



INSIGHT

## ADAPTING TO CHANGE: COVID-19 AS A FACTOR SHAPING EU STATE AID LAW

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**ABSTRACT:** The purpose of this *Insight* is to illustrate how State aid law will work in this troubled time. First, it focuses on Art. 107, para. 3, let. b) and c), TFEU and the Temporary Framework adopted by the European Commission to support the economy in the context of the COVID-19 outbreak. Furthermore, it clarifies the role that Art. 107, para. 2, let. b), TFEU may play. Finally, it takes into consideration the General Block Exemption Regulation, and the *de minimis* Regulations. It is argued that a new approach to State aid law will be needed in the coming years, based on a compensation mechanism and some other expedients to avoid competitive distortions.

**KEYWORDS:** COVID-19 and the EU – State aid – Temporary Framework – competitive distortions – compensation mechanism – suspension of State aid.

### I. INTRODUCTION

The lockdown imposed by governments in many States to contain the Coronavirus pandemic has caused penetrating restrictions on freedom of movement and has limited the possibility of carrying out most economic activities. Even if it has been done for obvious and acceptable reasons, this is going to have a significant impact at the macro-economic level. Because of the interconnections that stay at the root of economic globalization, the measures taken so far are going to provoke shockwaves on both the demand and the supply side, which will reverberate at a global level.<sup>1</sup>

For its part, the European Commission has already intervened by stating that it intends to use all the instruments at its disposal to weather the storm, and plans to take all possible measures to ease the socio-economic impact of the COVID-19 outbreak. However, considering that the EU Multiannual Financial Framework for the period 2014-

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<sup>1</sup> For an introduction, see, M. HORVATH, *Sectoral Shocks and Aggregate Fluctuations*, in *Journal of Monetary Economics*, 2000, p. 69 *et seq.* and E. ATALAY, *How important are sectoral shocks?*, in *American Economic Journal: Macroeconomics*, 2017, p. 254 *et seq.*



2020 represents around 1% of the EU-28's gross national income,<sup>2</sup> it is clear that most of the financial effort to face the economic consequences of the COVID-19 outbreak will be put on the Member States' shoulders.

This is where State aid law may play a significant role. Thus, the purpose of this paper is to illustrate how EU rules on the matter will work in this troubled time. The second and the third section focus on Art. 107, para. 3, let. b) and c), TFEU and aim at highlighting the most important features of the Temporary Framework adopted by the European Commission in relation to the pandemic. In both sections, account is given of the European Commission's State aid practice related to the Coronavirus emergency. The fourth section takes into consideration Art. 107, para. 2, let. b), TFEU and aims at providing a swift clarification of the notion of aid to compensate the damage caused by natural disasters or exceptional occurrences that provision refers to. The European Commission's practice is taken into consideration in this case as well. Furthermore, the fourth section deals with the General Block Exemption Regulation (GBER) and the *de minimis* Regulations. Lastly, the fifth section is devoted to the need to avoid competitive imbalances that may occur due to the States' interventions in the economic sector.

## II. ART. 107, PARA. 3, LET. B), TFEU AND THE TEMPORARY FRAMEWORK TO SUPPORT THE ECONOMY IN THE CONTEXT OF THE VIRUS OUTBREAK

Under Art. 107, para. 3, let. b), TFEU, aid to remedy a serious disturbance in the economy of a Member State may be considered compatible with the internal market. In applying this provision, the European Commission benefits from a wide margin of discretion, the exercise of which involves assessments of economic and social nature which must be made within the EU rather than at a merely national level.<sup>3</sup> In this regard, the European Commission must take into account whether the project for which the aid is granted promotes the EU interest as a whole, whether the aid is necessary to achieve the expected result, and whether the duration, intensity and scope of the aid are proportional to the importance of the result.<sup>4</sup>

It must be noted that in the past, Art. 107, para. 3, let. b), TFEU has been applied very few times<sup>5</sup>. Things changed when the 2008 economic crisis hit Europe. In light of

<sup>2</sup> See European Parliament, *Multiannual Financial Framework*, Fact Sheets on the European Union – 2020, December 2019, [www.europarl.europa.eu](http://www.europarl.europa.eu).

