which contrasts with the powers available for similar investigations in the UK’s domestic competition law regime. See Enterprise Act 2002, Part 4.

States and private parties as it has under the investigation process triggered by notification.²⁴³ The Commission can also adopt a decision or injunction ordering the suspension of alleged unlawful aid or its provisional recovery pending its investigation.²⁴⁴ The latter remedy is only available in circumstances where it is clear that the impugned measure is aid and where there is urgency and a serious risk of substantial irreparable harm to a competitor.²⁴⁵ Failure to comply with these injunctions can result in infringement proceedings being brought against the Member State concerned.²⁴⁶ The aid then is subject to the ordinary preliminary assessment and formal investigation process if necessary, but without the ordinary time limits.²⁴⁷ Article 16 also clarifies that in the event of a negative decision on the aid, the Commission must order its recovery unless ‘this would be contrary to a general principle of Union law.’²⁴⁸ While this statement of the position is somewhat clearer,²⁴⁹ it largely restates the existing case law which holds that unlawful aid must be recovered except in a few very narrowly defined circumstances.²⁵⁰ These include where the recovery of the aid is impossible.²⁵¹ The Commission has also refrained from ordering recovery in some cases

²⁴³ 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, articles 12(2)-(3).

²⁴⁴ *ibid* articles 13(1)-(2).

²⁴⁵ *ibid* article 13(2).

²⁴⁶ *ibid* article 14.

²⁴⁷ *ibid* article 15.

²⁴⁸ *ibid* article 16.

²⁴⁹ This may allow the Commission to use this power more assertively. See Nikolaos Zahariadis, ‘Discretion by the Rules: European State Aid Policy and the 1999 Procedural Regulation’ (2010) 17 *Journal of European Public Policy* 954.

²⁵⁰ See for example Case T-473/12 *Aer Lingus v Commission* ECLI:EU:T:2015:78, paras 86, 108-109. It is often stated that the Commission generally has no discretion to determine the remedial consequences and is normally compelled to order recovery.

²⁵¹ The bar for impossibility is quite high. It may arise where the beneficiary of the aid has been liquidated or no longer exists as in Case C-499/99 *Commission v Spain* ECLI:EU:C:2002:408, [2002] ECR I-6031, paras 36-46. It may also occur if the aid was granted to a publicly-owned company that has subsequently been sold, meaning that the benefit has already been recovered to the State. See Case C-390/98 *Banks* ECLI:EU:C:2001:456, [2001] ECR I-6117, paras 77-79. The financial difficulties of undertakings do not amount to impossibility, neither does the prospect of social unrest, administrative difficulties in recovery or the large numbers of undertakings involved. See respectively Case C-404/97 *Commission v Portugal* ECLI:EU:C:2000:345, [2000] ECR I-4897, para 53; Case C-63/14 *Commission v France* ECLI:EU:C:2015:458, para 52; Case C-378/98 *Commission v Belgium* ECLI:EU:C:2001:378, [2001] ECR I-5107, para 42; Case C-280/95 *Commission v Italy* ECLI:EU:C:1998:28, [1998] ECR I-259, paras 12-15.

where it made a very novel finding that could not have been predicted²⁵² or where it has revoked a decision to clear the aid.²⁵³ While some commentators suggest that recovery is an ineffective remedy in that it simply returns the funds at issue to the Member State that has breached the law and propose alternatives such as the recovery of the aid by the EU institutions themselves,²⁵⁴ such a remedy is likely to be considered to be contrary to Article 108(2) TFEU.²⁵⁵

The Procedural Regulation also clarifies the procedures applicable to existing aid which includes all aid pre-existing the coming into force of the Treaties and aid that is authorised or exempt from notification.²⁵⁶ Article 108(1)-(2) TFEU gives the initiative to the Commission in dealing with existing aid, providing simply that the Commission must review existing aid and launch investigations where it finds that such aid is incompatible with the internal market or is being misused. The Commission will first try to enter negotiations with the relevant Member State with a view to remedying the issue, including by its abolition.²⁵⁷ The Member State can agree to the Commission's proposals, which then become binding on

²⁵² In such a case, it is said to be inconsistent with the general principle of legal certainty to recover the aid. See *State Aid implemented by France for France Télécom* (Case C(2004) 3060) Decision 2006/621/EC [2006] OJ L257/11, paras 262-263.

²⁵³ This forbearance to order recovery is held to be required due to the legitimate expectations of the beneficiary and other interested parties. See Case T-6/99 *ESF Elbe-Stahlwerke v Commission* ECLI:EU:T:2001:145, [2001] ECR II-1523, paras 188-192; Case T-129/96 *Preussag Stahl v Commission* ECLI:EU:T:1998:69, [1998] ECR II-609, para 78.

²⁵⁴ Andreas Bartosch, 'The Procedural Regulation in State Aid Matters' (2007) 6 *European State Aid Law Quarterly* 474, 483; Caroline Buts, Tony Joris and Marc Jegers, 'State Aid Policy in the EU Member States: It's a Different Game They Play' (2013) 12 *European State Aid Law Quarterly* 330. It may also be ineffective in that the aid is often recovered only after a very long period of time (especially if this is contested) which limits the ability of the remedy to meaningfully restore the market to the position before the aid was granted. For example, see *Minister for Finance and Ireland v Comhshorbairt (Gaillimh) t/a Aer Arann* [2021] IECA 264 and discussion in Christopher McMahon, 'Unlawful State Aid and the Inevitability of Recovery: the Conclusion of the Air Travel Tax Litigation in *Minister for Finance and Ireland v Comhshorbairt (Gaillimh) t/a Aer Arann* [2021] IECA 264' (2022) 29 *Commercial Law Practitioner* 95.

²⁵⁵ Andreas Bartosch, 'The Procedural Regulation in State Aid Matters' (2007) 6 *European State Aid Law Quarterly* 474, 483. It would therefore be impossible to make such a remedy available through secondary legislation.

²⁵⁶ 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, article 1(b).

²⁵⁷ *ibid* articles 21-22.

it.²⁵⁸ If an agreement cannot be reached, the Commission is empowered to open the formal investigation procedure.²⁵⁹

2.5.2.3. Rights of Affected Undertakings

Another important and controversial element of the Procedural Regulation is its treatment of complainants and beneficiaries of aid.²⁶⁰ Regulating this element of State aid procedure is particularly challenging when compared with competition law. In competition law, the unlawful conduct is carried out by an undertaking who is also the beneficiary of that unlawful conduct and this has a negative effect on competitors and consumers. By contrast, regarding State aid, the unlawful conduct is committed by a Member State. It has been suggested that this makes the enforcement of the State aid rules more politically sensitive.²⁶¹ However, this also means that the entity responsible for the wrongdoing is not the entity who obtains the primary benefit of the wrongdoing. The primary beneficiary of the aid is not a Member State, but an undertaking, even if there are thought to be ancillary benefits for Member States. Further, the grant of aid will also have a negative impact on the competitors of the beneficiary. There is a more complicated network of interested parties at play in State aid investigations whose interests have to be reconciled.

Article 24(1) of the Procedural Regulation allows interested parties to submit comments under article 6 as part of the formal investigation procedure and grants those interested parties who have submitted comments the right to receive a copy of the final decision. Interested party is defined broadly as any Member State, person, undertaking or association

²⁵⁸ *ibid* article 23(1).

²⁵⁹ *ibid* article 23(2).

²⁶⁰ See the discussion on the options available to undertakings to participate in the enforcement of the State aid rules in Section 7.3.2.

²⁶¹ Michelle Cini and Lee McGowan, *Competition Policy in the European Union* (2nd edn, Palgrave Macmillan 2008) 162-163.

of undertakings who might be affected by the granting of aid, particularly beneficiaries and competing undertakings.²⁶² Article 24(2) allows interested parties to submit a complaint about unlawful aid or misuse of aid by a prescribed form and gives an interested party who does so the right to receive a copy of any decision taken on the matter. A beneficiary of aid will also be sent a decision on that aid as a matter of course.²⁶³ Interested parties are also entitled to copies of decisions taken under the Regulation upon request.²⁶⁴ The Commission must consider any complaint that is correctly submitted²⁶⁵ and it must undertake a preliminary examination of the aid.²⁶⁶ However, these rules have been criticised for the limited rights that they afford undertakings affected by investigations. Interested parties are only entitled to participate once the formal investigation procedure is opened and have no procedural rights at the preliminary examination stage.²⁶⁷ Interested parties also have no access to the file in State aid investigations,²⁶⁸ and no right to respond to the comments of other parties.²⁶⁹ Some commentators suggest that this is insufficient in circumstances where undertakings bear heavy burdens of being compelled to provide information to the Commission.²⁷⁰ These rules preserve the largely bilateral character of investigations between

²⁶² 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, article 1(h). Although there is some scholarship that proposes extending this so

²⁶³ *ibid* article 24(1).

²⁶⁴ *ibid* article 24(3).

²⁶⁵ *ibid* article 12(2).

²⁶⁶ Case C-521/06 P *Athinaiki Techniki v. Commission* ECLI:EU:C:2008:422, [2008] ECR I-5829, para 38.

²⁶⁷ Andreas Bartosch, 'The Procedural Regulation in State Aid Matters' (2007) 6 *European State Aid Law Quarterly* 474, 476. Adinda Sinnaeve and Piet Jan Slot, 'The New Regulation on State Aid Procedures' (1999) 36 *Common Market Law Review* 1153, 1183. See for example Joined Cases 91/83 and 127/83 *Heineken Brouwerijen* ECLI:EU:C:1984:307, [1984] ECR 3435, para 15; Case T-266/94 *Skibsværftsforeningen and others v Commission* ECLI:EU:T:1996:153, [1996] ECR II-1399, paras 257, 259; Case C-367/95 P *Commission v Sytraval* ECLI:EU:C:1998:154, [1998] ECR I-1719, paras 58-59.

²⁶⁸ Case T-613/97 *Union Française de L'Express (Ufex) v Commission* ECLI:EU:T:2000:304, [2000] ECR II-4055, para 90; Case C-139/07 P *Commission v TGI* ECLI:EU:C:2010:376, [2010] ECR I-5885, paras 50-64; Case T-198/01 *TGI v Commission* ECLI:EU:T:2004:222, [2004] ECR II-2717, para 197; Cases T-494/08 to T-500/08 and T-509/08 *Ryanair v Commission* ECLI:EU:T:2010:511, [2010] ECR II-5723, para 70.

²⁶⁹ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, paras 180-181; Case T-165/15 *Ryanair and Airport Marketing Services v Commission* ECLI:EU:T:2018:953, paras 66, 70; Case T-266/94 *Skibsværftsforeningen and others v Commission* ECLI:EU:T:1996:153, [1996] ECR II-1399, para 258.

²⁷⁰ Preslava Dilkova, 'The new procedural regulation in state aid: whether "modernisation" is in the right direction?' (2014) 35 *European Competition Law Review* 88-91, 91; Edoardo Gambaro and Francesco

the Commission and the Member State.²⁷¹ Despite these weaknesses, undertakings do have some influential levers to influence decision making, by submitting complaints,²⁷² challenging decisions not to open the formal investigation procedure before the Union courts²⁷³ and restraining the grant of unlawful aid through national courts.²⁷⁴ While undertakings have only limited control of State aid enforcement, they nevertheless have a range of tools at their disposal which can exert considerable pressure on the Commission to investigate and take formal decisions. This operates at the very least as a practical constraint on the Commission's enforcement powers.²⁷⁵

2.6. Modern State Aid Control: Article 108(4) TFEU, Article 109 TFEU and Secondary Legislation

2.6.1. Legislative Power and Legislative Change

Mazzocchi, 'Private Parties and State Aid Procedures: A Critical Analysis of the Changes Brought by Regulation 734/2013' (2016) 53 *Common Market Law Review* 385, 396. Adinda Sinnaeve and Piet Jan Slot, 'The New Regulation on State Aid Procedures' (1999) 36 *Common Market Law Review* 1153, 1184; Andreas Bartosch, 'The Procedural Regulation in State Aid Matters' (2007) 6 *European State Aid Law Quarterly* 474, 479.

²⁷¹ Adinda Sinnaeve and Piet Jan Slot, 'The New Regulation on State Aid Procedures' (1999) 36 *Common Market Law Review* 1153, 1183; Andreas Bartosch, 'The Procedural Regulation in State Aid Matters' (2007) 6 *European State Aid Law Quarterly* 474, 475; Edoardo Gambaro and Francesco Mazzocchi, 'Private Parties and State Aid Procedures: A Critical Analysis of the Changes Brought by Regulation 734/2013' (2016) 53 *Common Market Law Review* 385, 390. The greater priority given to the Member State concerned by comparison with any private party is recognised in Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *SBS TV and Danish Television v Commission* ECLI:EU:T:2008:66, [2007] ECR II-491, para 137.

²⁷² The Commission must consider the complaint under 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, article 12(1). The Commission must also give the complainant a right of reply if they are going to dismiss the complaint for lack of evidence. Following Case C-521/06 P *Athinaiki Techniki v. Commission* ECLI:EU:C:2008:422, [2008] ECR I-5829, paras 38-39.

²⁷³ See Fernando Pastor-Merchante, 'The Protection of Competitors under State Aid Law' (2016) 15 *European State Aid Law Quarterly* 527, 537. However, Piet Jan Slot, 'Administrative Procedure' in Leigh Hancker, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (5th edn, Sweet & Maxwell 2016) 1047-1095, para 29-103 argues that this may be difficult in the absence of a right of access to the investigation file.

²⁷⁴ Again Edoardo Gambaro and Francesco Mazzocchi, 'Private Parties and State Aid Procedures: A Critical Analysis of the Changes Brought by Regulation 734/2013' (2016) 53 *Common Market Law Review* 385, 406-407 argue that this is made difficult by the lack of access to the file. All of these options will be described in further detail in Section 7.3.2.

²⁷⁵ See Section 7.3.2 for a more detailed exposition of this argument.

The text of the State aid rules has changed little since it was drafted as part of the Treaty of Rome. Indeed, the scarcity of legislative developments of any sort relating to the State aid rules is striking with no substantive changes to the Treaties or secondary legislation in this field being enacted until the 1990s. This may in part reflect disagreements between the Member States on how to proceed and may also reflect the flexibility of the relatively open-ended and ambiguous text of the State aid rules which has allowed them to adapt and develop through the case law of the CJEU and the decisional practice of the Commission without any direct change. The delay in enacting any secondary legislation on State aid has not been the result of any obstacle in the text of the Treaties themselves. Article 109 TFEU empowers the Council to make regulations for the application of Articles 107 and 108 TFEU. The Procedural Regulation which was discussed above is one enactment adopted under this legal basis. Article 109 TFEU also expressly enables the Council to adopt secondary legislation to ‘determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.’ While the purpose of such an exemption will vary according to its content, they are generally thought to reduce the administrative burden on the Commission and Member States, allowing more focused enforcement from the Commission and swifter implementation of policy by national governments.²⁷⁶ While the Council has adopted legislation of this type, it simply confers powers on the Commission to adopt detailed rules outlining these exemptions.²⁷⁷ It appears that some delegation of this type may have been envisaged by the Treaties, with Article 108(4) providing that ‘Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by [Article 108 TFEU]’. This section considers the two important forms of exemption from the obligation

²⁷⁶ Eugene Stuart and Iana Roginska-Green, *Sixty Years of EU State Aid Law and Policy: Analysis and Assessment* (Wolters Kluwer 2018) 49, 84.

²⁷⁷ Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid [2015] OJ L248/1.

to notify aid under Article 108(3) TFEU that have been adopted by secondary legislation: de minimis thresholds and the block exemptions.

2.6.2. De Minimis Regulations

2.6.2.1. Adoption and Structure of De Minimis Regulations

The first of these involve the definition of thresholds below which aid measures are not required to be notified to the Commission ('De Minimis Regulations'). It has been clearly established that there is no de minimis threshold for the definition of the concept of aid referred to in Article 107(1) TFEU.²⁷⁸ This proposition combined with the increased enforcement of the State aid rules from the 1990s onwards can be seen as dramatically increasing the workload of the Commission in that it would require all aid measures, no matter how small and inconsequential to be notified and processed before they can be implemented. In addition to considerably reducing the flexibility of Member States to implement even small amounts of aid, it has been suggested that the high volume of cases that the Commission must process limits its ability to carry out an effective review of more difficult cases and the most problematic grants of aid.²⁷⁹

This difficulty helped to justify the need for a De Minimis Regulations even if the possibility of a de minimis threshold being built into the notion of aid in Article 107(1) TFEU

²⁷⁸ Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:160, [1980] ECR 2671, Opinion of AG Capotorti, 2699; Case C-172/03 *Heiser* ECLI:EU:C:2005:130, [2005] ECR I-1627, para 32; Case C-280/00 *Altmark* ECLI:EU:C:2003:415, [2003] ECR I-7747, para 81; Case C-142/87 *Commission v Belgium (Tubemeuse)* ECLI:EU:C:1990:125, [1990] ECR I-959, para 43. Such a threshold was considered inappropriate for State aid law due to the broad derogations in Article 107(2)-(3) TFEU in Case 234/84 *Commission v Belgium* ECLI:EU:C:1986:151, [1986] ECR 2263, Opinion of AG Lenz, 2274. While the Commission is beginning to apply some version of this threshold for the condition relating to an effect on trade between Member States in its guidance, its approach has not been properly tested by the Union courts. The impact standards for Article 107(1) TFEU undoubtedly remain low in any event. See discussion at Section 2.3.5 above. See also discussion in Sections 8.3.1-8.3.2.

²⁷⁹ Ulrich Soltész, 'EU state aid law and taxation – where do we stand today?' (2020) 41 *European Competition Law Review* 18.

seems to be foreclosed. The Commission sought to implement a threshold of this type in 1992 by way of guidelines on the granting of aid to small and medium-sized enterprises ('SMEs').²⁸⁰ In 1996, the Commission issued a dedicated notice outlining de minimis thresholds.²⁸¹ The Council adopted legislation under Article 109 TFEU to empower the Commission to adopt regulations exempting certain categories of aid from the obligation to notify.²⁸² The Commission adopted various regulations defining and amending these thresholds in the early to mid-2000s.²⁸³ The general threshold is contained in Commission Regulation (EC) No 1407/2013 and currently stands at €200,000 per undertaking per three year period.²⁸⁴ Aid granted in amounts below this threshold are considered not to be aid and do not have to be notified to the Commission.²⁸⁵

2.6.2.2. Evaluation of De Minimis Regulations

The De Minimis Regulations undoubtedly have some justification in principle. The scale of the harm that is thought to be caused by State aid is to some extent linked to the value of the subsidy. This is true whether State aid control is viewed as an competition policy tool, an

²⁸⁰ Information from the Commission - Community guidelines on State aid for small and medium-sized enterprises (SMEs) [1992] OJ C213/2.

²⁸¹ Commission notice on the de minimis rule for State aid [1996] OJ C68/9.