<sup>3</sup> Court of Justice, judgment of 15 December 2005, case C-66/02, *Italy v. Commission*, para. 135. From its part, the Court of Justice cannot substitute its own assessment in the matter but must confine itself to examining whether the authority's assessment is vitiated by a manifest error or by misuse of powers (see also Court of Justice, judgment of 15 December 2005, case C-148/04, *Unicredito italiano*, para. 71).

<sup>4</sup> L. HANCHER, T. OTTERVANGER, P.J. SLOT, *EU State Aids*, London: Sweet & Maxwell, Thomson Reuters, 2012, p. 147 *et seq.*

<sup>5</sup> For some references, see L. HANCHER, T. OTTERVANGER, P.J. SLOT, *EU State Aids*, cit., p. 154 *et seq.*, F.J. SACKER, F. MONTAG (eds), *European State Aid Law: A Commentary*, München, Oxford, Baden Baden: C.H. Beck,

Art. 107, para. 3, let. b), TFEU, the European Commission sorted out a Temporary Framework “to apply State aid rules in a way that achieves maximum flexibility for tackling the crisis while maintaining a level playing field and avoiding undue restrictions of competition”.<sup>6</sup> Two objectives were pursued: to unblock bank lending and to make it possible for companies to make investments. In that Temporary Framework, the European Commission clarified that it would only consider State aid schemes not exceeding a cash grant of € 500,000 per undertaking that was not in difficulty on 1 July 2008 as compatible with the internal market. Furthermore, aid in the form of State guarantees for loans at a reduced premium, subsidized interest rate, and subsidized loans to produce eco-friendly products would be considered compatible with the internal market.

That experience provided the blueprint for the European Commission’s reaction when Coronavirus started to become a widespread problem.<sup>7</sup> In its Communication on 13 March 2020, the European Commission highlighted that Art. 107, para. 3, let. b), TFEU would provide the proper basis to declare public intervention compatible with EU rules.<sup>8</sup>

On 19 March 2020, the European Commission issued a Temporary Framework for State aid measures to support the economy in the COVID-19 outbreak (the Temporary Framework), where it lays out the compatibility requirements to be taken into account when evaluating COVID-19-related State aid measures in light of Art. 107, para. 3, let. b), TFEU.<sup>9</sup> The Temporary Framework applies from 19 March 2020 to 31 December 2020.<sup>10</sup>

As a rule, State aid schemes that do not exceed € 800,000 per undertaking will be deemed compatible with the internal market. They may be given in the form of direct grants, tax and payment advantages or other forms to undertakings that were not al-

Hart, Nomos, 2016, p. 251 *et seq.* and R. IANUS, M.F. ORZAN, *Aid Subject to a Discretionary Assessment under Article 107(3) TFEU*, in H.C.H. HOFMANN, C. MICHEAU (eds), *State Aid Law of the European Union*, Oxford: Oxford University Press, 2016, p. 240 *et seq.*

<sup>6</sup> Communication from the European Commission of 22 January 2009, *Temporary framework for State aid measures to support access to finance in the current financial and economic crisis*, p. 1. On this *Temporary Framework*, see generally R. LUJA, *State Aid and the Financial Crisis: Overview of the Crisis Framework*, in *European State Aid Law Quarterly*, 2009, p. 15 *et seq.*, R. D’SA, “Instant” *State Aid Law in a Financial Crisis – A U-Turn?*, in *European State Aid Law Quarterly*, 2009, p. 6 *et seq.* and F. SCIAUDONE, *Gli aiuti di Stato tra regolamentazione “orizzontale” e crisi dei mercati: il ruolo della Commissione europea*, in C. SCHEPISI (ed.), *La “modernizzazione” della disciplina sugli aiuti di Stato. Il nuovo approccio della Commissione europea e i recenti sviluppi in materia di public e private enforcement*, Torino: Giappichelli, 2011, p. 139 *et seq.*

<sup>7</sup> For an introduction, see N. DE SADELEER, J. GODFROID, *The story behind COVID-19: Animal diseases at the crossroads of wildlife, livestock and human health*, in *European Journal of Risk Regulation*, 2020, p. 1 *et seq.*

<sup>8</sup> Communication COM(2020) 112 final of 13 March 2020 from the European Commission, *Coordinated economic response to the COVID-19 outbreak*, p. 9.

<sup>9</sup> Communication C(2020) 1863 final of 19 March 2020 from the European Commission, *Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*.

<sup>10</sup> *Temporary Framework*, cit., para. 49.

ready in difficulty on 31 December 2019.<sup>11</sup> The aid must also be granted no later than 31 December 2020.<sup>12</sup>

Aid in the form of guarantees on loans and subsidised interest rates for loans may also be granted, provided that certain conditions on the increase of guarantee premiums and of the credit risk margin are met.<sup>13</sup>

Aid may also be provided in the form of guarantees and loans granted through credit and financial institutions and short-term export credit insurance.<sup>14</sup>

All aid may be cumulated together, except for aid granted in the form of guarantees on loans and of subsidised interest rates for loans, if the aid is granted for the same loan and the overall loan amount per undertaking exceeds the thresholds outlined in the Temporary Framework.<sup>15</sup>

As of 30 April 2020, the European Commission has approved more than 80 State aid measures related to the COVID19 outbreak that have been considered compatible with the internal market in light of Art. 107, para. 3, let. b), TFEU and the Temporary Framework.<sup>16</sup> Among the most significant ones (at least from a quantitative point of view), there are:

- a €15 billion Austrian liquidity scheme (aid will be granted to all undertakings either directly or, in the case of guarantees on loans or subsidised public loans, through credit institutions and financial institutions);
- a €50 billion Belgian support scheme in the form of State guarantees on new short-term loans;
- two German loan programmes covering a significant part (90% and 80%) of the risk for loans for companies of all sizes;
- a €22 billion Polish scheme accessible by all the medium and large Polish companies, allowing for the provision of public guarantees on investment loans and working capital loans by the Polish National Development Bank;
- two Portuguese schemes, with a budget of €13 billion, to support SMEs through direct grants and State guarantees for investment and working capital loans granted by commercial banks;

<sup>11</sup> For a definition of the concept of the concept of undertaking in difficulty, see the GBER (Art. 2, para. 18, of Commission Regulation (EU) 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).

<sup>12</sup> *Temporary Framework*, cit., para. 22. Special rules apply to the agricultural, fishery and aquaculture sectors.

<sup>13</sup> *Ibid.*, paras 25 and 27.

<sup>14</sup> *Ibid.*, para. 28 *et seq.*

<sup>15</sup> *Ibid.*, para. 20.

<sup>16</sup> See European Commission, *Coronavirus Outbreak – List of Member States Measures Approved Under Article 107(2)(b) TFEU, Article 107(3)(b) TFEU and Under the Temporary State Aid Framework*, 8 May 2020, ec.europa.eu.

- a €20 billion Spanish guarantee schemes for companies and self-employed individuals through direct grants, repayable advances, tax and payment advantages, guarantees on loans and subsidised interest rates for loans;
- a €9.1 billion Swedish guarantee scheme on new loans.

Generally speaking, the European Commission has approved the State aid schemes in 48 hours after being notified. This seems to confirm that the 2008 economic crisis has led to the development of a significant expertise that makes it possible to provide a swift response to massive economic shocks.

Considering the impact that the COVID-19 outbreak will have on the European economy, it is likely that the thresholds set out by the Commission will be amended in the coming months.

### III. ART. 107, PARA. 3, LET. C), TFEU AND THE TEMPORARY FRAMEWORK TO SUPPORT THE ECONOMY IN THE CONTEXT OF THE COVID-19 OUTBREAK

Art. 107, para. 3, let. c), TFEU, states that aid to facilitate the development of certain economic activities or certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be considered compatible with the internal market.