²⁸² Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid [1998] OJ L142/1. Minor amendments to this enabling regulation were made in its restatement in Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid [2015] OJ L248/1. There has been little substantive change however. See Koen Van de Castele, 'De Minimis Aid' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot, (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 205-216, para 6-007.

²⁸³ Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid [2001] OJ L10/30; Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid [2006] OJ L379/5.

²⁸⁴ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1, article 3. Commission Regulation (EC) No 1407/2013 due to expire at the end of 2020, but has been extended for a further three years until the end of 2023 by Commission Regulation (EU) 2020/972 of 2 July 2020 amending Regulation (EU) No 1407/2013 as regards its prolongation and amending Regulation (EU) No 651/2014 as regards its prolongation and relevant adjustments [2020] OJ L215/3.

²⁸⁵ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1, article 3(1).

engine of market integration or a mechanism for managing regulatory competition. Further, authors calling for a more streamlined and economics-focused enforcement of State aid control with optimal decision-making architecture have argued in favour of the introduction of safe harbours for measures which are least likely to be harmful to reserve more detailed analysis for less clear cases.²⁸⁶ This is likely to reduce the administrative burden for the Commission and for Member States granting aid.²⁸⁷ However, some doubts have been raised with the purely quantitative approach of the De Minimis Regulations with some authors describing it as overly simplistic.²⁸⁸ However, it should be observed that Commission Regulation (EC) No 1407/2013 does go slightly beyond the quantitative approach to exclude its application to export aid, which might be regarded as particularly damaging.²⁸⁹ It is also important not to overstate the utility of the De Minimis Regulations in creating legal certainty. This is particularly the case in circumstances where the boundaries of the notion of aid in Article 107(1) TFEU are unclear and it may be difficult for Member States to precisely quantify the relevant amount in advance for fiscal aid and some other forms of aid.²⁹⁰

Another criticism of the De Minimis Regulations that has been identified in the literature arises from their relationship with the State aid rules contained in the TFEU.

²⁸⁶ Hans Friederiszick, Lars-Hendrik Röller and Vincent Verouden, 'European State Aid Control: An Economic Framework' in P Buccirossi (eds), *Advances in the Economics of Competition Law* (MIT Press 2006) 625–669; Ulrich Schwalbe, 'European State Aid Control – The State Aid Action Plan' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 161-192.

²⁸⁷ Adinda Sinnaeve, 'The Complexity of Simplification: The Commission's Review of the de Minimis Regulation' (2014) 13 *European State Aid Law Quarterly* 261, 265.

²⁸⁸ Michael Berghofer, 'The New De Minimis Regulation: Enlarging the Sword of Damocles?' (2007) 6 *European State Aid Law Quarterly* 11, 22; Rainer Nitsche and Paul Heidhues, *Study on methods to analyse the impact of State aid on competition* (European Commission 2006) 11.

²⁸⁹ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1, recital (9) article 1(d)-(e).

²⁹⁰ Adinda Sinnaeve, 'Block Exemptions for State Aid: More Scope for State Aid Control by Member States and Competitors' (2001) 38 *Common Market Law Review* 1479, 1499. See also Raymond Luja, 'Do State Aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty?' (2016) 25 *EC Tax Review* 312.

Council Regulation (EC) No 1588/2015 and Commission Regulation (EC) No 1407/2013 both describe measures which provide a benefit to undertakings below the stated thresholds as measures that do not affect trade between Member States within the meaning of Article 107(1) TFEU.²⁹¹ This is controversial because it has been established that aid is an objective concept of EU law whose boundaries can only be determined definitively by the CJEU, and it is unclear that the Commission or indeed the Council have the power to determine that this criterion is not fulfilled for a class of interventions.²⁹² Berghofer explains that the De Minimis Regulations were designed in this way because the Commission could not secure agreement on legislative proposals and therefore sought to introduce the de minimis thresholds through its own guidance.²⁹³ Declaring that the measures were not aid through general guidance was the only way to avoid the obligation to notify and this approach continued when the De Minimis Regulations were adopted.²⁹⁴ Van de Castele suggests that the CJEU has accepted this approach as legitimate based on its remarks in *Renove*.²⁹⁵ However, Berghofer argues that this finding was limited to the guidance at issue in that case rather than the De Minimis Regulations.²⁹⁶ Further, he suggests that when framed in this way

²⁹¹ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1, recital (3) article 3(1); Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid [2015] OJ L248/1, recitals (9), (14), (17), article 2(1).

²⁹² Adinda Sinnaeve, 'Block Exemptions for State Aid: More Scope for State Aid Control by Member States and Competitors' (2001) 38 *Common Market Law Review* 1479, 1498; Michael Berghofer, 'The New De Minimis Regulation: Enlarging the Sword of Damocles?' (2007) 6 *European State Aid Law Quarterly* 11, 23; Koen Van de Castele, 'De Minimis Aid' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot, (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 205-216, para 6-041.

²⁹³ Michael Berghofer, 'The New De Minimis Regulation: Enlarging the Sword of Damocles?' (2007) 6 *European State Aid Law Quarterly* 11, 14

²⁹⁴ *ibid.*

²⁹⁵ Koen Van de Castele, 'De Minimis Aid' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot, (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 205-216, paras 6-042 – 6-043; Case C-351/98 *Spain v Commission (Renove)* ECLI:EU:C:2002:530, [2002] ECR I-8031, paras 51-52.

²⁹⁶ Michael Berghofer, 'The New De Minimis Regulation: Enlarging the Sword of Damocles?' (2007) 6 *European State Aid Law Quarterly* 11, 14.

the De Minimis Regulations contradict the case law of the CJEU establishing that there may be an effect on trade even though the amounts of aid are very small.²⁹⁷

This infirmity in the De Minimis Regulations may be easily remedied by re-enacting them as block exemption regulations that consider the relevant measures to be aid, albeit compatible with the internal market and exempt from obligation to notify. The De Minimis Regulations could be re-enacted in this form with substantially the same effect with relative ease to cure this defect.²⁹⁸ Van de Castele observes that De Minimis Regulations may be capable of having retrospective effect,²⁹⁹ a reality which may reduce the consequences of any lacuna emerging if the existing regulations were challenged and may explain the failure on the part of the EU institutions to correct this defect.

2.6.3. General Block Exemption Regulations

2.6.3.1. Enactment and Extension

The other type of secondary legislation that seeks to exempt certain measures from the obligation to notify in Article 108(3) TFEU takes the form of general block exemption regulations. Much like the De Minimis Regulations, this seeks to reduce the administrative burden for the Commission and Member States arising from notifications and to provide legal certainty for Member States and undertakings.³⁰⁰ This scheme was also introduced through Council Regulation (EC) No 994/98 which empowers the Commission to adopt

²⁹⁷ *ibid.*

²⁹⁸ Michael Berghofer, 'The New De Minimis Regulation: Enlarging the Sword of Damocles?' (2007) 6 *European State Aid Law Quarterly* 11, 21-22.

²⁹⁹ Koen Van de Castele, 'De Minimis Aid' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot, (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 205-216, para 6-043. This position is confirmed in the Communication from the Commission — Commission Notice on the recovery of unlawful and incompatible State aid [2019] OJ C247/1, para 101.

³⁰⁰ Phedon Nicolaides, 'An Economic Assessment of the Usability of the New General Block Exemption Regulation for State Aid (Regulation 651/2014)' (2014) 10 *European Competition Journal* 403, 417; Koert van Buiren and Alexander Rose, 'General Block Exemption Regulation' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 221-260, 223.

further regulations exempting certain categories of aid from the notification requirement including regional aid, aid to SMEs and aid for research and development, employment and training and environmental protection.³⁰¹ Legislative reform in this area has sought to progressively streamline enforcement in a manner consistent with the Commission's State Aid Action Plan in the late 2000s and the later State Aid Modernisation scheme.³⁰² The Commission adopted a number of different block exemption regulations on that basis before expanding and consolidating them into a single regulation in 2008.³⁰³ This was then replaced by Commission Regulation (EU) No 651/2014 (the 'GBER') which remains in force.³⁰⁴ The GBER covers a more expansive range of aid measures including aid for culture and heritage, dealing with natural disasters, regional transport, broadband infrastructure, sport and other types of infrastructure.

2.6.3.2. Comparison between GBER and De Minimis Regulations

It is worth noting some key differences between the GBER and the De Minimis Regulations. While they are both derived from the same legal basis and have similar practical effects, the mechanisms through which they exempt aid from the obligation to notify differs. While the

³⁰¹ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid [1998] OJ L142/1, article 1. This was replaced, with little change, by Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid [2015] OJ L248/1.

³⁰² Koen Van de Castele, 'General Block Exemption Regulation' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 217-251, paras 7-007 – 7-010.

³⁰³ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty [2008] OJ L214/3. See Koen Van de Castele, 'General Block Exemption Regulation' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 217-251, para 7-005 for a list of the regulations made prior to the consolidation in 2008.

³⁰⁴ 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 [2014] OJ L187/1. The GBER was originally due to expire at the end of 2020. However, it has been extended until the end of 2023 by Commission Regulation (EU) 2020/972 of 2 July 2020 amending Regulation (EU) No 1407/2013 as regards its prolongation and amending Regulation (EU) No 651/2014 as regards its prolongation and relevant adjustments [2020] OJ L215/3.

De Minimis Regulations declare that aid granted in amounts below a certain threshold does not affect trade between Member States and is therefore not aid within the meaning of Article 107(1) TFEU, the GBER simply declares aid measures to be compatible with the internal market. Therefore, it is submitted that the GBER does not have the same legal infirmity that is evident in the De Minimis Regulations that has been described by some authors.³⁰⁵

Further, the GBER represents a much more intricate scheme than that which is contained in the De Minimis Regulations. The GBER defines a range of different quantitative thresholds that are specific to each category of aid covered and combines these with conditions specific to each type of aid.³⁰⁶ It might therefore be better targeted than the relatively blunt instrument of the De Minimis Regulations. In particular, the GBER only applies to aid that has an incentive effect in bringing an undertaking to carry out a definite project that has been identified in advance.³⁰⁷ The objectives of the GBER are also considerably more diverse.³⁰⁸

The GBER also contains a more sophisticated set of safeguards designed to prevent its abuse in light of increasing oversight responsibilities for Member States. It only applies to transparent aid for which the gross grant equivalent can be calculated.³⁰⁹ It requires Member States to publish summary information on the aid and to provide summary information to the Commission on each aid measure granted under the exemption.³¹⁰ Further,

³⁰⁵ Adinda Sinnaeve, 'Block Exemptions for State Aid: More Scope for State Aid Control by Member States and Competitors' (2001) 38 *Common Market Law Review* 1479, 1498; Michael Berghofer, 'The New De Minimis Regulation: Enlarging the Sword of Damocles?' (2007) 6 *European State Aid Law Quarterly* 11, 21-22.

³⁰⁶ 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 [2014] OJ L187/1, article 4.

³⁰⁷ *ibid* article 6.

³⁰⁸ Koert van Buiren and Alexander Rose, 'General Block Exemption Regulation' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 221-260, 239 suggest that it covers aid designed to address market failures as well as aid designed to promote equity concerns such as regional aid, disaster aid and aid for broadband and transport infrastructure.

³⁰⁹ 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 [2014] OJ L187/1, article 5.

³¹⁰ *ibid* articles 9, 11.

Member States must keep detailed records relating to each aid measure to allow compliance with the conditions set out in the GBER to be verified.³¹¹ The GBER also contains express provision for fiscal aid granted automatically following a declaration from the undertaking concerned and requires Member States to verify compliance with the conditions of the aid afterwards by assessing samples of the aid recipients.³¹² For aid schemes with an annual budget exceeding €150 million, Member States must also submit a plan on how the aid and its performance will be evaluated.³¹³ It has been suggested that the GBER devolves many of the monitoring responsibilities to the Member States and that this must be accompanied by rigorous enforcement and active cooperation from the Commission to ensure that it is not abused.³¹⁴ National courts must also apply the GBER when inquiring into whether aid was granted unlawfully under Article 108(3) TFEU.³¹⁵ However, it has been suggested that there are obstacles to the competitors of the beneficiaries of aid using this tool as national courts may have difficulty in applying such densely technical legislation.³¹⁶ While the GBER

³¹¹ *ibid* article 12.

³¹² *ibid* article 12(2).

³¹³ *ibid* article 1.

³¹⁴ Phedon Nicolaides, 'An Economic Assessment of the Usability of the New General Block Exemption Regulation for State Aid (Regulation 651/2014)' (2014) 10(3) *European Competition Journal* 403, 417; Koert van Buijen and Alexander Rose, 'General Block Exemption Regulation' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 221-260, 253.

³¹⁵ Viktor Kreuzschitz, 'Decentralized Judicial Review and Enforcement of State Aid Rules' in H Herwig and C Micheau, *State Aid Law and the European Union* (Oxford University Press 2013) 450-465, 455. The exemptions must be interpreted strictly following Case C-349/17 *Eesti Pagar AS* ECLI:EU:C:2019:172, para 60. Unlike other forms of existing aid that have been approved as compatible by the Commission, aid granted without notification pursuant to the GBER can be reviewed by national courts after it is granted. See Case C-654/17 P *Bayerische Motoren Werke v Commission and Freistaat Sachsen v Commission* ECLI:EU:C:2019:634; Leonardo Armati and Federico Macchi, 'The Commission Adopts the New Notice on the Enforcement of State Aid Rules Before National Courts' (2022) 21 *European State Aid Law Quarterly* 3, 12.

³¹⁶ Adinda Sinnaeve, 'Block Exemptions for State Aid: More Scope for State Aid Control by Member States and Competitors' (2001) 38 *Common Market Law Review* 1479, 1495. This may be mitigated by the possibility of observations submitted to the national court by the Commission under 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, article 29. A reference for a preliminary ruling under Article 267 TFEU may also be sought. Leonardo Armati and Federico Macchi, 'The Commission Adopts the New Notice on the Enforcement of State Aid Rules Before National Courts' (2022) 21 *European State Aid Law Quarterly* 3, 12-13 also suggest that the Commission's updated notice is intended to assist national courts in playing a greater role in applying the GBER and facilitating more streamlined enforcement of the State aid rules. See Communication from the Commission – Commission Notice on the enforcement of State aid rules by national courts [2021] OJ C305/1, paras 64-68.

mandates the publication of information on grants of aid that may alert competitors and facilitate them seeking remedies in a national court, this information is relatively limited.³¹⁷

2.7. Conclusion

This chapter has outlined the foundations of the EU State aid control regime. From the above analysis, it is possible to draw the following general conclusions about the regime which inform the discussion in later chapters. The first is that the general prohibition on aid contained in Article 107(1) TFEU is very sparsely worded and relies heavily on the case law of the Union courts to clarify its meaning and identify aid among the various economic policies that Member States are free to pursue without limitation from this area of the law. The reach of State aid law is very broad and its impact is significant, as economic policies that are enacted in contravention of it must generally be reversed and any aid recovered. Unlike the system prevailing under the ECSC Treaty, the modern prohibition on aid is qualified and provides for many derogations under which aid may be compatible with the internal market. Again, the open-ended language in the Treaties does not purport to exhaustively explain how these derogations apply, and the text is supplemented by a voluminous set of guidelines issued by the Commission that allow the regime to adapt to changing circumstances and new challenges.

This reliance on administrative guidelines also highlights another important feature of the regime in the central role played by the Commission.³¹⁸ In addition to setting the rules on compatibility, the Commission also exercises considerable power in enforcing the

³¹⁷ Michael Berghofer, 'The General Block Exemption Regulation: A Giant on Feet of Clay' (2009) 8 *European State Aid Law Quarterly* 323, 336.

³¹⁸ Imelda Maher and Oana Stefan, 'Delegation of powers and the rule of law: Energy Justice in EU energy regulation' (2019) 128 *Energy Policy* 84, 89-90 highlight the legal obstacles to delegating any of the Commission's functions to more specialised regulatory agencies, such as those responsible for energy regulation, posed by the division of competences envisaged by the Treaties.

prohibition on aid. The Commission is notified of a broad range of national economic policies before they are implemented to determine whether they are aid and, if they are, whether they are compatible with the Treaties. In most disputes on State aid, the Commission will have made the first formal decision on the matter. While some of the secondary legislation defining procedural rules circumscribes the Commission's powers, others have given the Commission further powers to issue secondary legislation identifying exemptions to the obligation to notify aid.

Despite the central role of the Commission, the regime also leaves some space for private enforcement of the rules. The beneficiaries of aid and their competitors have a considerable interest in shaping how the State aid rules are enforced and the law gives them some useful tools to achieve this. Undertakings can assert their own influence over the regime through direct challenges to the Commission's decisions and investigations, as well as by enlisting the assistance of national courts to restrain the grant of unlawful aid.

Understanding this framework is essential in addressing the primary research question of this thesis. This is the framework in which the developments in the interpretation of Article 107(1) TFEU responding to the challenge of fiscal aid have arisen. It is also the framework within which the impact on the application of the rules to other forms of government intervention will fall to be examined. Before examining these developments in detail, it is necessary to consider what objectives this system of State aid control serves in the next chapter.

3. CHANGING PURPOSE OF EU STATE AID LAW

3.1. Introduction

EU State aid law is rife with ambiguities. Legal sources are limited to a few sparsely worded, open-ended provisions in the Treaties supplemented with relatively little secondary legislation, as well as guidelines, policies and decisions from the Commission. These ambiguities are particularly acute in the application of Article 107(1) TFEU and the interpretation of the term ‘aid’ which is a vital part of any understanding of this scheme of regulation. In the absence of a legislative definition of the term,¹ considerable reliance must be placed on the case law of the Union courts to clarify the limits of this concept.²

Resolving these ambiguities requires a clear sense of the purpose of State aid control and what it is trying to achieve. Identifying the purposes that this system is designed to serve can assist in clarifying the interpretation of the notion of aid and the breadth of the prohibition in Article 107(1) TFEU. This may be particularly true in the context of a legal system such as that of the EU which claims to give effect to teleological interpretations of its rules, focused on its objectives.³ As the Commission and the Union courts apply these rules to an increasingly broad range of national policies, including fiscal measures, recourse to these objectives to clarify the limits of the notion of aid is likely to become increasingly necessary. Identifying the objectives of the State aid control regime is also useful for the work undertaken by this thesis. An understanding of these objectives not only points in the direction of what the law should be, but also provides criteria for evaluating the case law of the Union courts and the Commission’s decisional practice. As with other areas of economic

¹ Leigh Hancher, ‘The General Framework’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 43-130, para 3-007.

² See also Sections 2.2, 2.3.1.

³ See Koen Lenaerts, ‘Interpretation and the Court of Justice: A Basis for Comparative Reflection’ (2007) 41 *The International Lawyer* 1011, 1017. However, the role of teleological interpretation remains controversial. See Stephen Brittain, ‘Justifying the Teleological Methodology of the European Court of Justice: A Rebuttal’ (2016) 55 *Irish Jurist* 134. It has also been claimed that the CJEU does not apply a teleological approach consistently. See Gunnar Beck, ‘Judicial Activism in the Court of Justice of the EU’ (2017) 36 *University of Queensland Law Journal* 343, 352-353.

law in the EU,⁴ there are likely to be multiple competing and overlapping rationales and objectives that serve to justify State aid control and the order of priority between them may shift with changing market conditions.