In this regard, it should be considered that the Temporary Framework was amended on 3 April 2020. Following this amendment and based on Art. 107, para. 3, let. c), TFEU, aid may be given in the form of direct grants, repayable advances or tax advantages for R&D projects carrying out COVID-19-related research. The aid intensity for each beneficiary can cover 100% of eligible costs for fundamental research and shall not exceed 80% of eligible costs for industrial research and experimental development. *Inter alia*, eligible costs may refer to personnel costs, costs for digital and computing equipment, for diagnostic tools, for data collection and processing tools, for R&D services and for pre-clinical and clinical trials. Again, aid will not be granted to undertakings that were already in difficulty on 31 December 2019.<sup>17</sup>

Aid granted in the form of direct grants, tax advantages or repayable advances for the construction or upgrade of testing and upscaling infrastructures will be considered compatible with the internal market as well. Such infrastructures would be required to develop, test and upscale, *inter alia*, COVID-19 relevant medicinal products and treatments, medical devices, hospital and medical equipment, disinfectants, and data collection/processing tools. The aid intensity shall not exceed 75% of the eligible costs, i.e. the investment costs necessary for setting up the relevant infrastructures. As previously, undertakings that were already in difficulty on 31 December 2019 are excluded.<sup>18</sup>

<sup>17</sup> *Temporary Framework*, cit., para. 35.

<sup>18</sup> *Ibid.*, para. 37.

Finally, investment aid in the form of direct grants, tax advantages or repayable advances may be deemed compatible with the internal market if it is granted to produce COVID-19 relevant products (for example medicinal products and treatments). The rule on undertakings that were already in difficulty on 31 December 2019 applies to this case as well.<sup>19</sup>

All aid may be cumulated in these cases as well, except for aid granted for COVID-19 relevant research and development, investment aid for testing and upscaling infrastructures, and investment aid for the production of COVID-19 relevant products, should they concern the same eligible costs.<sup>20</sup>

As of 30 April 2020, at least six schemes have been approved under these provisions.<sup>21</sup> However, it should be noted that an Italian scheme to support the production and supply of medical equipment that was notified before the amendment was approved under Article 107, para. 3, let. b).

Furthermore, as far as Art. 107, para. 3, let. c), is concerned, one may want to consider the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty.<sup>22</sup> In this regard, it is clarified in the Temporary Framework that the principle of ‘one time last time’ of the Guidelines does not cover aid that the Commission declares compatible under Article 107, para. 2, let. b), as this type of aid is not rescue aid, restructuring aid or temporary restructuring support’ within the meaning of the Guidelines.<sup>23</sup>

#### IV. OTHER PATHS: ART. 107, PARA. 2, LET. B), TFEU, THE GBER, AND THE *DE MINIMIS* REGULATIONS

In its Communication on 13 March 2020, the European Commission underlined that Art. 107, para. 3, let. b), TFEU could be complemented by Art. 107, para. 2, let. b), TFEU.<sup>24</sup>

Under this provision, aid to compensate the damage caused by natural disasters or exceptional occurrences shall be compatible with the internal market. As this provision sets an exception to the general prohibition of State aid, it must be interpreted restrictively.<sup>25</sup> In addition, the European Commission does not enjoy a margin of discretion, as

<sup>19</sup> *Ibid.*, para. 38.

<sup>20</sup> *Ibid.*, para. 20.

<sup>21</sup> See European Commission, *List of Member States Measures*, cit.

<sup>22</sup> European Commission, *Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty*. For a comment, see M. SCHÜTTE, *Revising the Rescue and Restructuring Aid Guidelines for the Real Economy – A Practitioner’s Wishlist*, in *European State Aid Law Quarterly*, 2012, p. 813 *et seq.* and C. BUTS, J-F. ROMAINVILLE, V. BILSEN, *Evaluating Restructuring Aid: a Case Study Approach*, in *European State Aid Law Quarterly*, 2016, p. 338 *et seq.*

<sup>23</sup> *Temporary Framework*, cit., para. 15.

<sup>24</sup> European Commission, *Coordinated economic response to the COVID-19 Outbreak*, cit., para. 9.

<sup>25</sup> Court of Justice: judgment of 11 November 2004, case C-73/03, *Spain v. Commission*, para. 37; judgment of 23 February 2006, joined cases C-346/03 and C-529/03, *Giuseppe Atzeni and Others*, para. 79.

it can only check whether the requirements set out in the Treaty are met. More specifically, the European Commission must assess whether the situation is exceptional, whether the damage (for which the compensation is to be granted) is a direct consequence of the disaster, and whether the aid does not result in overcompensation (as it must only rectify the damage in question).<sup>26</sup> As far as the disaster or occurrence is concerned, the European Commission performs a case-by-case analysis in order to verify whether it is unforeseeable (or difficult to foresee),<sup>27</sup> whether it has a significant scale or economic impact<sup>28</sup> and whether it is extraordinary.<sup>29</sup>

In the past, events such as floods, nuclear or industrial accidents, as well as oil pollution caused by the sinking of a ship<sup>30</sup> have been considered to fall under the scope of Art. 107, para. 2, let. b), TFEU. The same happened with epidemics and contamination, such as with foot and mouth disease, the bovine spongiform encephalitis, and the contamination of animal feed with dioxin.<sup>31</sup>

COVID-19 can surely be considered an exceptional occurrence. As the European Commission has already made clear, “the tangible threat of a pandemic, associated with the public health risk deriving from the absence of therapeutics or vaccines for the novel COVID-19 determine the exceptionality of the circumstances” and “the rapidity of the spread can cause enormous consequences both in terms of fatal outcomes in high-risk groups and in terms of economic and societal disruption”.<sup>32</sup>

Therefore, aid granted to compensate the damage caused by the pandemic are compatible with EU rules on the matter.

As of 30 April 2020, the European Commission has approved eight measures falling under the scope of Art. 107, para. 2, let. b), TFEU.<sup>33</sup> These include four Danish schemes (a € 12 million scheme to compensate for damages caused by cancellations of large public, a € 1.3 billion scheme to compensate self-employed people, a € 5.4 billion scheme to compensate companies, and a € 137 million scheme to compensate an air-

<sup>26</sup> See A. PISAPIA, *Aiuti di Stato: profili sostanziali e rimedi giurisdizionali*, Padova: Cedam, 2012, p. 29-30, M.F. ORZAN, *De Jure Compatible Aid under Article 107(2) TFEU*, in H.C.H. HOFMANN, C. MICHEAU (eds), *State Aid Law of the European Union*, cit., p. 236 et seq. and K. BACON, *European Union Law of State Aid*, Oxford: Oxford University Press, 2017, p. 95 et seq.

<sup>27</sup> Commission Decision of 1 August 2008, case SA.32163, *Remediation of damage to airlines and airports caused by seismic activity in Iceland and the volcanic ash in April 2010*, Slovenia, para. 31.

<sup>28</sup> Commission Decision of 11 April 2012, case SA.33487, *Agricultural and fisheries aid to compensate for damage due to exceptional occurrence (red mud "Aluminium accident")*, Hungary, para. 35.

<sup>29</sup> Commission Decision of 19 May 2004 concerning the aid scheme that Italy plans to implement for poultry farms – AIMA programme for the poultry industry – C 59/2001 (ex N 97/1999), Italy.

<sup>30</sup> A. PISAPIA, *Aiuti di Stato*, cit., p. 30.

<sup>31</sup> P. NICOLAIDES, *A New Temporary State Aid Framework to Fight the Effects of the Corona Virus*, in *State Aid Hub.eu*, 20 March 2020, stateaidhub.eu.

<sup>32</sup> Commission Decision of 12 March 2020, case SA.56685, *Compensation scheme for cancellation of events related to COVID-19*, Denmark, para. 28.

<sup>33</sup> See European Commission, *List of Member States Measures*, cit.

line), a French scheme deferring payment of certain taxes by airlines, two Swedish schemes (a € 38 million scheme to compensate for damages caused by cancellations or postponement of cultural events and a € 137 million scheme to compensate an airline) and a German State guaranteed loan to compensate an airline.

As the emergency has not come to an end yet, the main issue here will concern the exact amount of the damage suffered by the undertakings. As clarified by the European Commission in the cases of the Swedish and the German schemes to compensate the airlines, the damage will be quantified after the coronavirus crisis, based on the airlines' operating accounts for the year 2020; should public support exceed the actual damage, a claw-back mechanism will be activated.<sup>34</sup>

As airlines will be severely hit by the next economic crisis, the possibility of judicial disputes over the amount of the damage suffered cannot be ruled out.