This chapter explores the different objectives that the State aid rules are designed to serve and how these may change in light of the increase in their enforcement against national tax measures since the mid-1990s. First, the primary objectives of EU State aid law will be outlined and evaluated, including market integration, competition policy and addressing national government failure.⁵ Second, this chapter will go on to explain the distinctive challenges posed by fiscal measures to these existing objectives that relate to the form and economic effects of national tax policy as well as the changing dynamics of competition between Member States. Third, the management of regulatory competition will be proposed as an alternative and underexplored rationale for the State aid control regime that can better explain the application of the rules to fiscal measures and the competitive dynamics that they seek to regulate. These enforcement patterns have reoriented the objectives of State aid control around this rationale. This chapter will also build on existing accounts of this rationale by proposing the concept of solidarity between Member States as an aim that the process of regulatory competition should serve.

3.2. Market Integration

3.2.1. State Aid as a Barrier to Trade and Market Integration

⁴ See Ariel Ezrachi, 'Sponge' (2017) 5 *Journal of Antitrust Enforcement* 49; Laura Parret, 'The multiple personalities of EU competition law: time for a comprehensive debate on its objectives' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar 2012) 61-84, 81.

⁵ While this thesis assumes that the rules are designed to serve some useful purpose and actually do to some extent actually serve these purposes, it is worth noting that the utility of State aid or subsidy control has been doubted by some scholars. See Alan Sykes, 'The questionable case for subsidies regulation: A comparative perspective' (2010) 2 *Journal of Legal Analysis* 473.

The most obvious rationale for State aid control in the EU that emerges from the early case law of the CJEU and the enforcement activity of the Commission is the integration of the EU's internal market and the removal of obstacles to trade that might partition that market. This rationale is clear from the remarks of AG Lagrange in the early case of *Steenkolenmijnen*, that: 'there is no common market if there are national customs duties. In the same way there is no real common market in an industry straddling several countries if one of those countries subsidizes its own industry'.⁶ In the early years of European market integration, the Commission and the CJEU were particularly concerned with this objective, and enforcement prioritised overtly discriminatory measures and export aid.⁷ State aid was viewed as one of many different ways in which Member States could disrupt the integration of the internal market, just like customs charges, discriminatory taxation and quantitative restrictions on imports which are also prohibited by the Treaties.

Indeed, many of the early cases deal with aid measures that are closely connected to other types of trade barrier, with the CJEU consistently ruling that a customs charge, discriminatory tax measure or measure equivalent to a quantitative restriction on imports can also be an aid measure.⁸ For example, a scheme for certifying that certain goods are produced domestically and the public funding of advertising and promotion for such goods were regarded as engaging the prohibitions in both Article 34 TFEU and Article 107 TFEU in

⁶ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1960:41, [1961] ECR 3, Opinion of AG Lagrange, 41. See also discussion in Section 2.2.

⁷ Juan Jorge Piernas López, 'The Evolving Nature of the Notion of Aid under EU Law' (2016) 3 *European State Aid Law Quarterly* 400, 403.

⁸ See Case 47/69 *France v Commission* ECLI:EU:C:1970:60, [1970] ECR 487, para 14; Case 73/79 *Commission v Italy* ECLI:EU:C:1980:129, [1980] ECR 1533, para 6; Case C-78/90 *Compagnie commerciale de l'Ouest v Receveur principal des douanes de La Pallice-Port* ECLI:EU:C:1992:118, [1992] ECR I-1847, para 35; Case C-144/91 *Demoor v Belgian State* ECLI:EU:C:1992:518, [1992] ECR I-6613, paras 24-25; Case C-114/91 *Claeys* ECLI:EU:C:1992:516, [1992] ECR I-6559, para 25; C-266/91 *CELBI v Fazenda Pública* ECLI:EU:C:1993:334, [1993] ECR I-4337, para 21; C-72/92 *Scharbatke v Germany* ECLI:EU:C:1993:858, [1993] ECR I-5509, paras 18-20. For measures engaging both Article 34 TFEU and Article 107 TFEU, see Case 249/81 *Commission v Ireland* ECLI:EU:C:1982:402, [1982] ECR 4005; Case 18/84 *Commission v France* ECLI:EU:C:1985:175, [1985] ECR 1339; Case 103/84 *Commission v Italy* ECLI:EU:C:1986:229, [1986] ECR 1768.

Commission v Ireland.⁹ Similarly, a parafiscal levy imposed on both domestic and imported products that is used to fund the promotion of domestic goods was capable of engaging Article 107 TFEU together with either Article 30 TFEU or Article 110 TFEU.¹⁰ It is also clear that the Commission has a duty to ensure that the State aid measures it reviews comply with other Treaty provisions, including those on free movement.¹¹ It has been argued that these overlaps between State aid and the free movement provisions in the Treaties demonstrate that they share a common function.¹² State aid has been used to extend the reach and effectiveness of the free movement provisions.¹³

However, State aid can also affect trade and undermine market integration in itself without the infringement of some other provision of the Treaties. As with any form of uncoordinated intervention at the level of the Member State, State aid can create different trading conditions in different Member States, thereby partitioning the internal market.¹⁴ In particular, Member States can use State aid as a barrier to trade by subsidising domestic production such that it becomes more difficult for foreign companies to compete in their markets.¹⁵ Member States can also use aid to subsidise exports to other countries. This may cause dumping whereby firms from one Member State are able to flood the markets of

⁹ Case 249/81 *Commission v Ireland* ECLI:EU:C:1982:402, [1982] ECR 4005, para 18.

¹⁰ Case C-144/91 *Demoor and Others v Belgian State* ECLI:EU:C:1992:518, [1992] ECR I-6613, para 24.

¹¹ Case 74/76 *Ianelli v Meroni* ECLI:EU:C:1977:51, [1977] ECR 557, paras 9-14; Leigh Hancher, 'The General Framework' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 43-130, paras 3-268, 3-274 – 3-282; Andrea Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' (2010) 12 *Cambridge Yearbook of Legal Studies* 35, 51; Christophe Giolito, 'La procedure de contrôle des aides d'Etat peut-elle être utilisée pour contrôler la bonne application d'autres dispositions de droit communautaire?' in *EC State Aid Law: Liber Amicorum Francisco Santaolalla Gadea* (Wolters Kluwer 2008) 145-167, 167.

¹² Andrea Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' (2010) 12 *Cambridge Yearbook of Legal Studies* 35, 47.

¹³ Andrea Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' (2010) 12 *Cambridge Yearbook of Legal Studies* 35, 47.

¹⁴ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 43.

¹⁵ Andrea Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' (2010) 12 *Cambridge Yearbook of Legal Studies* 35, 36; Simon Lester, 'The Problem of Subsidies as a Means of Protectionism: Lessons from the WTO *EC – Aircraft Case*' (2011) 12 *Melbourne Journal of International Law* 1, 5.

another with goods at an artificially low price that pushes other firms out of those markets.¹⁶ Further, use of these subsidies by one Member State to promote its own industry intensifies the incentives of others to behave similarly to counteract the negative effects for their own industries.¹⁷ This can create self-reinforcing trends of escalating subsidies. There are nevertheless important differences between aid and other trade barriers such as tariffs and quotas. While trade barriers such as tariffs and subsidies tend to increase consumer prices, subsidies often have the reverse effect.¹⁸ While tariffs and quotas are an instrument of trade policy primarily designed to influence the flow of trade, subsidies often serve a broader range of domestic objectives beyond protectionism.¹⁹ Further, it has been suggested that the financing and effects of subsidies are more transparent than those of other trade barriers.²⁰

However, not all aid measures constitute trade barriers in any meaningful sense. For example, in *Commission v World Duty Free Group*,²¹ the CJEU determined that a Spanish measure that granted favourable tax treatment for undertakings who acquired shareholdings

¹⁶ Jørgen Hansen and Jørgen Nielsen, 'Subsidy-induced Dumping' (2014) 37 *The World Economy* 654, 654-655.

¹⁷ Phedon Nicolaides 'The Economics of State Aid and the Fundamental State Aid Trilemma' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 23-42, para 2-022. However, competition for investment and location decisions from multinational companies (as opposed to the subsidisation of domestic industry) has become a more prominent feature of the competition between Member States following the integration of the internal market. See discussion in Section 3.5.6.

¹⁸ Simon Lester, 'The Problem of Subsidies as a Means of Protectionism: Lessons from the WTO *EC – Aircraft Case*' (2011) 12 *Melbourne Journal of International Law* 1, 4.

¹⁹ Simon Lester, 'The Problem of Subsidies as a Means of Protectionism: Lessons from the WTO *EC – Aircraft Case*' (2011) 12 *Melbourne Journal of International Law* 1, 4; Bernard Hoekman and Doug Nelson, 'Rethinking International Subsidy Rules' (2020) Centre for Economic Policy Research Discussion Paper DP14833, 8-10
<https://cadmus.eui.eu/bitstream/handle/1814/66586/RSCAS%202020_20.pdf?sequence=1&isAllowed=y>
accessed 21 November 2022.

²⁰ Simon Lester, 'The Problem of Subsidies as a Means of Protectionism: Lessons from the WTO *EC – Aircraft Case*' (2011) 12 *Melbourne Journal of International Law* 1, 4; Bernard Hoekman and Doug Nelson, 'Rethinking International Subsidy Rules' (2020) Centre for Economic Policy Research Discussion Paper DP14833, 6
<https://cadmus.eui.eu/bitstream/handle/1814/66586/RSCAS%202020_20.pdf?sequence=1&isAllowed=y>
accessed 21 November 2022.

²¹ Joined Cases C-20/15 and C-21/15 P *Commission v World Duty Free Group* ECLI:EU:C:2016:981. This conclusion was ultimately upheld following its remittal to the General Court in Case T-219/10 RENV *World Duty Free Group v Commission* ECLI:EU:T:2018:784 and subsequently by the Grand Chamber of the CJEU on appeal in C-51/19 P and C-64/19 P *World Duty Free and Spain v Commission* ECLI:EU:C:2021:793

in foreign companies was capable of being State aid. While this may well affect cross-border trade in some way, it does not seek to repress such trade. In fact, it may encourage cross-border trade in the form of acquisitions of foreign shareholdings at the expense of equivalent transactions within the domestic Spanish market. Therefore, while State aid control has played an important role in market integration in the EU, market integration cannot explain all of what it does.

3.2.2. Market Integration and Competition between Member States

This market integration rationale has been described as the central rationale for EU State aid control by many commentators.²² It has been suggested that the primacy of this rationale means that State aid is primarily concerned with regulating competition between Member States rather than between undertakings.²³ The State aid rules have been described as being more closely aligned with the free movement provisions in the Treaties rather than the competition rules.²⁴ However, there are two specific features of the model of competition between Member States that is envisaged by this rationale that are worth highlighting. First, it views the regime as regulating a form of competition between Member States that is

²² Andrea Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' (2010) 12 *Cambridge Yearbook of Legal Studies* 35, 42; José Luis Buendía Sierra and Ben Smulders, 'The Limited Role of the "Refined Economic Approach" in Achieving the Objectives of State Aid Control: Time for Some Realism' in *EC State Aid Law: Liber Amicorum Francisco Santaolalla Gadea* (Wolters Kluwer 2008) 1-26; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 40-43.

²³ Andrea Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' (2010) 12 *Cambridge Yearbook of Legal Studies* 35, 42; José Luis Buendía Sierra and Ben Smulders, 'The Limited Role of the "Refined Economic Approach" in Achieving the Objectives of State Aid Control: Time for Some Realism' in *EC State Aid Law: Liber Amicorum Francisco Santaolalla Gadea* (Wolters Kluwer 2008) 1-26; Ulrich Schwalbe, 'European State Aid Control – The State Aid Action Plan' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 161-192, 163; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 40-43.

²⁴ Andrea Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' (2010) 12 *Cambridge Yearbook of Legal Studies* 35, 42; José Luis Buendía Sierra and Ben Smulders, 'The Limited Role of the "Refined Economic Approach" in Achieving the Objectives of State Aid Control: Time for Some Realism' in *EC State Aid Law: Liber Amicorum Francisco Santaolalla Gadea* (Wolters Kluwer 2008) 1-26, 9; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 38.

mediated through national industries in order to remove trade barriers and establish the internal market. Second, it assumes that the industries that are the likely recipients of the aid are to a large extent organised at a national level.

These features are evident in Schwalbe's description of this process as one where 'the Member States compete by means of the firms by subsidising them.'²⁵ Member States compete by granting subsidies to domestic undertakings who then compete with other undertakings, with the availability and intensity of the subsidies shaping market outcomes. This process often involves the selection by Member States of 'national champions' who will benefit from subsidies to help them to compete against the firms of other Member States.²⁶ While State aid can affect both the production and locational decisions of undertakings,²⁷ this rationale for State aid law is concerned with the former. The focus on subsidisation of domestic industry is apparent in the observation of AG Lagrange in *Steenkolenmijnen* that there cannot be a common market in an industry 'if one of those countries subsidizes its *own* industry'²⁸ not the industry of another country nor large multinational companies.

As a result, this rationale focuses on the cross-border effects of national aid policies in the form of obstacles to trade and therefore explains why State aid control should be limited to measures that affect trade between Member States.²⁹ This also gives a clear rationale for

²⁵ Ulrich Schwalbe, 'European State Aid Control – The State Aid Action Plan' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 161-192, 163.

²⁶ Phedon Nicolaidis 'The Economics of State Aid and the Fundamental State Aid Trilemma' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 23-42, para 2-015.

²⁷ Leigh Hancher, 'EU State Aid Law – Déjà Vu All Over Again' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (5th edn, Sweet & Maxwell 2016) 3-29, para 1-029.

²⁸ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1960:41, [1961] ECR 3, Opinion of AG Lagrange, 41 (emphasis added).

²⁹ The prohibition in Article 107(1) TFEU is limited in principle to measures 'in so far as [they affect] trade between Member States'. However, the threshold for this effect in the case law is very low. See for example, Case C-518/13 *Eventech v The Parking Adjudicator* ECLI:EU:C:2015:9, para 68; 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

supranational control of aid policy. Supranational control will allow one central authority with information on multiple jurisdictions and the cross-border effects of national rules to coordinate policies so that there are no obstacles to trade.³⁰ Further, as Member States will have incentives to impose trade barriers on other States while seeking to free ride on the advantages of the internal market,³¹ a supranational authority may be an appropriate means of policing Member State behaviour and overcoming problems of mutual trust.³²

3.3. Competition Rationales

3.3.1. Two Strands of Competition: Fair Processes and Efficient Outcomes

While the market integration rationale was clearly a priority of State aid control in the years following the adoption of the ECSC Treaty and the subsequent Treaty of Rome, the objective of protecting the process of competition between undertakings can also be discerned from the early case law. Indeed, Article 107(1) TFEU extends its qualified prohibition to aid ‘which distorts or threatens to distort competition’. In *Steenkolenmijnen*, the CJEU described subsidies as presenting an obstacle to ‘the most rational distribution of production at the highest possible level of productivity.’³³ In *Hansen v Hauptzollamt Flensburg*,³⁴ the purpose

[2016] OJ C262/1, para 192; Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International 2014) 207; Case C-142/87 *Commission v Belgium (Tubemeuse)* ECLI:EU:C:1990:125, [1990] ECR I-959, para 35; Case C-494/06 P *Commission v Italy and Wam SpA* ECLI:EU:C:2009:272 [2009] ECR I-3639, para 62. For more complete discussion, see Sections 2.3.5, 8.3.1, 8.3.2.

³⁰ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 43; Vincent Verouden and Philipp Werner, ‘Introduction – The Law and Economics of State Aid Control’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-64, 12.

³¹ Vincent Verouden and Philipp Werner, ‘Introduction – The Law and Economics of State Aid Control’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-64, 12.

³² Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 43-44.

³³ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1961:2, [1961] ECR 3, 19.

³⁴ Case 91/78 *Hansen v Hauptzollamt Flensburg* ECLI:EU:C:1979:65, [1979] ECR 935.

of the State aid rules was described as preventing the distortion of competition on the internal market and discrimination between undertakings.³⁵

This rationale views the State aid rules as another form of competition law, albeit one that is directed at distortions of competition arising from government intervention rather than the behaviour of undertakings.³⁶ However, it should be observed that competition law itself in the European context has also been described as being shaped by a plurality of different values.³⁷ Despite this, competition approaches to State aid can broadly be characterised as regarding the competitive process in a relatively free market as valuable and as regarding State aid as some kind of external interruption to that process. There are two broad camps of competition theory in the scholarship on competition in the EU that can be applied to State aid law: the first relates to the competitive process and the second relates to economic efficiency.³⁸ The first of these is derived from ordoliberal theory that regards the free and fair competitive process as an important component of economic freedom, holding that all should have the opportunity to compete on a level playing field.³⁹ Another strand of this

³⁵ Case 91/78 *Hansen v Hauptzollamt Flensburg* ECLI:EU:C:1979:65, [1979] ECR 935, paras 9-10. See also Case 73/79 *Commission v Italy* ECLI:EU:C:1980:129, [1980] ECR 1533, para 8.

³⁶ Alexander Collins, 'Is the Regulation of State-Aid a Necessary Component of an Effective Competition Law Framework?' (2005) 16 *European Business Law Review* 379; Ulrich Schwalbe, 'European State Aid Control – The State Aid Action Plan' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 161-192, 163-165; Wolfgang Kerber, 'EU State Aid Policy, Economic Approach, Bailouts and Merger Policy: Two Comments' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 241-252, 243. Major programmes of reform from the Commission in the past few decades have sought to adopt a 'more refined economic approach' that apparently seeks to prioritise competition rationales in the enforcement of the State aid rules. See Commission, 'State aid action plan - Less and better targeted state aid: a roadmap for state aid reform 2005-2009' (Consultation document) COM (2005) 107 final; Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU State aid Modernisation (SAM)' COM (2012) 209 final.

³⁷ Laura Parret, 'The multiple personalities of EU competition law: time for a comprehensive debate on its objectives' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar 2012) 61-84, 81; Ariel Ezrahi, 'Sponge' (2017) 5 *Journal of Antitrust Enforcement* 49. For an argument elaborating on the doctrinal consequences of this broader range of objectives, see Christopher McMahon and Alan Eustace, 'Nothing to Lose but Their Restraints of Trade: Lessons for Employment Non-Compete Clauses from EU Competition Law' (2022) *Industrial Law Journal* <<https://doi.org/10.1093/indlaw/dwac025>> accessed 21 January 2023.

³⁸ See Oles Andriychuk, *The Normative Foundations of European Competition Law* (Edward Elgar 2017) 100-101 for discussion of this dichotomy.