Furthermore, the European Commission referred to the GBER and the *de minimis* Regulations.

As it is well known, the GBER sets the eligible thresholds for specific categories of State aid that are considered compatible with the Treaty if they respect those requirements. It applies, among other categories, to aid given to SMEs in the form of investment aid, operating aid, SME's access to finance, and aid for research and development.

The *de minimis* Regulations refer to State aid that does not need to be notified to the European Commission, as it is so limited that it is unlikely to distort competition.<sup>35</sup> In this regard, the Commission Regulation on *de minimis* aid granted to undertakings providing services of general economic interest (SGEI) should be taken into account.<sup>36</sup>

<sup>34</sup> See European Commission, Press Release of 22 April 2020, State aid: Commission approves 38 million Swedish scheme to compensate damages caused by cancelled or postponed cultural events due to coronavirus outbreak, ec.europa.eu and European Commission, Press Release of 24 April 2020, State aid: European Commission approves Swedish public guarantee of up to 137 million to compensate airline SAS for damage caused by coronavirus outbreak, ec.europa.eu.

<sup>35</sup> See Commission Regulation (EU) 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, Commission Regulation (EU) 1408/2013 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 in the agriculture sector, and Commission Regulation (EU) 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the fishery and aquaculture sector.

<sup>36</sup> Commission Regulation (EU) 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. On State aid law and SGEI, see E. GROMNICKA, *Services of General Economic Interest in the State Aids Regime: Proceduralisation of Political Choices*, in *European Public Law*, 2005, p. 429 *et seq.*, A. RENZULLI, *Services of General Economic Interest: The Post-Altmark Scenario*, in *European Public Law*, 2009, p. 399 *et seq.*, and E. Szyzszak, *Services of General Economic Interest, State Aid and State Measures Affecting Competition*, in *Journal of European Competition Law & Practice*, 2017, p. 678 *et seq.* On SGEI as a general concept, see G. NAPOLITANO, *Towards a European Legal Order for Services of General Economic Interest*, in *European Public Law*, 2005, p. 565 *et seq.*, M.T. KARAYIGIT, *The Notion of Services of General Economic Interest Revisited*, in *European Public Law*, 2009, p. 575 *et seq.*, C. WEHLANDER, *Services of General*



As it is widely known, SGEI are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention.<sup>37</sup> Some sectors falling under this broad definition may be affected by the virus outbreak, such as hospital services and elderly care. The SGEI *de minimis* Regulation provides that aid measures not exceeding € 500.000 over any period of three fiscal years per undertaking are outside the notion of aid. Therefore, the Member States may adopt measures to support those sectors.

Moreover, the Commission Decision setting out the conditions under which State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEI is compatible with the internal market must be taken into account.<sup>38</sup> As provided for under Article 2, para. 1, let. b) and let. c), of this Decision, compensation may be granted for the provision of SGEI such as medical care and health and long term care, provided that certain requirements are met.

## V. THE WAY FORWARD?

A rapid overview of State aid rules related to the COVID-19 outbreak confirms the idea that “the hard lessons of the 2008 financial crisis have been learned” by both the European Commission and the Member States.<sup>39</sup> A clear legal framework and rapid procedures are needed now more than ever in order for the Member States to deploy their full potentials and save their economies.

In this regard, the above-mentioned provisions of Art. 107, paras 2 and 3, TFEU play the most important role. However, one should not forget that the GBER and the *de minimis* Regulations may prove to be useful and that the Member States may adopt measures of general application that do not fall under the prohibition set out in Art. 107 TFEU, such as wage subsidies, and direct financial support to consumers.

Thus, an integrated system where these provisions interact would seem to provide what is necessary as far as State aid law is concerned.