³⁹ Laura Parret, 'The multiple personalities of EU competition law: time for a comprehensive debate on its objectives' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar 2012) 61-84, 66-67; Frank Maier-Rigaud, 'On the normative foundations of competition law – efficiency, political freedom and the

school of thought regards market law as a means of constraining capricious and arbitrary exercises of State power.⁴⁰ On this view, the granting of aid clearly pre-empts this process by giving certain competitors privileged access to resources that they would not have been able to obtain on the market.

The second type of competition theory regards its goal as maximising economic efficiency and consumer welfare. While these concepts are not entirely synonymous,⁴¹ they often pull in the same direction and it has been suggested that a focus on consumer welfare is more appropriate for the purpose of State aid law.⁴² The suggestion is that competitive markets generally operate efficiently in allocating resources and maximising consumer welfare. The grant of aid by the State may be regarded as an external disruption of this process that leads to an allocation of resources that is less than rational.⁴³ Further, where recipient undertakings already enjoy considerable market power or hold a dominant position on a given market, there is a risk that the grant of aid may exacerbate this and reduce overall welfare further,⁴⁴ with some research showing that market shares of undertakings increase in the years after they receive aid.⁴⁵

freedom to compete' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar 2012) 132-168, 150; Oles Andriychuk, *The Normative Foundations of European Competition Law* (Edward Elgar 2017) 96-97.

⁴⁰ Heike Schweitzer, 'Efficiency, political freedom and the freedom to compete – comment on Maier-Rigaud' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar 2012) 169-181, 181; Oles Andriychuk, *The Normative Foundations of European Competition Law* (Edward Elgar 2017) 101-102.

⁴¹ Laura Parret, 'The multiple personalities of EU competition law: time for a comprehensive debate on its objectives' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar 2012) 61-84, 69.

⁴² Hans Friederiszick, Lars-Hendrik Röller and Vincent Verouden, 'European State Aid Control: An Economic Framework' in P Buccirosi (eds), *Advances in the Economics of Competition Law* (MIT Press 2006) 625-669, 644-645.

⁴³ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1961:2, [1961] ECR 3, 19; Phedon Nicolaides 'The Economics of State Aid and the Fundamental State Aid Trilemma' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 23-42, para 2-013.

⁴⁴ Timothy Besley and Paul Seabright, 'The Effects and Policy Implications of State Aids to Industry: An Economic Analysis' (1999) 14 *Economic Policy* 15; Pietro Crocioni, 'Can State Aid Policy Become More Economic Friendly' (2006) 29 *World Competition* 89; Vincent Verouden and Philipp Werner, 'Introduction – The Law and Economics of State Aid Control' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-64.

⁴⁵ Patricia Coppens, Katharina Hilken and Caroline Buts, 'On the Longer-Term Effects of State Aid on Market Shares' (2015) 14 *European State Aid Law Quarterly* 215.

Another strand in the efficiency literature focuses on aid in the form of bailouts or restructuring funds for companies undergoing financial difficulties. If undertakings suspect that they will receive a bailout or other form of aid, the consequences of commercial failure and the incentive to use resources efficiently are diminished.⁴⁶ Undertakings may respond to this with risky investment projects or poor management practices and they may be less inclined to cut costs and improve the quality of their output.⁴⁷ This may also decrease price responsiveness and generate excess demand.⁴⁸ This in turn shapes the behaviour of creditors, customers and investors towards undertakings that are likely to receive some governmental assistance, reducing the cost of capital.⁴⁹ The perceived availability of government aid may create incentives for undertakings to divert more resources towards government lobbying.⁵⁰ Therefore the consequences of a relatively liberal aid regime may extend beyond the undertakings that actually receive the aid.⁵¹ State aid control therefore provides Member States with a means of making a credible commitment not to grant aid which prevents distortions to the market occurring in this way.⁵²

3.3.2. Relationship between Competition and Market Integration

While there is a debate over the relative importance of the market integration and competition objectives in State aid law, the two are not as diametrically opposed as might

⁴⁶ Janos Kornai, 'The Soft Budget Constraint' (1986) 39 *Kyklos* 3.

⁴⁷ David Spector, 'State Aids: Economic Analysis and Practice in the EU' in X Vives (ed), *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (Oxford University Press 2009) 176-202, 179

⁴⁸ Janos Kornai, 'The Soft Budget Constraint' (1986) 39 *Kyklos* 3.

⁴⁹ Wolfgang Kerber, 'EU State Aid Policy, Economic Approach, Bailouts and Merger Policy: Two Comments' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 241-252.

⁵⁰ Vincent Verouden and Philipp Werner, 'Introduction – The Law and Economics of State Aid Control' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-64.

⁵¹ David Spector, 'State Aids: Economic Analysis and Practice in the EU' in X Vives (ed), *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (Oxford University Press 2009) 176-202, 179-180

⁵² David Spector, 'State Aids: Economic Analysis and Practice in the EU' in X Vives (ed), *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (Oxford University Press 2009) 176-202, 179-180; Vincent Verouden and Philipp Werner, 'Introduction – The Law and Economics of State Aid Control' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-64.

first appear. Some authors argue that State aid is primarily about protecting the internal market and not the process of competition between undertakings.⁵³ However some authors who take this view also describe the objective of State aid law as securing free trade in the internal market under normal conditions of competition,⁵⁴ which suggests a link to competition goals. Further, it has been suggested that market integration increases the likelihood of cross-border externalities from State intervention and amplifies their effects,⁵⁵ which may help to support some of the contentions of competition rationales. Some authors emphasise the competition goals of the State aid rules.⁵⁶ However, the competition scholarship in the EU and the early case law of the CJEU has often acknowledged that the competition rules in the Treaties play some role in defending the integrity of the internal market.⁵⁷ The relationship between these two objectives is therefore somewhat ambiguous.⁵⁸

⁵³ José Luis Buendía Sierra and Ben Smulders, ‘The Limited Role of the “Refined Economic Approach” in Achieving the Objectives of State Aid Control: Time for Some Realism’ in *EC State Aid Law: Liber Amicorum Francisco Santaolalla Gadea* (Wolters Kluwer 2008) 1-26, 10; Andrea Biondi, ‘The Rationale for State Aid Control: A Return to Orthodoxy’ (2010) 12 *Cambridge Yearbook of Legal Studies* 35.

⁵⁴ Andrea Biondi, ‘The Rationale for State Aid Control: A Return to Orthodoxy’ (2010) 12 *Cambridge Yearbook of Legal Studies* 35.

⁵⁵ Case C-303/88 *Italy v Commission* ECLI:EU:C:1990:352, [1991] ECR I-1433, Opinion of AG Van Gerven, 1462; Vincent Verouden and Philipp Werner, ‘Introduction – The Law and Economics of State Aid Control’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-64, 11.

⁵⁶ See for example Alexander Collins, ‘Is the Regulation of State-Aid a Necessary Component of an Effective Competition Law Framework’ (2005) 16 *European Business Law Review* 379; Ulrich Schwalbe, ‘European State Aid Control – The State Aid Action Plan’ in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 161-192, 163-165; Wolfgang Kerber, ‘EU State Aid Policy, Economic Approach, Bailouts and Merger Policy: Two Comments’ in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 241-252, 243; Phedon Nicolaides ‘The Economics of State Aid and the Fundamental State Aid Trilemma’ in Leigh Hancker, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 23-42, para 2-042.

⁵⁷ Laura Parret, ‘The multiple personalities of EU competition law: time for a comprehensive debate on its objectives’ in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar 2012) 61-84, 66; Matteo Negrinotti, ‘The single market imperative and consumer welfare: irreconcilable goals? Exploring the tensions amongst the objectives of European competition law through the lens of parallel trade in pharmaceuticals’ in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar 2012) 295-337, 336; Ariel Ezrachi, ‘Sponge’ (2017) 5 *Journal of Antitrust Enforcement* 49. Pablo Ibáñez Colomo and Andriani Kalintiri, ‘The Evolution of EU Antitrust Policy: 1966-2017’ (2020) 83 *Modern Law Review* 321, 331-332, 359-360, 369-371 explain that market integration remains an important rationale motivating enforcement of Articles 101 and 102 TFEU. See Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* ECLI:EU:C:1966:41, [1966] ECR 299, 340-343.

⁵⁸ The challenging nature of this interaction can be seen in the discussion by Imelda Maher, ‘Competition Policy’ in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012) 441-452, indicating that a reference to competition as an objective of the EU in proposals for a constitutional treaty in the EU was removed and relegated to an acknowledgement

The focus on the extent to which different branches of EU economic law prioritise ‘market interests’ at the expense of ‘non-market interests’ in some strands of the literature also suggests that there may be some unifying idea behind these two rationales.⁵⁹

However, there are certainly more concrete differences between the two rationales. Unlike the market integration rationale, competition does not explain the enforcement architecture for the State aid rules particularly well. The negative effects of aid on market competition may spill over to affect markets in other countries and this might justify some form of supranational control. However, competition rationales would equally justify a system of domestic regulators of State aid of the same type as those that exist for competition law.⁶⁰ It also appears that the competition rationales are more sceptical of State intervention in markets and tend to regard such intervention as presumptively harmful. This is despite the fact that it is difficult to conceive of a market entirely free from State intervention.⁶¹ However, this literature does acknowledge the utility of State aid where it is used in a targeted way that seeks to eliminate specific market failures.⁶² While one might balance

that the internal market. ‘includes a system ensuring that competition is not distorted’ in Protocol (No. 27) to THE TEU following the rejection of these proposals by France. However, Article 3(3) TEU commits the EU to a ‘highly competitive social market economy’.

⁵⁹ Anna Gerbrandy, ‘Rethinking Competition Law within the European Economic Constitution’ (2019) 57 *Journal of Common Market Studies* 127, 131. See also Anna Gerbrandy, Willem Janssen, Lyndsey Thomsin, ‘Shaping the Social Market Economy After the Lisbon Treaty: How “Social” is Public Economic Law?’ (2019) 15 *Utrecht Law Review* 32; Delia Ferri and Juan Jorge Piernas López, ‘The Social Dimension of EU State Aid Law and Policy’ (2019) 21 *Cambridge Yearbook of European Legal Studies* 75.

⁶⁰ Although some supranational and domestic enforcement can obviously co-exist, as is the case for competition law in the EU. See Caroline Buts, Tony Joris and Marc Jegers, ‘State Aid Policy in the EU Member States: It’s a Different Game They Play’ (2013) 12 *European State Aid Law Quarterly* 330 for an outline of domestic State aid regimes in EU Member States. See also Karsten Naundrup Olesen and Caroline Heide-Jørgensen, ‘Regulating State Aid in the Member States’ (2021) 20 *European State Aid Law Quarterly* 51 for an analysis of the Danish national State aid control system.

⁶¹ Herwig Hofmann, ‘State Aid Review in a Multi-Level System: Motivations for Aid, Why Control It, and the Evolution of State Aid Law in the EU’ in Herwig Hofmann and Claire Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016) 3-11, 7 posits that ‘[n]o default “natural” market exists in a “non-distorted” way which could be used as a starting point of analysis. Conditions of competition in any market are in effect the result of political decisions that have over time established the complex regulatory system, including inter alia tax, environment, and trade rules, designing the legal regime applicable to that market’.

⁶² Phedon Nicolaidis ‘The Economics of State Aid and the Fundamental State Aid Trilemma’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 23-42, para 2-005.

efficiency losses against the pursuit of some non-market objective or equitable concern, it is difficult to systematically assess this trade-off using economic methods.⁶³ This may support criticisms of European economic law that argue that it leads to centralising, deregulatory integration.⁶⁴ It also appears somewhat inconsistent with the commitment of the EU to a ‘social market economy’ in Article 3(3) TEU, which envisages a greater need for State intervention. Despite these impulses in State aid law, some commentators suggest that State aid law has been reasonably effective in responding to non-market values.⁶⁵

3.4. National Government Failure and Regulatory Capture

3.4.1. Member State Vulnerabilities

Another theory seeking to justify State aid control emerges from the literature on regulatory capture and national government failure. The first element of this theory is the assertion that Member State governments are likely to squander public money on wasteful subsidies.⁶⁶ For example, Nicolaidis suggests that while the possibility of Member States adopting aid measures in their own interest that cause externalities to others might justify some supranational control, he goes on to suggest that this is even more necessary when one relaxes the assumption of Member State rationality.⁶⁷ Elsewhere he considers how fiscal aid

⁶³ Vincent Verouden and Philipp Werner, ‘Introduction – The Law and Economics of State Aid Control’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-64, 37; Ulrich Schwalbe, ‘European State Aid Control – The State Aid Action Plan’ in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 161-192.

⁶⁴ Pedro Caro de Sousa, ‘Negative and positive Integration in EU Economic Law: Between Strategic Denial and Cognitive Dissonance?’ (2012) 13 *German Law Journal* 979.

⁶⁵ Anna Gerbrandy, Willem Janssen, Lyndsey Thomsin, ‘Shaping the Social Market Economy After the Lisbon Treaty: How ‘Social’ is Public Economic Law?’ (2019) 15 *Utrecht Law Review* 32; Delia Ferri and Juan Jorge Piernas López, ‘The Social Dimension of EU State Aid Law and Policy’ (2019) 21 *Cambridge Yearbook of European Legal Studies* 75.

⁶⁶ Mathias Dewatripont and Paul Seabright, ‘“Wasteful” Public Spending and State Aid Control’ (2006) 4 *Journal of the European Economic Association* 513, 514, 516-517.

⁶⁷ Phedon Nicolaidis ‘The Economics of State Aid and the Fundamental State Aid Trilemma’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 23-42, paras 2-023, 2-026.

might waste resources more than direct grants.⁶⁸ Piernas López considers that the increased application of the private investor test in the 1980s was a result of the Commission's desire to reduce investment in inefficient public undertakings.⁶⁹ Kerber praises EU State aid control for removing much of Member States' 'previous discretion for arbitrarily granting State aid to all kinds of firms and industries.'⁷⁰ Kühling asserts that even when their policies do not have harmful cross-border effects, 'national authorities tend to damage national economies by giving too many State aids and central authorities such as the Commission might be in a better position to solve such problems.'⁷¹

This understanding of State aid law is not confined to the academic literature, but appears frequently in the Commission's rhetoric on State aid. When announcing that the Commission would appeal the decision of the General Court in *Ireland and Apple v Commission*,⁷² Margrethe Vestager, Executive Vice-President of the Commission echoed this rationale in stating that the application of the State aid rules was necessary to prevent a situation where 'the public purse and citizens are deprived of funds for much needed investments – the need for which is even more acute now to support Europe's economic recovery.'⁷³ When commenting on the application of the State aid rules to recovery and support measures implemented by Member States in response to the Covid-19 pandemic, Vestager stated that

⁶⁸ Phedon Nicolaides, 'Grants versus Fiscal Aid: In Search of Economic Rationality' (2015) 14 *European State Aid Law Quarterly* 410.

⁶⁹ Juan Jorge Piernas López, 'The Evolving Nature of the Notion of Aid under EU Law' (2016) 15 *European State Aid Law Quarterly* 400, 405.

⁷⁰ Wolfgang Kerber, 'EU State Aid Policy, Economic Approach, Bailouts and Merger Policy: Two Comments' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 241-252, 241.

⁷¹ Jürgen Kühling, 'The Need for a More Economic Approach' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 211-224, 212.

⁷² Joined Cases T-778/16 and T-892/16 *Ireland and Apple v Commission* ECLI:EU:T:2020:338.

⁷³ Commission, 'Statement by Executive Vice-President Margrethe Vestager on the Commission's decision to appeal the General Court's judgment on the Apple tax State aid case in Ireland' (Press Release, 25 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1746> accessed 26 January 2021.

the operation of the State aid rules was necessary in order to ‘reap the full benefits of limited public funds’.⁷⁴

Many of these comments appear linked to a competition rationale in viewing aid as harmful in interfering with the market. Others go further and imply that even if some subsidies are not particularly harmful to competition, they may nonetheless be largely ineffective and therefore a wasteful and imprudent use of public money by Member States and that this justifies the application of the State aid rules. Taken to its logical conclusion, this rationale would justify a much more centralised system of State aid control than currently exists and does not provide any obvious limits to supranational control. For example, it is not clear why national governments should have the right of initiative on granting aid under this rationale and why measures without any impact on trade should be excluded from scrutiny.⁷⁵ More fundamentally, the rationale is premised on two flawed explanations as to why Member States would introduce policies contrary to their own interests and, crucially, why the Commission might effectively guard against this. The first is the vulnerability of national governments to interest group capture. The second relates to their incompetence relative to the Commission. This section will interrogate these propositions and argue that they are not particularly convincing.

3.4.2. Member States’ Supposed Vulnerability to Interest Group Capture

The first reason why Member States are thought to offer self-destructive or wasteful subsidies is that national governments are particularly vulnerable to regulatory capture by

⁷⁴ Commission, ‘State aid: Commission puts forward initiatives to further facilitate implementation of recovery and coronavirus support measures’ (Press Release, 21 December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2494> accessed 26 January 2021.

⁷⁵ See for example Mathias Dewatripont and Paul Seabright, “‘Wasteful’ Public Spending and State Aid Control” (2006) 4 *Journal of the European Economic Association* 513, 521 who suggest a need for State aid control even where there are not international spillover effects. They consider that the allocation of supervisory powers to the Commission in respect of aid without international effects might be desirable because the Commission has the relevant expertise to review State aid and that it is likely to be more easily made independent from domestic political pressure.

interest groups.⁷⁶ Nicolaidis observes ‘domestic tendencies for interventionist or discriminatory policies which generally benefit small but organised, politically influential groups’ and claims that the State aid rules can counteract these tendencies by constraining national governments and making them ‘less vulnerable to domestic lobbying by special interest groups.’⁷⁷ It has further been argued that the risk of regulatory capture by interest groups is much higher if the task of controlling aid policy is left to national governments.⁷⁸ One commentator suggests that the selectivity criterion for identifying aid is designed to ensure that measures falling outside the prohibition are broadly applicable and costly, making it less likely to be the result of interest group capture.⁷⁹

The relative vulnerability of EU and Member State governments to regulatory capture by interest groups is not as clear as some authors have suggested. It has been argued that the Commission may have higher reputational costs of ceding to political pressure from lobby groups.⁸⁰ While the political science literature is not conclusive on the relative vulnerabilities of Member States and EU institutions to lobbying and interest group capture, some case studies suggest that interest group capture and effective lobbying at the EU level are

⁷⁶ ‘Regulatory capture’ here refers to the meaning of that term in the economic literature which can be described broadly as ‘the process through which special interests affect state intervention in any of its forms, which can include areas as diverse as the setting of taxes, the choice of foreign or monetary policy, or the legislation affecting [research and development]’, following Ernesto Dal Bó, ‘Regulatory Capture: A Review’ (2006) 22 *Oxford Review of Economic Policy* 203, 203, who also provides an overview of the literature in this area. See also George Stigler, ‘The Theory of Economic Regulation’ (1971) 2 *The Bell Journal of Economics and Management Science* 3; Sam Peltzman, ‘Towards a More General Theory of Regulation’ (1976) 19 *Journal of Law and Economics* 211.