However, it has already been underlined that the flexibility recognized by the Temporary Framework applies in theory to all Member States. “In practice, however, it most-

*Economic Interest as a Constitutional Concept of EU Law*, Berlin: Springer, 2016, J.M. BURKE, *A Critical Account of Article 106(2) TFEU: Government Failure in Public Service Provision*, Oxford: Hart Publishing, 2018 and I. BARTHA, T.M. HORVÁTH, *Does not it matter? Widening of the derogation for Services of General Interests*, in *Maastricht Journal of European and Comparative Law*, 2020, p. 55 *et seq.*

<sup>37</sup> See Communication COM(2011) 900 final of 20 December 2011 from the European Commission, *A Quality Framework for Services of General Interest in Europe*, p. 3.

<sup>38</sup> Commission Decision 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.

<sup>39</sup> A. BIONDI, *State Aid in the Time of COVID-19*, in *EU Law Live*, 25 March 2020, eulawlive.com.

ly benefits deeper-pocketed Member States with the means and the budget to spend the greatest resources” and “massive capital injections by only certain Member States might lead to massive distortions of competition”.<sup>40</sup>

Therefore, one cannot but subscribe to the proposal of establishing a compensation mechanism that would take the form of “a contribution to the support of companies established in other Member States [that] could be equivalent to a percentage (for example, 15%) of the public resources involved in the measures at issue”.<sup>41</sup>

Of course, this proposal may be met with some reluctance by some Member States. As a matter of fact, some Governments seem to be focusing their attention more on the exclusive protection of their national economies than on spreading solidarity. As a matter of fact, on 20 April Austria put forward the idea to suspend State aid rules.<sup>42</sup>

The reasons behind this kind of initiatives are quite clear. According to Fitch ratings, the world GDP will contract by 3.9% in 2020 while the Eurozone GDP will drop by 7% this year because of the Coronavirus pandemic.<sup>43</sup> The International Monetary Fund has already underlined that all the EU Member States will be severely hit as their GDP will drop dramatically.<sup>44</sup> Their economies will need years before recovering from such an unprecedented shock.

In truth, the Austrian proposal does not seem to fall outside the scope of application of Art. 109 TFEU as under this provision, the Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Arts 107 and 108 TFEU.

However, should this happen, it would start a race to the bottom in terms of public support to national economies that would lead to more and more competitive distortions. Thus, this approach should be avoided.

Nevertheless, there are other risks that should be taken into account. On 27 March, Germany enacted a law allowing the Government to buy stakes in large companies to prevent takeovers.<sup>45</sup> Should this happen, those companies should be reprivatized at a later date.

<sup>40</sup> A. LAMADRID, *A Moment of Truth for the EU: A Proposal for a State Aid Solidarity Fund*, in *Chillin'Competition*, 31 March 2020. See also J.L. BUENDIA SIERRA, A. DOVALO, *State Aid Versus COVID-19: The Commission Adopts a Temporary Framework*, in *European State Aid Law Quarterly*, 2020, p. 7 and L. HORNKOHL, J. VAN'T KLOOSTER, *With Exclusive Competence Comes Great Responsibility. How the Commission's Covid-19 State Aid rules Increase Regional Inequalities within the EU*, in *Verfassungsblog*, 29 April 2020, [verfassungsblog.de](http://verfassungsblog.de).

<sup>41</sup> A. LAMADRID, *A Moment of Truth for the EU*, cit.

<sup>42</sup> See Competition Policy International, *Austria Wants Rule Suspension of EU State Aid During COVID-19*, 20 April 2020, [www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com).

<sup>43</sup> See Fitch Ratings, *Coronavirus Impact: Research Highlights*, [www.fitchratings.com](http://www.fitchratings.com).

<sup>44</sup> International Monetary Fund, *World Economic Outlook. Chapter 1. The Great Lockdown*, April 2020, p. ix.

<sup>45</sup> See Deutsche Welle, *Coronavirus: German Aid Package Gets Final Approval*, in *Deutsche Welle*, 27 March 2020, [www.dw.com](http://www.dw.com).

This kind of recapitalization may prove quite dangerous as public support could be granted to non-viable companies only because they are considered to be strategic. Thus, State ownership should be temporary and be followed by some form of debt restructuring.

Notwithstanding these considerations, amendments to the thresholds set out in the Temporary Framework and the *de minimis* Regulations and new Guidelines on rescuing and restructuring non-financial undertakings in difficulty will be needed soon.