⁷⁷ Phedon Nicolaidis ‘The Economics of State Aid and the Fundamental State Aid Trilemma’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 23-42, para 2-023.

⁷⁸ Timothy Besley and Paul Seabright, ‘The Effects and Policy Implications of State Aids to Industry: An Economic Analysis’ (1999) 14 *Economic Policy* 15, 33; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 44. See also Francesco de Cecco, ‘The Many Meanings of “Competition” in EC State Aid Law’ (2006-2007) 9 *Cambridge Yearbook of European Legal Studies* 111.

⁷⁹ Francesco de Cecco, ‘The Many Meanings of “Competition” in EC State Aid Law’ (2006-2007) 9 *Cambridge Yearbook of European Legal Studies* 111.

⁸⁰ Vincent Verouden and Philipp Werner, ‘Introduction – The Law and Economics of State Aid Control’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-64, 13.

possible.⁸¹ This may also be true of State aid policy. A centralised regulator with a broad discretion such as the Commission may also be conducive to regulatory capture.⁸² The effectiveness of a given lobby group in relation to a particular policy will also vary from Member State to Member State,⁸³ further undermining the broad generalisation in the State aid literature.

3.4.3. Relative Competence of EU and Member State Government

Short of regulatory capture by interest groups, there is more general scepticism in elements of the literature towards the quality of the decisions that Member States are likely to make regarding aid policy.⁸⁴ One explanation for this scepticism is the suggestion that State aid decisions will be motivated by domestic political pressures.⁸⁵ It might also be that Member States are simply more likely to make poorer decisions on State aid than the Commission. Possible reasons for this may be that the Commission has greater expertise as a specialised State aid regulator that will be useful to other Member States. These may be enhanced by

⁸¹ See Eileen Keller, 'Forging a new Mittelstand Compromise: Lobbying Strategies and Business Influence after the Financial Crisis' (2015) Max Weber Programme Working Paper 2015/19, 11 <https://cadmus.eui.eu/bitstream/handle/1814/38004/MWP_2015_19.pdf?sequence=1&isAllowed=y> accessed 21 November 2022.

⁸² David Deller and Francesca Vantaggiato, 'Revisiting the Regulatory State: A Multidisciplinary Review Establishing a New Research Agenda' (2014) Centre for Competition Policy Working Paper 14-9, 26, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850883> accessed 21 November 2022.

⁸³ Sanjay Patnaik, 'A cross-country study of collective political strategy: Greenhouse gas regulations in the European Union' (2019) 50 *Journal of International Business Studies* 1130.

⁸⁴ Wolfgang Kerber, 'EU State Aid Policy, Economic Approach, Bailouts and Merger Policy: Two Comments' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 241-252, 241; Jürgen Kühling, 'The Need for a More Economic Approach' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 211-224, 212; Phedon Nicolaides 'The Economics of State Aid and the Fundamental State Aid Trilemma' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 23-42, para 2-023.

⁸⁵ Phedon Nicolaides, 'The Economics of State Aid' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 23-42, para 2-023; Caroline Buts, Tony Joris and Marc Jegers, 'State Aid Policy in the EU Member States: It's a Different Game They Play' (2013) 12 *European State Aid Law Quarterly* 330; David Spector, 'State Aids: Economic Analysis and Practice in the EU' in X Vives (ed), *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (Oxford University Press 2009) 176-202, 178. It has also been suggested that Member States can avoid such domestic pressures by emphasising the extent to which they are constrained by EU rules. See Phedon Nicolaides 'The Economics of State Aid and the Fundamental State Aid Trilemma' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 23-42, para 2-023.

the economies of scale and expertise derived from centralised regulation.⁸⁶ Indeed, the Commission has been praised for its role as a ‘valuable and sceptical external scrutineer of the frequently unrealistic evaluations performed by the member states themselves.’⁸⁷ However, in respect of measures with little or no cross-border externalities, these arguments appear to be based on inappropriately pessimistic assumptions about the behaviour, competence and motivation of Member State governments.⁸⁸ Spector argues that there is no reason to assume that national officials are less competent than their counterparts in the EU institutions.⁸⁹ The Commission’s expertise and economies of scale come at the a cost of lack of local knowledge which may help to inform such decisions.⁹⁰ Further, sensitivity to domestic political pressure is an inevitable feature of national democracy that is at least to some extent desirable. It is not clear that the difference in the relative competence of Member State governments and the Commission is so pronounced as to make a meaningful contribution towards justifying supranational State aid control. Further, if this rationale prescribes independent scrutiny for spending decisions, then it might also justify the review of the subsidies administered by the EU itself by some other independent institution.⁹¹

3.5. The Challenge of Fiscal Measures

⁸⁶ Alan Sykes, ‘Regulatory Competition or Regulatory Harmonization? A Silly Question?’ (2000) 3 *Journal of International Economic Law* 257; Daniel Etsy and Damien Gerardin, ‘Regulatory Co-Opetition’ (2000) 3 *Journal of International Economic Law* 235.

⁸⁷ Timothy Besley and Paul Seabright, ‘The Effects and Policy Implications of State Aids to Industry: An Economic Analysis’ (1999) 14 *Economic Policy* 15, 40.

⁸⁸ See Karsten Mause and Friedrich Gröteke, ‘The Economic Approach to European State Aid Control: A Politico-Economic Analysis’ (2016) 17 *Journal of Industry, Competition & Trade* 185 for discussion of these assumptions of the characteristics of national administrations.

⁸⁹ David Spector, ‘State Aids: Economic Analysis and Practice in the EU’ in X Vives (ed), *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (Oxford University Press 2009) 176-202, 177

⁹⁰ Pietro Crocioni, ‘Can State Aid Policy Become More Economic Friendly’ (2006) 29 *World Competition* 89, 93.

⁹¹ Herwig Hofmann, ‘State Aid Review in a Multi-Level System: Motivations for Aid, Why Control It, and the Evolution of State Aid Law in the EU’ in Herwig Hofmann and Claire Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016) 3-11, 10-11.

3.5.1. Fiscal Measures as a Form of State Aid

The notion of aid has been interpreted as being somewhat broader than that of a subsidy, encompassing other types of intervention that have similar effects.⁹² It has been long understood that aid encompasses a wide range of different measures available to Member States.⁹³ This flexibility in the notion of aid has been expressed by the CJEU as meaning that the prohibition in Article 107(1) TFEU ‘does not distinguish between the measures of State intervention concerned by reference to their causes or aims but defines them in relation to their effects.’⁹⁴ It has also been held that the specific regulatory technique used by Member States is irrelevant to the question of whether that measure constitutes State aid.⁹⁵ While determined enforcement of the rules against fiscal measures, particularly those related to direct taxation only began in the 1990s,⁹⁶ the flexibility emerging from the early case law on State aid has meant that it has long been clear that fiscal measures are capable of constituting State aid.⁹⁷ The State aid rules are said to apply with full effect to areas such as direct taxation, irrespective of the fact that Member States have exclusive competence over such matters.⁹⁸

This position reflects the reality that fiscal measures can often confer advantages that cause precisely the types of harm that the State aid rules seek to avoid. It also reflects a legitimate concern that the State aid rules might be circumvented if they were unduly

⁹² Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1961:2, [1961] ECR 3, 19. See also Section 2.2.

⁹³ Vincent Verouden and Philipp Werner, ‘Introduction – The Law and Economics of State Aid Control’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-64, 7.

⁹⁴ Case 173/73 *Italy v Commission (Italian Textiles)* ECLI:EU:C:1974:71, [1974] ECR 709, para 13. See also further discussion on this formula in Section 5.3.2.

⁹⁵ Case C-487/06 P *British Aggregates Association v Commission* ECLI:EU:C:2008:757, [2008] ECR I-10515, paras 85, 89; Case C-279/08 P *Commission v Netherlands* ECLI:EU:C:2011:551, [2011] ECR I-7671, para 51; Joined Cases C-106/09 and C-107/09 P *Commission and Spain v Gibraltar and United Kingdom* ECLI:EU:C:2011:732, [2011] ECR I-11113, para 87. See also further discussion on this formula in Section 5.3.3.

⁹⁶ Juan Jorge Piernas López, ‘The Evolving Nature of the Notion of Aid under EU Law’ (2016) 15 *European State Aid Law Quarterly* 400, 408.

⁹⁷ Case 173/73 *Italy v Commission (Italian Textiles)* ECLI:EU:C:1974:71, [1974] ECR 709,

⁹⁸ Case T-538/11 *Belgium v Commission* ECLI:EU:T:2015:188, paras 65-66.

concerned with the regulatory form of the measure, with Member States achieving the same objectives through different means.⁹⁹ In many important respects, a direct grant to a particular undertaking on the condition that it construct a factory is equivalent to a tax break of the same amount granted to that undertaking with the same condition. Despite these similarities, there are also important differences between fiscal measures and non-fiscal measures that have implications for how the law regulates them. Indeed, it is not clear that many fiscal measures were the primary target of the State aid rules as they were first envisaged in the ECSC Treaty and the Treaty of Rome.¹⁰⁰ This section explores some important differences between fiscal measures and non-fiscal measures in the context of the State aid rules. These, combined with the renewed focus on the enforcement of these rules against fiscal measures, undermine elements of the rationales for State aid control proposed above.

Before doing so, it is necessary to clarify some issues of terminology. The term ‘fiscal measures’ refers in this thesis to rules, policies or practices delivered through the tax system. These can take any of a wide range of forms including tax exemptions, rebates and deferrals. The term ‘non-fiscal measures’ refers to State intervention in the market by any other means. These categories are internally diverse and this section seeks only to outline the differences between them in general terms, acknowledging that some fiscal measures may be quite similar to equivalent non-fiscal ones. This distinction remains useful for understanding the general shift in the enforcement priorities and value judgments in the relevant law and decisional practice and its impact on the objectives of the State aid control regime. However, it is worth acknowledging that interventions embedded in systems of direct taxation will often be more clearly distinct from non-fiscal measures than indirect

⁹⁹ See discussion in Section 5.2.

¹⁰⁰ Vincent Verouden and Philipp Werner, ‘Introduction – The Law and Economics of State Aid Control’ in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-64, 7.

taxes. Further, aid granted in the form of non-fiscal regulatory scheme, such as through the grant of a permit or licence may pose quite similar questions to fiscal measures.

3.5.2. Regulating Non-intervention

The first distinctive feature of fiscal aid measures is that they take the form of non-intervention by the State, whereas many forms of non-fiscal aid such as direct grants, loans and guarantees can be understood as interventions by a Member State in the market. This means that instead of requiring Member States to refrain from intervening in the internal market, State aid law may act to compel Member States to intervene. To avoid the application of the State aid rules, a Member State may be compelled to impose a heavier tax burden on an undertaking or broaden the category of undertakings that are subject to a particular tax.¹⁰¹ This can be distinguished from the case of direct grants, where the rules will simply require that the Member State refrain from paying out the grant or recover a grant that was unlawfully paid out. It could be argued that this distinction is illusory because it is equally open to a Member State to pay out an impugned grant to a wider category of undertaking, perhaps including all undertakings, to avoid the prohibition in Article 107(1) TFEU. While this option is indeed open to Member States with non-fiscal aid, the ordinary budget constraints on Member States will often make this impossible. Instead, Member

¹⁰¹There is an exception to this in narrowly defined circumstances where the tax or charge itself may be regarded as forming part of the aid measure. This will occur where such a charge is hypothecated for the provision of aid. See Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 190-192; Case C-449/14 P *DTS Distribuidora de Televisión Digital SA v Commission* ECLI:EU:C:2016:848, para 68; Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* ECLI:EU:C:2006:403, [2006] ECR I-5293, para 46; Case C-333/07 *Régie Networks* ECLI:EU:C:2008:764, [2008] ECR I-10807, para 99. This also appears to apply to situations where there is an asymmetrical tax such that there are two categories of undertakings in competition with one another, one of which is subject to the tax while the other is not. In these circumstances, the tax itself will be regarded as part of the aid measure and subject to challenge. See Case C-526/04 *Laboratoires Boiron* ECLI:EU:C:2006:528, [2006] ECR I-7529, para 39; Case C-449/14 P *DTS Distribuidora de Televisión Digital SA v Commission* ECLI:EU:C:2016:848, para 75. However, it has been suggested by Helmut Brokelmann and Mariarosaria Ganino, ‘DTS v Commission: When is a Tax Measure State Aid?’ (2017) 8 *Journal of European Competition Law and Practice* 102 that the CJEU has been unwilling to extend the principle too far beyond the facts of *Laboratoires Boiron*.

States will more often have to withdraw the aid measure. For fiscal aid, the option of further intervention by increasing taxation on some undertakings will increase revenues, which may make it preferable to the alternative of broadening the tax exemption.

This is significant because the market integration and competition rationales understand the State aid rules as restraining the harmful actions taken by Member States in the form of the imposition of trade barriers or through intervention in an otherwise well-functioning market. They also view the system as a mechanism of negative market integration by prohibiting certain actions by Member States.¹⁰² The prospect of State aid law prohibiting certain omissions by Member States and therefore requiring them to intervene in the market in some cases undermines this view of the regime. This is particularly problematic for variants of the competition rationales that generally favour market mechanisms for the efficient allocation of resources because it will increasingly lead the rules to require Member States to intervene to avoid the prohibition on State aid, even in the absence of any demonstrable market failure.

3.5.3. Benchmarks and Assessment

This view of State aid law as restraining some active intervention on the part of the State that is shared to differing extents by the market integration and competition rationales sheds light on a related difference between fiscal and non-fiscal measures and how they are treated under the State aid control regime. It is more difficult to identify appropriate benchmarks to assess whether fiscal measures constitute aid. Many types of non-fiscal measures that may constitute aid such as direct grants, loans or guarantees can be understood as one-off

¹⁰² See Pedro Caro de Sousa, 'Negative and positive Integration in EU Economic Law: Between Strategic Denial and Cognitive Dissonance?' (2012) 13 German Law Journal 979 for an explanation of this distinction.

interventions in the internal market. State aid law takes non-intervention by the State as the relevant benchmark to identify where the State has acted in a manner that might grant an aid.

By contrast, fiscal measures occur in a context where State intervention is ubiquitous as they are granted through an often-complex system of law that constitutes the national tax system.¹⁰³ Fiscal aid is itself a form of non-intervention by the State, whereby the State refrains from collecting taxes that would otherwise be due. This means that the benchmark of non-intervention is not readily available to assess this type of aid. Further, the exclusive competence of Member States in the field of direct taxation and the diversity of fiscal policies across the Union means that no other benchmark of what should and should not be taxed is forthcoming.¹⁰⁴ Indeed, it has been suggested that ‘there exists no general rule as to which economic events arising within a jurisdiction must be taxed.’¹⁰⁵ This may lead to practical difficulties in identifying what sort of act or omission on the part of a Member State potentially constitutes State aid. Indeed, particular difficulties have been observed in distinguishing between selective tax advantages and general fiscal policy measures.¹⁰⁶

These difficulties are perhaps more easily reconciled with the view that State aid law is designed to address national government failure. If State aid law is simply a means of policing bad policies on the part of Member States, it probably matters less whether these policies take the form of acts, omissions or a combination of both. It is perhaps for this reason

¹⁰³ Wolfgang Schön, ‘State Aid in the Area of Taxation’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, para 12-021.

¹⁰⁴ Wolfgang Schön, ‘Tax Competition in Europe: The Legal Perspective’ (2000) 9 *EC Tax Review* 90, 100; Wolfgang Schön, ‘Playing Different Games? Regulatory Competition in Tax and Company Law Compared’ (2005) 42 *Common Market Law Review* 331, 352; Claire Micheau, ‘Tax selectivity in European law of state aid: legal assessment and alternative approaches’ (2015) 40 *European Law Review* 323, 333.

¹⁰⁵ Wolfgang Schön, ‘Tax Legislation and the Notion of Fiscal Aid – A Review of Five Years of European Jurisprudence’ (2015) Max Planck Institute for Tax Law and Public Finance Working Paper 2015-14, 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2707049> accessed 21 November 2022.

¹⁰⁶ Claire Micheau, ‘Tax selectivity in European law of state aid: legal assessment and alternative approaches’ (2015) 40 *European Law Review* 323, 333; Wolfgang Schön, ‘State Aid in the Area of Taxation’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, paras 12-076 – 12-078; Ulrich Soltész, ‘EU state aid law and taxation – where do we stand today?’ (2020) 41 *European Competition Law Review* 18, 19.

that the Commission has emphasised this rationale in justifying its enforcement of the State aid rules in relation to the tax affairs of large multinational companies, stressing that they must pay their ‘fair share’ of tax.¹⁰⁷ However, as indicated above, this rationale does not offer a particularly convincing justification for State aid control or the limits of the regime.¹⁰⁸ While the form of the measure does not affect this rationale very much, it remains the case that the benchmarks for assessment it prescribed are too broad and open-ended.

3.5.4. Fiscal Measures and Member State Sovereignty

Another element of the distinctive nature of fiscal aid suggested by the literature is a supposed link between the tax system and national sovereignty.¹⁰⁹ It has been suggested that the development of common European benchmarks or standards about what the tax system should look like would be ‘an unacceptable encroachment to national sovereignty.’¹¹⁰ It has further been argued that where there are gaps in specific areas of national tax rules, that State aid law cannot and should not interfere with national sovereignty to an extent that would allow it to develop its own rules.¹¹¹ Political concerns about national sovereignty over taxation have prevented the development of such common standards through the channels provided by the Treaties.¹¹² It has also been suggested that taxation requires a degree of

¹⁰⁷ See for example Commission, ‘State aid: Commission investigates transfer pricing arrangements on corporate taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg)’ (Press Release, 11 June 2014) <https://ec.europa.eu/commission/presscorner/detail/en/IP_14_663> accessed 12 August 2022; Commission, ‘Statement by Executive Vice-President Margrethe Vestager on the Commission's decision to appeal the General Court's judgment on the Apple tax State aid case in Ireland’ (Press Release, 25 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1746> accessed 26 January 2021.

¹⁰⁸ See Section 3.4 above.

¹⁰⁹ See further discussion of fiscal sovereignty in Section 5.4.1] as a possible means of applying different standards to fiscal and non-fiscal measures to determine whether they are aid within the meaning of Article 107(1) TFEU.

¹¹⁰ Christiana Panayi, ‘State Aid and Tax: A Third Way?’ (2004) 32 *Intertax* 283, 304.

¹¹¹ Raymond Luja, ‘Do State Aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty?’ (2016) 25 *EC Tax Review* 312, 323.

¹¹² Frans Vanistendael, ‘Fiscal Support Measures and Harmful Tax Competition’ (2000) 9 *EC Tax Review* 152, 161; Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 198-199.

legitimacy that the EU cannot realistically achieve.¹¹³ Schön has elaborated on this link by arguing that there is a particularly intimate connection between taxation and national democracy.¹¹⁴ This connection is centred on a basic principle shared by liberal democracies that tax cannot be levied on a particular economic event without being authorised by the legislature.¹¹⁵

However, the practical significance of this is somewhat exaggerated. State aid policy has always been politically sensitive in interposing EU norms into the relationships between Member States and national industries¹¹⁶ and the particular concerns surrounding fiscal aid may to some extent reflect the fact that the redirection of the Commission's enforcement priorities towards fiscal aid is relatively recent.¹¹⁷ Further, national tax policies are not uniquely free from international constraints. Even leaving to one side the fact that there are some discrete areas where there is some degree of tax harmonisation at an EU level,¹¹⁸ Member State choices on tax policy may also be constrained by the fact that an unfavourable tax system may cause certain businesses to relocate or invest elsewhere.¹¹⁹ Even authors expressing concern about the extent of enforcement against fiscal aid have pointed out how

¹¹³ Jussi Jaakola, 'A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?' (2019) 20 *German Law Journal* 660, 672.

¹¹⁴ Wolfgang Schön, 'Tax Legislation and the Notion of Fiscal Aid – A Review of Five Years of European Jurisprudence' (2015) Max Planck Institute for Tax Law and Public Finance Working Paper 2015-14, 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2707049> accessed 21 November 2022; Wolfgang Schön, 'Taxation and Democracy' (2019) 72 *Tax Law Review* 235, 240.

¹¹⁵ Wolfgang Schön, 'Tax Legislation and the Notion of Fiscal Aid – A Review of Five Years of European Jurisprudence' (2015) Max Planck Institute for Tax Law and Public Finance Working Paper 2015-14, 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2707049> accessed 21 November 2022; Wolfgang Schön, 'Taxation and Democracy' (2019) 72 *Tax Law Review* 235, 240.

¹¹⁶ Hussein Kassim and Bruce Lyons, 'The New Political Economy of EU State Aid Policy' (2013) 13 *Journal of Industry, Competition and Trade* 1, 3.

¹¹⁷ Juan Jorge Piernas López, 'The Evolving Nature of the Notion of Aid under EU Law' (2016) 15 *European State Aid Law Quarterly* 400, 408.

¹¹⁸ Wolfgang Schön, 'Tax Legislation and the Notion of Fiscal Aid – A Review of Five Years of European Jurisprudence' (2015) Max Planck Institute for Tax Law and Public Finance Working Paper 2015-14, 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2707049> accessed 21 November 2022. See Article 113 TFEU which provides for measures to harmonise such taxes to be adopted by the Council by unanimity.

¹¹⁹ Jussi Jaakola, 'A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?' (2019) 20 *German Law Journal* 660, 672.

national tax laws are really part of a much more complicated international system made up of bilateral double taxation treaties.¹²⁰

However, it is possible to draw some instructive insights from this literature. If one looks past the rhetoric on sovereignty, the core of the concern is that Member States should continue to be able to make basic decisions about what should be taxed.¹²¹ This does not preclude the possibility that the State aid rules will have some impact on these decisions but simply acknowledges that State aid law cannot provide a complete vision of the substance of the tax system. This contrasts with the position on non-fiscal aid, where the system of State aid control does purport to regulate direct grants and subsidies in a more comprehensive manner without objections of the same type. It may therefore be necessary for any account of State aid control to explain how its objectives are more limited than this, and that principled limits exist to prevent it from erasing national differences in tax policy and prescribing a new tax system for Member States.

3.5.5. Fiscal Measures and Economic Effects

While the differences outlined thus far relate to the manner in which State aid law responds to the subsidies and fiscal measures, there is also some evidence that their economic effects are not identical.¹²² Because fiscal aid control involves the regulation of State inaction, the nature and extent of any distortion of competition may be different to that caused by an equivalent subsidy. It has been observed that State aid in the form of subsidies may cause a

¹²⁰ Raymond Lujá, 'Do State Aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty?' (2016) 25 EC Tax Review 312, 322. Although Lujá contends that State aid law should not seek to disrupt this complicated system that regulates international taxation. However, there is recent evidence of an approach that is more accommodating towards rules on double taxation in Case C-705/20 *Fossil (Gibraltar) Ltd v Commissioner of Income Tax* ECLI:EU:C:2022:680, paras 61-62.

¹²¹ Wolfgang Schön, 'Tax Legislation and the Notion of Fiscal Aid – A Review of Five Years of European Jurisprudence' (2015) Max Planck Institute for Tax Law and Public Finance Working Paper 2015-14, 2-3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2707049> accessed 21 November 2022.

¹²² See Sections 5.5.2, 7.3.3 for discussion on how this difference may allow differentiation between the standards applied to fiscal and non-fiscal measures to determine whether they amount to aid within the meaning of Article 107(1) TFEU.

distortion of competition in the market where it is granted, but it may also cause distortions arising from its method of financing.¹²³ This is because the funds required to finance the aid will generally be raised through taxation. Taxation is often described as causing a deadweight loss, reducing overall welfare and economic efficiency by distorting the incentives of consumers and producers.¹²⁴ Indeed, it has been argued that the Commission's processes for the review of the compatibility of State aid does not account sufficiently for the additional distortion that may be caused by the financing of the measure by taxation elsewhere in the economy.¹²⁵ This additional distortion does not necessarily arise for tax exemptions. Unlike direct grants, the tax exemption is essentially an omission on the part of the State to collect taxes. A tax exemption does not require a heavier tax burden elsewhere in the economy to finance itself. However, even if it is financed in this way, the extent of the State's intervention may still be more limited than the collection of tax revenues followed by direct payments to undertakings. Under the competition rationales, which are concerned with market distortions, fiscal measures may be considered less harmful than many non-fiscal measures.

Another important difference between fiscal aid and other types of aid is identified by Nicolaidis who argues that direct subsidies are likely to be more effective than tax exemptions encouraging undertakings to undertake a specific investment projects.¹²⁶ Unlike

¹²³ Phedon Nicolaidis and Ioana Eleanora Rusu, 'The "Binary" Nature of Economics of State Aid' (2010) 37 *Legal Issues of Economic Integration* 25; Phedon Nicolaidis, 'The Economics of State Aid and the Fundamental State Aid Trilemma' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 23-42, para 2-059; Vincent Verouden and Philipp Werner, 'Introduction – The Law and Economics of State Aid Control' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-64, 40, 48.

¹²⁴ Jérôme Massiani and Gabriele Picco, 'The Opportunity Cost of Public Funds: Concepts and Issues' (2013) 33 *Public Budgeting & Finance* 96, 98, 101-102.

¹²⁵ Ulrich Schwalbe, 'European State Aid Control – The State Aid Action Plan' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 161-192, 180-181; Vincent Verouden and Philipp Werner, 'Introduction – The Law and Economics of State Aid Control' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 7-64, 48.

¹²⁶ Phedon Nicolaidis, 'Grants versus Fiscal Aid: In Search of Economic Rationality' (2015) 14 *European State Aid Law Quarterly* 410.

subsidies, he argues that tax exemptions are often only beneficial to undertakings with other income sources that are turning a substantial enough profit such that the exemption will reduce their tax bill.¹²⁷ Further, he suggests that tax exemptions can be more costly than direct grants because they will often go beyond the minimum required to incentivise the undertaking to carry out a particular investment project.¹²⁸ The effect of subsidies in incentivising investment in a specific project may therefore be stronger than that of an equivalent tax exemption.¹²⁹ The advantage of fiscal aid may be that it is more likely to encourage undertakings to relocate more of their operations or capital to a particular jurisdiction in order to have the aid apply to more of their income.¹³⁰

This characteristic of fiscal aid means that it is likely to be a particularly effective tool for Member States competing to influence the locational decisions of undertakings. It has also been suggested that fiscal aid is increasingly more effective at attracting investment than subsidies granted in advance in circumstances where companies are increasingly mobile and can relocate with relative ease after the subsidy that attracted them dries up.¹³¹ However, the difference in the effect between direct subsidies and tax exemptions is likely to vary significantly depending on the policy area and the nature and size of the beneficiary.¹³² It is submitted that direct grants and fiscal aid may therefore be associated with different models of inter-state competition. The former may be more closely associated with the market integration rationale's understanding of inter-state competition via national industries while

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ *ibid.* See also Ken Woodside, 'Tax Incentives vs. Subsidies: Political Considerations in Governmental Choice' (1979) 5 *Canadian Public Policy* 248.

¹³⁰ Phedon Nicolaidis, 'Grants versus Fiscal Aid: In Search of Economic Rationality' (2015) 14 *European State Aid Law Quarterly* 410.

¹³¹ Alexander Haupt and Tim Krieger, 'The role of relocation mobility in tax and subsidy competition' (2020) 116 *Journal of Urban Economics* 103196.

¹³² Isabel Busom, Beatriz Corchuelo and Ester Martínez-Ros, 'Tax incentives... or subsidies for business R&D?' (2014) 43 *Small Business Economics* 571; Hua Cheng et al., 'Different policy instruments and the threshold effects on collaboration efficiency in China' (2020) 47 *Science and Public Policy* 348.

the latter appears to have a stronger affinity for inter-state competition for foreign investment and location decisions.

3.5.6. Changing Dynamics of Competition between Member States

The effectiveness of fiscal aid in locational competition also suggests another way in which the dynamics of inter-state competition may be different for such aid when compared to direct grants or other types of non-fiscal aid. It has been argued that competition of this type favours small countries and less advanced economies.¹³³ Advanced economies are thought to benefit from agglomeration effects which attract businesses to areas with a high density of advanced economic activity and allow them to retain investment even when tax rates remain high.¹³⁴ However, these agglomeration effects may constrain such economies from raising tax rates beyond a certain threshold because the loss of these effects beyond that threshold will amplify the negative effects for that economy.¹³⁵ Further, smaller countries are thought to benefit from tax competition because any capital transfer that it stimulates will be larger in proportion to the size of that country's economy.¹³⁶ It has been suggested that this is more true of competition on general tax rates than more targeted aid measures.¹³⁷ However, it is submitted that the line between these two types of competition is difficult to

¹³³ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 130.

¹³⁴ Richard Baldwin and Paul Krugman, 'Agglomeration, integration and tax harmonisation' (2004) 48 *European Economic Review* 1.

¹³⁵ Richard Baldwin and Paul Krugman, 'Agglomeration, integration and tax harmonisation' (2004) 48 *European Economic Review* 1; Gonzalo Fernández, 'A note on tax competition in the presence of agglomeration economies' (2005) 35 *Regional Journal of Economics* 837.

¹³⁶ Nicolas Chatelais and Mathilde Peyrat, 'Are Small Countries the Leaders of the European Tax Competition?' (2008) CES Working Paper 2008.58, 25 <<https://halshs.archives-ouvertes.fr/halshs-00332479/document>> accessed 21 November 2022; Michel Devereux and Simon Loretz, 'What Do We Know About Corporate Tax Competition?' (2013) 66 *National Tax Journal* 745, 765.

¹³⁷ Achim Kemmerling and Eric Seils, 'The Regulation of Redistribution: Managing Conflict in Corporate Tax Competition' (2009) 32 *West European Politics* 756, 770.

delineate with precision and remains one of the most contested issues in the cases dealing with fiscal measures.¹³⁸

The dynamics of inter-state competition over the locational decisions of mobile companies can be contrasted with the conventional model of inter-state competition that is assumed by the market integration rationale for State aid control. Under the latter model, Member States compete by subsidising their own national industries so that they will be able to offer lower prices than those of other Member States. In this model, it is likely that larger Member States with more advanced economies will be more successful because there are likely to have more resources in absolute terms to invest in subsidies than smaller, less industrialised Member States. Fiscal measures and the attempt to apply the State aid rules to such measures therefore significantly changes the competitive dynamic between Member States that the rules seek to regulate. Indeed, this type of inter-state competition is likely to accelerate and become more prominent as the EU's internal market has become progressively more integrated due to the influence of the free movement rules in the Treaties.¹³⁹ This competitive process is driven by the reality that undertakings enjoy legal guarantees in the Treaties that allow them freedom of establishment in any Member State,¹⁴⁰ the freedom to provide services¹⁴¹ and export goods¹⁴² across borders to the whole of the internal market from that Member State. The prominence of this model of inter-state competition further reduces the explanatory power of the market integration rationale. This

¹³⁸ Claire Micheau, 'Tax selectivity in European law of state aid: legal assessment and alternative approaches' (2015) 40 *European Law Review* 323, 333; Wolfgang Schön, 'State Aid in the Area of Taxation' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 431-490, para 12-076 – 12-078; Ulrich Soltész, 'EU state aid law and taxation – where do we stand today?' (2020) 41 *European Competition Law Review* 18, 19.

¹³⁹ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 40-41.

¹⁴⁰ Article 49 TFEU. For an overview of the case law, see Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (7th edn, Oxford University Press 2020) 868-888.

¹⁴¹ Article 56 TFEU. For an overview of the case law, see Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (7th edn, Oxford University Press 2020) 889-907.

¹⁴² Article 30 TFEU; Article 34 TFEU. For an overview of the case law, see Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (7th edn, Oxford University Press 2020) 698-705, chapter 20.

is because this rationale is more focused on trade barriers preventing cross-border movement rather than incentives to stimulate such movement.

3.6. Managing Regulatory Competition and Fiscal Competition

3.6.1. Regulatory Competition: Advantages, Disadvantages and Alternatives

The previous section has outlined important differences between the application of the rules to fiscal and non-fiscal aid that undermine the explanatory power of accounts of State aid law based on market integration, competition rationales and national government failure. Fiscal measures were also identified as being particularly important tools for Member States as they compete for investment and location decisions by mobile companies under a model of competition in which aid is not a barrier to trade but an incentive to invest or relocate. It was observed that the prevalence of this model of competition makes it more difficult to explain the dynamics that State aid law seeks to regulate in terms of the market integration rationale.

This section builds on these weaknesses in the various rationales for State aid control and proposes another guiding rationale that is increasingly useful for understanding the regulation of fiscal measures and modern dynamics of inter-state competition. This rationale sees State aid control as a mechanism for managing regulatory competition between Member States. This rationale is not entirely novel, but it has been neglected in the literature as scholarly debate has centred around whether the State aid is primarily a support to free movement law or the competition rules.¹⁴³ However, there is an ample literature discussing

¹⁴³ For examples of scholars favouring the market integration rationale, see Andrea Biondi, 'The Rationale of State Aid Control: A Return to Orthodoxy' (2010) 12 Cambridge Yearbook of Legal Studies 35, 42; José Luis Buendía Sierra and Ben Smulders, 'The Limited Role of the "Refined Economic Approach" in Achieving the Objectives of State Aid Control: Time for Some Realism' in *EC State Aid Law: Liber Amicorum Francisco Santaolalla Gadea* (Wolters Kluwer 2008) 1-26, 9-10; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 40-43. For scholars emphasising competition rationales, see Alexander Collins, 'Is the Regulation of State-Aid a Necessary Component of an Effective Competition Law Framework?'

other areas of EU integration through the prism of regulatory competition. Regulatory competition is the process by which Member States amend national regulation in the broad sense in response to the actual or potential impact of internationally mobile goods or factors of production without seeking to restrict or block such mobility.¹⁴⁴ These responses often seek to attract or retain mobile capital within a jurisdiction. There are advantages and disadvantages to regulatory competition that may differ from sector to sector. The scale of these advantages and disadvantages is likely to vary significantly depending on the sector and the context in which regulatory competition occurs.¹⁴⁵

Regulatory competition can be viewed as a constructive relationship between jurisdictions. Regulatory competition can facilitate Tiebout sorting whereby companies and

(2005) 16 *European Business Law Review* 379; Ulrich Schwalbe, 'European State Aid Control – The State Aid Action Plan' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 161-192, 163-165; Wolfgang Kerber, 'EU State Aid Policy, Economic Approach, Bailouts and Merger Policy: Two Comments' in Jürgen Basedow and Wolfgang Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 241-252, 243; ; Phedon Nicolaides 'The Economics of State Aid and the Fundamental State Aid Trilemma' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 23-42, para 2-005.

¹⁴⁴ Jeanne-Mey Sun and Jacques Pelkmans, 'Regulatory Competition in the Single Market' (1995) 33 *Journal of Common Market Studies* 67, 68-69. See also the more general definition proposed by Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (2nd edn, Oxford University Press 2012) 356 which encompasses 'competitive adjustment of regulatory regimes in order to secure some advantage'. Joel Paul, 'Competitive and Non-Competitive Regulatory Markets: The Regulation of Packaging Waste in the EU' in William Bratton, Joseph McCahery, Sol Picciotto and Colin Scott (eds), *International Regulatory Competition and Coordination* (Oxford University Press 1996) 355-379, 356 explains that in the context of the EU, regulatory competition is a by-product of the reduction of trade barriers, some harmonisation of national standards and delegation of some policy areas to supranational authorities. For a general discussion of regulatory competition in the EU, see William Bratton, Joseph McCahery, Sol Picciotto and Colin Scott, 'Introduction' in William Bratton, Joseph McCahery, Sol Picciotto and Colin Scott (eds), *International Regulatory Competition and Coordination* (Oxford University Press 1996) 1-55. This definition obviously relies on a definition of regulation, which, following Robert Baldwin, Colin Scott and Christopher Hood, 'Introduction' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press 1998) 1-55, 3-4, can generally be understood in the economic and legal literature as 'the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with the rules' ('regulation in the narrow sense'). This will include fiscal measures, as well as non-fiscal mandatory rules governing the behaviour of undertakings on the market ('market rules'). Baldwin, Scott and Hood also acknowledge another widely used definition of regulation that includes 'all the efforts of State agencies to steer the economy' and would therefore extend to most forms of aid, such as direct subsidies, grants, loans guarantees and market transactions ('regulation in the broad sense'). These definitions include intentional acts on the part of the State. There are also broader definitions which extend to 'all mechanisms of social control' including social norms, unintentional acts and the independent behaviour of private actors, but such definitions are less instructive for the purpose of this thesis, which deals with rules governing State interventions.

¹⁴⁵ Daniel Etsy and Damien Gerardin, 'Regulatory Co-Opetition' (2000) 3 *Journal of International Economic Law* 235.

individuals are free to migrate to jurisdictions with regulations that they prefer, leading to individuals and companies with similar preferences gathering in the same area and enjoying the benefits of their preferred level of regulation.¹⁴⁶ This process of competition can reach the most economically efficient outcome in at least some circumstances.¹⁴⁷ Further, it is suggested that this process exerts a disciplining influence on Member States, requiring them to adopt more efficient and less wasteful rules to avoid losing investment.¹⁴⁸ The diversity between Member States can also facilitate experimentation and innovation in regulatory design with migration offering some indicator of the success of novel regulatory strategies.¹⁴⁹

However, this process can also be harmful. Regulatory competition can provoke a ‘race to the bottom’ whereby States engage in progressive deregulation to undercut their neighbours.¹⁵⁰ In particular, this will be undesirable if Member States are in some sense compelled to adopt deregulation by the competitive pressures that bear on them rather than by actively choosing such policies.¹⁵¹ However, the process is rarely so conclusive and can often lead to slow and prolonged regulatory drift and change without any clear plan.¹⁵² This is especially the case if those subject to the relevant regulations are relatively immobile and

¹⁴⁶ Charles Tiebout, ‘A Pure Theory of Public Expenditures’ (1956) 64 *Journal of Political Economy* 416; Jeanne-Mey Sun and Jacques Pelkmans, ‘Regulatory Competition in the Single Market’ (1995) 33 *Journal of Common Market Studies* 67.

¹⁴⁷ Wallace Oates and Robert Schwab, ‘Economic competition among jurisdictions: efficiency enhancing or distortion inducing?’ (1988) 35 *Journal of Public Economics* 333.

¹⁴⁸ Jeanne-Mey Sun and Jacques Pelkmans, ‘Regulatory Competition in the Single Market’ (1995) 33 *Journal of Common Market Studies* 67; Alan Sykes, ‘Regulatory Competition or Regulatory Harmonization? A Silly Question?’ (2000) 3 *Journal of International Economic Law* 257; William Bratton and Joseph McCahery, ‘Tax coordination and tax competition in the European Union: evaluating the code of conduct on business taxation’ (2001) 38 *Common Market Law Review* 677; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 129.

¹⁴⁹ Jeanne-Mey Sun and Jacques Pelkmans, ‘Regulatory Competition in the Single Market’ (1995) 33 *Journal of Common Market Studies* 67; Alan Sykes, ‘Regulatory Competition or Regulatory Harmonization? A Silly Question?’ (2000) 3 *Journal of International Economic Law* 257.

¹⁵⁰ Jeanne-Mey Sun and Jacques Pelkmans, ‘Regulatory Competition in the Single Market’ (1995) 33 *Journal of Common Market Studies* 67, 84.

¹⁵¹ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 129.

¹⁵² Jeanne-Mey Sun and Jacques Pelkmans, ‘Regulatory Competition in the Single Market’ (1995) 33 *Journal of Common Market Studies* 67.

unable to engage in arbitrage on a meaningful scale.¹⁵³ The effectiveness of regulatory competition may also be undermined by the reality that there are relatively few State actors in the EU¹⁵⁴ and decisions on regulations are often resistant to immediate change.¹⁵⁵

The alternative to regulatory competition is harmonisation. Adopting uniform rules and policies across different jurisdictions operates much like a cartel of regulators.¹⁵⁶ The collusion of different jurisdictions on common rules will reduce competitive pressure and will allow regulators to impose a greater burden on the mobile companies that correspond to customers in this analogy. Setting rules centrally can also create economies of scale in the design and administration of those rules.¹⁵⁷ However, there appears to be consensus that harmonisation and regulatory competition are more appropriately regarded as complementary rather than in conflict with one another.¹⁵⁸ Harmonisation is a flexible tool that does not necessarily require complete uniformity of regulation across all Member States and minimum harmonisation can be employed as a tool to remove some of the deregulatory sting of inter-state competition without removing all discretion from Member States.¹⁵⁹ It has been suggested that the EU has developed a sophisticated method of reflexive

¹⁵³ *ibid.*

¹⁵⁴ Alan Sykes, 'Regulatory Competition or Regulatory Harmonization? A Silly Question?' (2000) 3 *Journal of International Economic Law* 257.

¹⁵⁵ Jeanne-Mey Sun and Jacques Pelkmans, 'Regulatory Competition in the Single Market' (1995) 33 *Journal of Common Market Studies* 67.

¹⁵⁶ Steven Kelman, 'The Ethics of Regulatory Competition' (1982) 6 *Regulation* 39; Timothy Besley and Paul Seabright, 'The Effects and Policy Implications of State Aids to Industry: An Economic Analysis' (1999) 14 *Economic Policy* 15.

¹⁵⁷ Alan Sykes, 'Regulatory Competition or Regulatory Harmonization? A Silly Question?' (2000) 3 *Journal of International Economic Law* 257; Daniel Etsy and Damien Gerardin, 'Regulatory Co-Opetition' (2000) 3 *Journal of International Economic Law* 235.

¹⁵⁸ Jeanne-Mey Sun and Jacques Pelkmans, 'Regulatory Competition in the Single Market' (1995) 33 *Journal of Common Market Studies* 67; Alan Sykes, 'Regulatory Competition or Regulatory Harmonization? A Silly Question?' (2000) 3 *Journal of International Economic Law* 257; Daniel Etsy and Damien Gerardin, 'Regulatory Co-Opetition' (2000) 3 *Journal of International Economic Law* 235; Simon Deakin, 'Legal Diversity and Regulatory Competition: Which Model for Europe?' (2006) 12 *European Law Journal* 440-454.

¹⁵⁹ Alan Sykes, 'Regulatory Competition or Regulatory Harmonization? A Silly Question?' (2000) 3 *Journal of International Economic Law* 257; Daniel Etsy and Damien Gerardin, 'Regulatory Co-Opetition' (2000) 3 *Journal of International Economic Law* 235-255.

harmonisation in some areas of law, rejecting any dichotomy between anarchic regulatory competition and total centralisation.¹⁶⁰

3.6.2. Regulatory Competition through Aid

The policies of Member States on subsidies and taxation can also be understood as examples of regulatory competition. Besley and Seabright argue that Member States offer subsidies to mobile businesses to incentivise them to invest or establish themselves in their respective markets in order to produce positive externalities and spin-off benefits such as employment and tax revenue.¹⁶¹ They describe Member States as behaving as though bidding in an auction for the location decisions of businesses, suggesting that a similar process may occur for setting fiscal policies.¹⁶² Indeed, the connection between fiscal competition and subsidy competition can be observed in the observation that countries appear to treat them as alternative mechanisms for achieving the same result.¹⁶³ It has also been suggested that the State aid rules are a *lex specialis* in relation to the Treaty provisions on harmonisation to avoid distortions of competition.¹⁶⁴

While it follows a similar model to regulatory competition in other areas, it is worth considering how tax and subsidy competition might be distinctive. Member States compete not only on price, but also in the quality of the public services financed by tax revenue or

¹⁶⁰ Simon Deakin, 'Legal Diversity and Regulatory Competition: Which Model for Europe?' (2006) 12 *European Law Journal* 440.

¹⁶¹ Timothy Besley and Paul Seabright, 'The Effects and Policy Implications of State Aids to Industry: An Economic Analysis' (1999) 14 *Economic Policy* 15.

¹⁶² Timothy Besley and Paul Seabright, 'The Effects and Policy Implications of State Aids to Industry: An Economic Analysis' (1999) 14 *Economic Policy* 15.

¹⁶³ Alexander Haupt and Tim Krieger, 'The role of relocation mobility in tax and subsidy competition' (2020) 116 *Journal of Urban Economics* 103196.

¹⁶⁴ Case C-308/01 *GIL Insurance* ECLI:EU:C:2003:481, [2004] ECR I-4777, Opinion of AG Geelhoed, paras 65-67. These provisions include the general legislative competence of the EU to react to distortions of competition on the internal market in Articles 116-117 TFEU.

indeed by the revenues saved by forbearance on subsidies.¹⁶⁵ Schön suggests that tax competition provides a bundle of public goods that are more difficult to tailor specifically to a particular category of undertakings than other types of regulation.¹⁶⁶ Further, it is possible to assume the existence of a floor for fiscal competition because businesses are consumers of public services and are presumably willing to pay for some minimum non-zero amount for a basic level of public services, which is not necessarily the case for other types of regulation.¹⁶⁷ Fiscal and subsidy policies may also be more easily translated into a price of doing business in a particular jurisdiction. They are by their nature more easily quantifiable and this may ease comparison and intensify competitive pressures. In addition, the fungible nature of State revenue and expenditure may mean that intense regulatory competition will not lead to a lower tax burden overall, but merely that the burden will be shifted to less mobile factors of production, such as labour.¹⁶⁸ This possibility poses a threat to the commitment of the EU in Article 3(3) TEU to achieving a highly competitive social market economy as it risks placing a disproportionate share of the tax burden on workers.

¹⁶⁵ Wolfgang Schön, 'Playing Different Games? Regulatory Competition in Tax and Company Law Compared' (2005) 42 *Common Market Law Review* 331; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 129.

¹⁶⁶ Wolfgang Schön, 'Playing Different Games? Regulatory Competition in Tax and Company Law Compared' (2005) 42 *Common Market Law Review* 331, 364.

¹⁶⁷ Jeanne-Mey Sun and Jacques Pelkmans, 'Regulatory Competition in the Single Market' (1995) 33 *Journal of Common Market Studies* 67. It is also the case that many businesses depend on the custom of public sector organisations which are funded through taxation.

¹⁶⁸ Wolfgang Schön, 'Playing Different Games? Regulatory Competition in Tax and Company Law Compared' (2005) 42 *Common Market Law Review* 331, 350; Jukka Snell and Jussi Jaakkola, 'Economic Mobility and Fiscal Federalism: Taxation and European Responses in a Changing Constitutional Context' (2016) 22 *European Law Journal* 772; Jussi Jaakkola, 'A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?' (2019) 20 *German Law Journal* 660. It is also worth noting an increasing body of scholarship which identifies an empirical relationship between the strength of competition policy and the labour share of income. See Amit Zac, Carola Casti, Christopher Decker and Ariel Ezrachi, 'Competition Policy and the Decline of the Labour Share' (2021) University of Oxford Centre for Competition Law and Policy Working Paper CCLP(L)54 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3824115> accessed 21 May 2021; Amit Zac, 'Economic Inequality and Competition Law: A Comparative Analysis of the USA Antitrust Model' (2021) University of Oxford Centre for Competition Law and Policy Working Paper CCLP(L)53 <https://www.law.ox.ac.uk/sites/files/oxlaw/working_paper_cclpl53.pdf> accessed 21 May 2021.

3.6.3. Advantages of Regulatory Competition over other Rationales for State Aid Control

This chapter argues that State aid control can be seen as a method of managing regulatory competition between Member States and that this account better explains important parts of the goals and implementation of the State aid regime than rationales based on market integration, competition and national government failure. In defining the regulatory competition approach to State aid, it is necessary to distinguish it from the market integration rationale outlined above. This distinction is particularly important in light of the fact that commentators who regard State aid as being centred on the market integration rationale frequently describe it as relating to regulatory competition.¹⁶⁹ Buendía Sierra and Smulders express a similar point with the slightly different expression ‘macro-economic competition between Member States.’¹⁷⁰ While the market integration rationale certainly aims to restrain some form of competition between Member States, this type of competition is not regulatory competition within the meaning posited in this thesis and it is submitted that there are important differences between this type of inter-state competition and regulatory competition. The market integration rationale regards State aid as a type of trade barrier and views State aid control as a system analogous to the free movement rules in the Treaties.¹⁷¹

However, reciprocal erection of trade barriers by Member States does not entail regulatory competition. As observed above, regulatory competition is the process whereby jurisdictions respond and adapt to the mobility of persons, capital, goods or companies

¹⁶⁹ Andrea Biondi, ‘The Rationale of State Aid Control: A Return to Orthodoxy’ (2010) 12 Cambridge Yearbook of Legal Studies 35, 42; Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 40-43.

¹⁷⁰ José Luis Buendía Sierra and Ben Smulders, ‘The Limited Role of the “Refined Economic Approach” in Achieving the Objectives of State Aid Control: Time for Some Realism’ in *EC State Aid Law: Liber Amicorum Francisco Santaolalla Gadea* (Wolters Kluwer 2008) 1-26, 10.

¹⁷¹ Andrea Biondi, ‘The Rationale of State Aid Control: A Return to Orthodoxy’ (2010) 12 Cambridge Yearbook of Legal Studies 35, 36; José Luis Buendía Sierra and Ben Smulders, ‘The Limited Role of the “Refined Economic Approach” in Achieving the Objectives of State Aid Control: Time for Some Realism’ in *EC State Aid Law: Liber Amicorum Francisco Santaolalla Gadea* (Wolters Kluwer 2008) 1-26, 9-10.

without seeking to restrict or impede such mobility.¹⁷² To the extent that Member States implement trade barriers, they are seeking to prevent mobility rather than respond to the reality of that mobility. These are two very distinct processes. The type of competition envisaged by the market integration rationale sees Member States seek to protect and support their domestic industries and limit the mobility of foreign firms, regulatory competition sees Member States compete for the attention of mobile firms and capital. While Member States may well continue to have incentives to implement aid measures that operate like trade barriers and State aid control still serves this objective insofar as it restrains this type of aid, the advent of tax competition and greater cross-border mobility has diminished the importance of the market integration rationale in favour of the management of regulatory competition.

The management of regulatory competition offers an effective explanation for supranational State aid control that improves on the deficiencies of the market integration rationale and the protection of competition between undertakings. Like the market integration rationale, it offers a clear justification for supranational control of State aid. It seeks to address the cross-border externalities of the policy decisions of Member States that may allow Member States to benefit themselves at the expense of their neighbours. A supranational authority such as the Commission with an interest in defending the interests of the Union as a whole¹⁷³ is therefore best placed to police these decisions.¹⁷⁴ However, it improves upon the market integration rationale in providing some explanation for the limits of supranational control. This justification for State aid control understands some national

¹⁷² Jeanne-Mey Sun and Jacques Pelkmans, 'Regulatory Competition in the Single Market' (1995) 33 *Journal of Common Market Studies* 67, 68-69.

¹⁷³ Article 17(1) TEU provides that '[t]he Commission shall promote the general interest of the Union and take appropriate initiatives to that end.'

¹⁷⁴ Timothy Besley and Paul Seabright, 'The Effects and Policy Implications of State Aids to Industry: An Economic Analysis' (1999) 14 *Economic Policy* 15, 40, 41; Pietro Crocioni, 'Can State Aid Policy Become More Economic Friendly' (2006) 29 *World Competition* 89-108.

regulatory diversity in some circumstances to be beneficial and simply seeks to confine regulatory competition to those areas where it does not cause harm.

This explanation for EU State aid control also improves upon rationales based on the protection of competition between undertakings because it does not entail any generalised scepticism for government intervention in the market in itself. Instead, the harm arises from the differences between policies across Member States and particular types of government intervention insofar as they provoke deregulatory races to the bottom.¹⁷⁵ This is important for two reasons. The first is that it is more consistent with the social commitments of the EU in accepting the idea that government intervention is a necessary part of market regulation that does not have to be justified as a proportionate means of achieving some other countervailing value. The second is that it can allow State aid control to comprehend the possibility of harm being caused by progressive deregulation such as through tax exemptions which can be construed as non-intervention by the Member State government.

3.6.4. Structure of Enforcement Regime and Regulatory Competition

Regulatory competition can also provide a useful explanation of the institutional structure established by the Treaties for the enforcement of State aid. It will be recalled from the previous chapter that Article 107(1) TFEU establishes a general prohibition on State aid.¹⁷⁶ The notion of aid and the breadth of this prohibition is a matter for the Union courts rather than the Commission.¹⁷⁷ Member States must not implement State aid measures without first

¹⁷⁵ There is a wide variation in the amounts spent on aid as a proportion of national GDP across EU Member States. See for example, Raj Chari, 'Evolution of Aid in the EU: Classifying Different Types of Countries, and the Financial and Economic Crisis' in Herwig Hofmann and Claire Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016) 12-17; Marco Schito, 'East Wind, West Wind: An Analysis of the Differences in State Aid Allocations between Old and New Member States' (2021) 20 *European State Aid Law Quarterly* 200.

¹⁷⁶ See in particular Sections 2.3-2.5.

¹⁷⁷ Conor Quigley, *European State Aid Law and Policy (and UK Subsidy Control)* (4th edn, Hart 2022) 4.

notifying the Commission and obtaining its approval.¹⁷⁸ National courts may also interpret the notion of aid to determine whether a measure should have been notified and approved before its implementation.¹⁷⁹ This general prohibition on aid is a qualified and conditional one.¹⁸⁰ Article 107(2) TFEU provides a list of circumstances where certain types of aid will be regarded as compatible with the internal market. Article 107(3) TFEU outlines further circumstances where aid may be regarded as compatible with the internal market. The Commission has a broad discretion to determine whether or not aid is compatible under one of the categories in Article 107(3) TFEU subject to the review of the CJEU¹⁸¹ and national courts are precluded from determining whether or not aid is compatible with the internal market.¹⁸² Exceptionally, a Member State may apply to the Council for a derogation from the State aid rules.¹⁸³

An important feature of this enforcement architecture is that it gives considerable flexibility and decision-making power to the Commission rather than to the CJEU. While the CJEU determines what measures constitute aid and can be subject to scrutiny, the Commission has significant freedom to determine whether aid is compatible with the internal market. The notification and initial investigation process is conducted by the Commission leading to a binding decision without requiring the involvement of the CJEU. While the role

¹⁷⁸ Article 108(3) TFEU; 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, articles 2-3.

¹⁷⁹ Case 120/73 *Lorenz GmbH v Germany* ECLI:EU:C:1973:152, [1973] ECR 1471; Case 121/73 *Markmann AG v Germany* ECLI:EU:C:1973:153, [1973] ECR 1495; Case 122/73 *Nordsee GmbH v Germany* ECLI:EU:C:1973:154, [1973] ECR 1511.

¹⁸⁰ Case 77/72 *Capolongo v Azienda Agricola Maya* ECLI:EU:C:1973:47, [1973] ECR 611, Opinion of AG Roemer, 627; Case 74/76 *Ianelli v Meroni* ECLI:EU:C:1977:51, [1977] ECR 557, para 11; Case 78/76 *Steinike und Weinlig* ECLI:EU:C:1977:52, [1977] ECR 595, para 8; Phedon Nicolaides, 'What should state aid control protect? A proposal for the next generation of state aid rules' (2019) 40 *European Competition Law Review* 276; Ulrich Wurmnest (eds), *Structure and Effects in EU Competition Law* (Wolters Kluwer 2011) 161-192.

¹⁸¹ Case 730/79 *Philip Morris v Commission* ECLI:EU:C:1980:209, [1980] ECR 2671, paras 17, 24; Case C-142/87 *Belgium v Commission (Tubemeuse)* ECLI:EU:C:1990:125, [1990] ECR I-959, para 56; Case C-301/87 *France v Commission* ECLI:EU:C:1990:67, [1990] ECR I-307, para 49.

¹⁸² Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66, [1965] ECR 585, 596; C-177/78 *Pigs and Bacon Commission v McCarren* ECLI:EU:C:1979:127, [1979] ECR 2161, Opinion of AG Warner, 2206.

¹⁸³ Article 108(2) TFEU.

of national governments is more limited, the Council does have powers to legislate on State aid and has the power to grant a derogation from the rules in exceptional, individual cases.

Elements of this enforcement structure can be explained by understanding State aid control as a tool for managing regulatory competition. This objective is more complex and multidimensional than the market integration and competition rationales. Whether regulatory competition is harmful or constructive will depend heavily on the circumstances,¹⁸⁴ including the reactions of other Member States to the behaviour of the Member State granting the impugned aid. It may also be desirable to co-ordinate aid policies across the Union.¹⁸⁵ An administrative entity such as the Commission that is subject to political accountability mechanisms is better placed to consider this broader context, subject to review by the CJEU.

The range of options for managing regulatory competition may also explain the centrality of the Commission. The literature on regulatory competition recognises that this process offers many options between total harmonisation and free regulatory competition and that the optimum solution will often lie between these extremes.¹⁸⁶ The correct response in any context will be very context-sensitive.¹⁸⁷ In other contexts, the EU's political institutions decide on what level of harmonisation is appropriate and by choosing the appropriate regulatory mechanism. It is submitted that the decision on whether aid is compatible with the internal market similarly determines what measures Member States may adopt unilaterally and therefore determines the intensity of regulatory competition.

¹⁸⁴ Daniel Etsy and Damien Gerardin, 'Regulatory Co-Opetition' (2000) 3 *Journal of International Economic Law* 235.

¹⁸⁵ Phedon Nicolaides 'The Economics of State Aid and the Fundamental State Aid Trilemma' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 23-42, paras 2-044 – 2-045.

¹⁸⁶ Jeanne-Mey Sun and Jacques Pelkmans, 'Regulatory Competition in the Single Market' (1995) 33 *Journal of Common Market Studies* 67; Alan Sykes, 'Regulatory Competition or Regulatory Harmonization? A Silly Question?' (2000) 3 *Journal of International Economic Law* 257; Daniel Etsy and Damien Gerardin, 'Regulatory Co-Opetition' (2000) 3 *Journal of International Economic Law* 235.

¹⁸⁷ Daniel Etsy and Damien Gerardin, 'Regulatory Co-Opetition' (2000) 3 *Journal of International Economic Law* 235.

This complexity is also reflected in the manner in which the State aid control regime subjects measures to differing levels of scrutiny. Some measures that closely resemble aid will fall outside the prohibition in Article 107(1) TFEU and will not require any scrutiny, such as universal subsidies or tax exemptions offered to all undertakings within the jurisdiction.¹⁸⁸ Other measures that fall within the prohibition may not require direct scrutiny from the Commission if they comply with certain exemptions set out in secondary legislation.¹⁸⁹ Measures falling within the prohibition must be notified and approved before being implemented. Some of these may be rendered compatible by the exemptions in Article 107(2) TFEU as interpreted by the CJEU. Others will be subject to the Commission's discretion under the grounds in Article 107(3) TFEU or exceptionally, the Council's discretion under Article 108(2) TFEU.

3.6.5. Regulatory Competition and Solidarity

The view that State aid law is a tool for the management of regulatory competition offers a more convincing way of explaining the objectives of the regime in dealing with fiscal aid and certain competitive dynamics between Member States. However, there is one deficiency in this account that merits closer attention. While both the market integration and competition rationales are centred around clearly articulated objectives, the management of regulatory competition might be viewed as more of a descriptive label referring to a process

¹⁸⁸ Case C-66/02 *Italy v Commission* [2005] ECR I-10901, para 99; Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, para 49; Case C-222/04 *Cassa di Risparmio di Firenze* [2006] ECR I-289, para 135; Michael Honoré, 'Selectivity' in Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer 2017) 119-168, 120.

¹⁸⁹ See for example 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 [2014] OJ L 187/1; Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L 352/1.

than a normative project. There may be some sense in which regulatory competition is simply describing what State aid does without any clear idea of its *telos*.

One possible solution to this may be to consider that the State aid rules seek to manage regulatory competition in order to secure solidarity between Member States. This is a concept that is to some extent built into the Treaties.¹⁹⁰ There are numerous references to solidarity in the TEU. While some of these refer to solidarity between citizens or people within the EU,¹⁹¹ Article 3(3) TEU identifies ‘solidarity among Member States’ as an objective of the Union.¹⁹² Other references insist that solidarity between Member State shall be an important part of the Union’s common foreign policy and defence.¹⁹³ There are also numerous references to solidarity in the TFEU including a general affirmation in the Preamble¹⁹⁴ and more specific references in respect of the immigration and border control,¹⁹⁵ energy policy,¹⁹⁶ financial and energy solidarity for disasters and exceptional events.¹⁹⁷ Article 222 TFEU also contains a specific ‘solidarity clause’ requiring the Union and its Member States to act ‘in a spirit of solidarity’ to assist a Member State which is the victim of a terrorist attack or natural or man-made disaster.¹⁹⁸ Solidarity in a more general sense forms part of the Charter of Fundamental Rights of the European Union,¹⁹⁹ with the title on

¹⁹⁰ It is also an integral part of the political project and ideals underpinning European integration. One important statement of the objectives of the European project, European Union, ‘Déclaration Schuman – mai 1950’ <https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_fr> accessed 7 June 2022, indicates the importance of solidarity: ‘L’Europe ne se fera d’un coup, ni dans une construction d’ensemble: elle se fera par des réalisations concrètes créant d’abord une solidarité de fait’ (‘Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity’).

¹⁹¹ Articles 2, 3(5) TEU.

¹⁹² Article 3(3) TEU.

¹⁹³ Articles 21(1), 24, 31(1), 32, 41, 42 TEU.

¹⁹⁴ Preamble to the TFEU refers to the heads of State of the Member States ‘intending to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations’.

¹⁹⁵ Articles 67, 80 TFEU.

¹⁹⁶ Article 194 TFEU.

¹⁹⁷ Article 122 TFEU.

¹⁹⁸ Article 222 TFEU.

¹⁹⁹ Charter of Fundamental Rights of the European Union [2014] OJ C326/391, Title IV. Much of the material in the Charter appears to relate more closely to solidarity between European citizens rather than between States in the recognition of employment and family rights (Articles 27-33), rights to social security and social

solidarity including a recognition of the ability of Member States to provide services of general economic interest, which is subject to more detailed regulation by the State aid rules.²⁰⁰ It has been observed that while Article 125 TFEU might seem to offer a limit on the extent to which the EU and Member States can act in solidarity, it has also been suggested that this legal limit has not prevented practical cooperation and joint action in response to various crises.²⁰¹

Inter-state solidarity also carries some uncertainty and ambiguity as to its meaning and status.²⁰² While its status is not entirely self-evident from the Treaties, there appears to be consensus that it should not be considered to be a general principle of EU law.²⁰³ However, some commentators regard it as a principle that can in some circumstances be legally enforceable in conjunction with other provisions in some contexts.²⁰⁴ Joppe considers

assistance (Article 34) and rights of access to healthcare (Article 35) and rights to consumer protection (Article 38). However, elements of these may also engage relationships and interaction between Member States. This is particularly apparent in the recognition of services of general economic interest (Article 36) and the need to integrate environmental protection into the policies of the Union (Article 37).

²⁰⁰ Charter of Fundamental Rights of the European Union [2014] OJ C326/391, Article 36. This could arguably relate more to national solidarity and allowing this to qualify internal market rules. However, there may also be an element relating to Member State solidarity in that Member States may agree on common rules that permit them to derogate from the stricter rules. See more generally Case C-280/00 *Altmark* ECLI:EU:C:2003:415, [2003] ECR I-7747; Thomas Jaeger, 'Services of General Economic Interest' in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 255-306.

²⁰¹ WT Eijsbouts and David Nederlof, 'Rethinking Solidarity in the EU, from Fact to Social Contract' (2011) 7 *European Constitutional Law Review* 169, 171-172.

²⁰² See for example Graham Butler and Holly Snaith, 'Negative Solidarity: The European Union in the Financial Crisis' in Helle Krunke, Hanne Petersen and Ian Manners, *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020) 128-164, 164.

²⁰³ Graham Butler, 'Solidarity and Its Limits for Economic Integration in the European Union's Internal Market' (2018) 25 *Maastricht Journal of European and Comparative Law* 310, 317-318; Malcolm Ross, 'Promoting solidarity: from public services to a European model of competition?' (2007) 44 *Common Market Law Review* 1057, 1069; Anne Joppe, 'EU Solidarity, Illustrated by the Covid-19 Crisis: What Does EU Solidarity Mean in the Context of Free Movement of Goods and Persons and How Is This Illustrated by the Response to the Covid-19 Pandemic?' (2021) 17 *Utrecht Law Review* 130, 133-134; For a contrary view see Federico Casolari, 'EU loyalty and the protection of Member States' national interests: A mapping of the law' in Marton Varju (ed), *Between compliance and particularism: Member State Interests and European Union Law* (Springer 2019) 49-78, 66; Case C-370/12 *Pringle* ECLI:EU:C:2012:675, Opinion of AG Kokott, paras 142-143.

²⁰⁴ An example might be in its interaction and overlap with the principle of sincere co-operation in Article 4(3) TEU. See Anne Joppe, 'EU Solidarity, Illustrated by the Covid-19 Crisis: What Does EU Solidarity Mean in the Context of Free Movement of Goods and Persons and How Is This Illustrated by the Response to the Covid-19 Pandemic?' (2021) 17 *Utrecht Law Review* 130, 132-133; Esin Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance' (2016) 23 *Maastricht Journal of European and Comparative Law* 965, 974.

that it is better regarded as a value rather than legally binding principle in the context of internal market law.²⁰⁵ Considerable differences in meaning can be observed across the different contexts in primary legislation where reference is made to it.²⁰⁶ Indeed, this ambiguity has led to criticisms that the concept is unduly vague and adds little value to the interpretation of EU law.²⁰⁷ It is also thought that its political character has made the CJEU reluctant to rely on the concept explicitly in the past few decades.²⁰⁸ Resolving these ambiguities entirely is beyond the scope of this thesis but it is worth noting that there are commentators who consider that the concept has great potential to shape the development of EU law.²⁰⁹

Nevertheless, it may be instructive to consider Sangiovanni's account of inter-state solidarity which regards it as an integral part of the European project which he claims is 'a way for member states to enhance their problem-solving capacities in an era of globalization,

²⁰⁵ Anne Joppe, 'EU Solidarity, Illustrated by the Covid-19 Crisis: What Does EU Solidarity Mean in the Context of Free Movement of Goods and Persons and How Is This Illustrated by the Response to the Covid-19 Pandemic?' (2021) 17 *Utrecht Law Review* 130, 134. See also Graham Butler, 'Solidarity and Its Limits for Economic Integration in the European Union's Internal Market' (2018) 25 *Maastricht Journal of European and Comparative Law* 310.

²⁰⁶ Anne Joppe, 'EU Solidarity, Illustrated by the Covid-19 Crisis: What Does EU Solidarity Mean in the Context of Free Movement of Goods and Persons and How Is This Illustrated by the Response to the Covid-19 Pandemic?' (2021) 17 *Utrecht Law Review* 130, 134; Graham Butler, 'Solidarity and Its Limits for Economic Integration in the European Union's Internal Market' (2018) 25 *Maastricht Journal of European and Comparative Law* 310, 312.

²⁰⁷ Graham Butler, 'Solidarity and Its Limits for Economic Integration in the European Union's Internal Market' (2018) 25 *Maastricht Journal of European and Comparative Law* 310, 329; Anne Joppe, 'EU Solidarity, Illustrated by the Covid-19 Crisis: What Does EU Solidarity Mean in the Context of Free Movement of Goods and Persons and How Is This Illustrated by the Response to the Covid-19 Pandemic?' (2021) 17 *Utrecht Law Review* 130, 133.

²⁰⁸ Esin Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance' (2016) 23 *Maastricht Journal of European and Comparative Law* 965, 983.; Anne Joppe, 'EU Solidarity, Illustrated by the Covid-19 Crisis: What Does EU Solidarity Mean in the Context of Free Movement of Goods and Persons and How Is This Illustrated by the Response to the Covid-19 Pandemic?' (2021) 17 *Utrecht Law Review* 130, 135. Compare Case C-370/12 *Pringle* ECLI:EU:C:2012:756, para 28; Case C-370/12 *Pringle* ECLI:EU:C:2012:675, Opinion of AG Kokott, paras 142-143.

²⁰⁹ See Malcolm Ross, 'Solidarity – A New Constitutional Paradigm for the EU?' in Malcolm Ross, and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford, OUP 2010) 23-45, 41; Dagmar Schiek, 'Solidarity in the Case Law of the European Court of Justice: Opportunities Missed?' in Helle Krunke, Hanne Petersen and Ian Manners, *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020) 252-300.

while indemnifying each other against the risks and losses implicit in integration.²¹⁰ He argues that while the Union as a whole may benefit from trade integration and the protection of competition goals, different Member States may have to deal with a disproportionate share of the benefits or costs of these processes which may arise from regulatory competition. Solidarity may also seek to preserve the resilience of the Union against the risks inherent in a market economy.²¹¹ Inter-state solidarity recognises that measures may sometimes be required to compensate Member States who bear a disproportionate burden in this context²¹² and that this may come in the form of allowing Member States to take action themselves through more active industrial policy. It has been suggested that solidarity in this context is largely concerned with Member States making sacrifices in pursuit of their own longer-term self-interest,²¹³ which does not appear inconsistent with Sangiovanni's account which involves burden sharing in pursuit of long-term mutual benefit.²¹⁴

This has a clear relevance to EU State aid law. One of the first judicial references to this concept occurred in *Commission v France*, in which the CJEU was called upon to interpret the State aid rules and held that solidarity was the basis of the obligations relating to the State aid rules and of the EU more generally.²¹⁵ This view was repeated by the CJEU in *Commission v Italy* in which it was held that Member States had to implement EU

²¹⁰ Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 Oxford Journal of Legal Studies 213, 241.

²¹¹ Rather than risks arising solely from integration. See Dagmar Schiek, 'Solidarity in the Case Law of the European Court of Justice: Opportunities Missed?' in Helle Krunke, Hanne Petersen and Ian Manners, *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020) 252-300, 292.

²¹² Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 Oxford Journal of Legal Studies 213, 241.

²¹³ Dagmar Schiek, 'Solidarity in the Case Law of the European Court of Justice: Opportunities Missed?' in Helle Krunke, Hanne Petersen and Ian Manners, *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020) 252-300, 293; Esin Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance' (2016) 23 Maastricht Journal of European and Comparative Law 965, 973.

²¹⁴ Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 Oxford Journal of Legal Studies 213, 231-232.

²¹⁵ Joined Cases 6/69 and 11/69 *Commission v France* ECLI:EU:C:1969:68, [1969] ECR 523, para 16.

agricultural market regulations even though they were contrary to their national interests.²¹⁶ While these remarks may appear to describe an integrative force in the form of an obligation for Member States to obey EU rules against their own interests,²¹⁷ the broader interpretation canvassed by Sangiovanni²¹⁸ and Schiek²¹⁹ implies that it might also be used to allow Member States to take compensatory action through market intervention in other contexts. It has been argued that solidarity of this type could help inform the justifications available to Member States when they restrict the exercise of free movement rights.²²⁰ Ross links this to broader themes in the case law, such as the role played by solidarity in limiting the effect of the competition and internal market rules, and argues that solidarity plays an important role in disputes on the allocation of competences between Member States and the EU.²²¹ This is clearly a role that is also performed by the State aid rules,²²² in determining the scope of the notion of aid and the limits of national economic policy. In the context of State aid law, this principle might similarly be used to clarify the scope of the prohibition in Article 107(1) TFEU and the Commission's guidelines on the compatibility of aid under Article 107(2)-(3) TFEU.²²³ Recourse to this concept of solidarity between Member States allows the rationale for State aid law outlined in this chapter to provide a more complete account of

²¹⁶ Case 39/72 *Commission v Italy* ECLL:EU:C:1973:13, [1973] ECR 101, para 25.

²¹⁷ Esin Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance' (2016) 23 *Maastricht Journal of European and Comparative Law* 965, 977-978; Dagmar Schiek, 'Solidarity in the Case Law of the European Court of Justice: Opportunities Missed?' in Helle Krunke, Hanne Petersen and Ian Manners, *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020) 252-300, 293.

²¹⁸ Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 *Oxford Journal of Legal Studies* 213.

²¹⁹ Dagmar Schiek, 'Solidarity in the Case Law of the European Court of Justice: Opportunities Missed?' in Helle Krunke, Hanne Petersen and Ian Manners, *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020) 252-300, 292.

²²⁰ Anne Joppe, 'EU Solidarity, Illustrated by the Covid-19 Crisis: What Does EU Solidarity Mean in the Context of Free Movement of Goods and Persons and How Is This Illustrated by the Response to the Covid-19 Pandemic?' (2021) 17 *Utrecht Law Review* 130, 137-138. This chapter has already outlined an analogy between this area of law and the State aid rules. See above.

²²¹ Malcolm Ross, 'Solidarity – A New Constitutional Paradigm for the EU?' in Malcolm Ross, and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford, OUP 2010) 23-45, 42.

²²² This characterisation is particularly appropriate in respect of Article 107(1) TFEU which defines the notion of aid.

²²³ See Section 8.2.4 for a proposal of how the principle might be used as an interpretive guide to assist in determining whether a measure is aid.

the system, explaining how it regulates a specific process (ie regulatory competition) to achieve or protect an important value or objective (ie inter-state solidarity).

3.7. Conclusion

This chapter has outlined the different rationales that have been used to explain and justify State aid control. The most prominent of these rationales in the literature are focus on market integration and competition policy concerns. Other strands of the literature and elements of the Commission's rhetoric justify the system as a means of correcting national government failure. While it is accepted that there may be a number of competing objectives served by the State aid control regime, these objectives have considerable deficiencies and are ill-equipped to explain the increasing enforcement of the rules against fiscal measures. Further, ambiguity on precisely what objectives are served by State aid law has also been criticised in the literature.²²⁴

This chapter has explained how fiscal measures, together with certain systems of regulation that are treated similarly by these rules, pose new challenges for State aid control. This is because of differences in the form and effect of such measures when compared to many non-fiscal measures that were more directly in contemplation when State aid rules were first drafted. It is also because of the way fiscal measures have changed the dynamics of competition between Member States. Instead of trying to impose trade barriers and support national industries, competition is increasingly about attracting investment from mobile capital. This is a form of regulatory competition enabled by a highly integrated internal market. This chapter has proposed an alternative rationale for the State aid rules based on the management of regulatory competition which has been neglected in the

²²⁴ See for example Ruth Mason, 'Ding-Dong! The EU Arm's Length Standard Is Dead' (2022) 108 *Tax Notes International* 1249, 1256.

literature and sometimes conflated with the market integration rationale. It has also proposed orienting the rationale around the concept of solidarity between Member States as a guiding principle. While this rationale need not entirely displace the other objectives discussed here, it is more useful in understanding what the regime seeks to achieve in light of these changing dynamics.

This examination of the objectives of State aid control serves two important purposes. The first is that these objectives can be used as guiding principles to assist the CJEU in determining the breadth of the notion of aid and the prohibition in Article 107(1) TFEU. As the legislative provisions on this point are sparse, significant interpretive choices must be made by the CJEU, in part by drawing on these objectives. The second is that it provides this thesis with a theoretical framework that offers criteria for the evaluation and critique of the case law of the CJEU and the Commission's decisional practice. It will also provide the foundation for proposals for reform. The following chapter will begin this process by identifying the developments in the doctrine on Article 107(1) TFEU emerging from cases on fiscal measures identifying some areas where the law already fits the account based on regulatory competition canvassed here and other areas where it falls short of this.