2. Industrial policy and EU state aid rules

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INTRODUCTION: EXPLORING THE RELATIONSHIP BETWEEN STATE AID RULES AND INDUSTRIAL POLICY

Economics literature employs a variety of definitions of industrial policies, broadly understood as aiming at influencing allocation of resources and outputs produced by existing markets.[1] This chapter relies on a definition of industrial policy as a set of measures or policies influencing industry deliberately,[2] whether of a vertical nature with a focus on a given sector/industry or a horizontal scope targeting all conditions of operations and capacities in multiple sectors to increase domestic production capacity and maintain competitiveness at the international level.[3]

Competition policy, and in particular State aid policy, fits within this definition to a certain extent. Indeed, one of the reasons for ensuring supranational control of Member States' subsidies was that fostering competition in the

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[1] Dani Rodrik, *Industrial Policy for the Twenty-First Century*, UNIDO, Sept. 2004, p. 2, available at https://j.mp/2nRcNXi, last accessed 19 May 2020. See also Jacques Pelkmans, "European industrial policy", Bruges European Economic Policy Briefings 15, European Economic Studies Department, College of Europe, 2006 (also published in *International Handbook of Industrial Policy*, ed. Patrizio Bianchi and Sandrine Labory, Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing); A. Andreoni and H. J. Chang, "Industrial policy and the future of manufacturing", *Economia e Politica Industriale*, 43 (2016); Wim Naudé, *Industrial Policy Old and New Issues*, WIDER Working Paper, UNU-WIDER, Helsinki, 2010; José M. Salazar-Xirinachs, Irmgard Nübler, and Richard Kozul-Wright, *Transforming Economics – Making Industrial Policy Work for Growth, Jobs and Development*, Geneva: International Labour Office, Geneva; Joseph Stiglitz, *Industrial Policy, Learning and Development*, WIDER Working Paper, 2016.

[2] Pelkmans, 2006, p. 3.

[3] See UNCTAD, *World Investment Report 2018*, Chapter IV: "Investment and new trade policies", 2018, p. 126.

European internal market[4] would preserve market outcomes and reward the most competitive undertakings. Those "winners" should in turn contribute to economic growth and foster the competitiveness of the European Union as a whole at global level. From this perspective, State aid policy and industrial policy constitute two sides of the same coin as they both aim at contributing to the transformation of European industries to enhance the global competitiveness of Europe.[5]

The Nature of State Aid Control in EU Competition Policy

Distortions of competition may originate from the behaviour of undertakings or from the actions of Member States. The first European treaties vested an independent body from the Member States, the European Commission (Commission), with the power to neutralize these distortions to guarantee equal opportunity and freedom for economic actors.[6] The EU Commission fulfils its mission in the area of competition policy through a variety of instruments: the control of mergers and acquisitions,[7] the review of horizontal and vertical agreements including cartels,[8] the screening of abuses of a dominant position[9] or the launching of sector inquiries,[10] as well as the power to control State subsidies to support private domestic undertakings,[11] that is State aid control.

State aid control had already existed in European treaties since the 1951 Treaty of Paris on the European Community of Steel and Coal, which also granted to the High Authority extensive regulatory powers as regards these two

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4 Pelkmans, 2006, pp. 5–6.

5 See in particular J. Almunia, Fighting for the Single Market, Speech/14/119, European Competition Forum, Brussels, 11 February 2014.

6 This is a simplified representation as national competition authorities, courts and other stakeholders play an important role in the enforcement of competition and State aid rules especially since 2004 regarding the decentralization process of competition enforcement.

7 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal L 24, 29.01.2004, pp. 1–22.

8 The basis of this review lies in Article 101 TFEU.

9 Article 102 TFEU contains the prohibition of abuse of a dominant position.

10 Rules regarding procedures and details on the powers of the Commission including on the right to conduct sector inquiries are detailed in secondary legislation. See in particular Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, pp. 1–25.

11 J. Almunia, "Honing the instruments of EU competition control", International Competition Law Forum, St. Gallen, 15 May 2014.

industrial sectors, including the power to levy taxes on coal and steel production and to float debts to finance investment, modernization and conversion.[12]

Currently, Article 107 and the following articles of the Treaty on the Functioning of the European Union (TFEU)[13] contain a general prohibition on State aid as any measure providing an advantage that is selective to an undertaking (in a broad sense[14]) thanks to state intervention creating a distortion of competition and causing an effect on trade. Prohibited aid may take the form of direct transfer of funds – whether subsidies, loans, guarantees or direct investment in the capital of companies – in addition to waivers of state revenues, such as a reduction in taxes[15] or social security contributions.

A list of exemptions follows, including those that apply automatically by law under Article 107(2) TFEU notably to aid displaying a social character in relation to individual consumers and to aid remedying situations in which damages have occurred due to natural disasters or exceptional circumstances. Article 107(3) TFEU contains a list of additional exemptions regarding which the Commission enjoys a margin of discretion in relation to regional development, the realization of projects of common European interest, remediation of a serious disturbance in the economy, the conservation of culture and heritage, as well as other aid authorized by the Council.

The TFEU also imposes on Member States procedural obligations of notification and pausing before implementation of any plans to grant new aid (Article 108(3) TFEU). It also requires that the Commission applies constant monitoring of existing aid (Article 108(1) TFEU). Article 108(2) TFEU outlines the monitoring steps, starting with a preliminary examination potentially leading to the opening of a formal procedure against a Member State. The powers of the Commission, the procedural aspects and the conditions to secure an exemption have been further detailed over the years with a significant

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[12] J. Monnet, *Mémoires*, Paris: Fayard, 1976, p. 572.

[13] Consolidated version of the Treaty on the Functioning of the European Union, OJ, C 326, 26,10,2012, pp. 47–390.

[14] The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed. See ECJ 12 September 2000, Pavlov and Others, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; Judgment of the Court of Justice of 10 January 2006, Cassa di Risparmio di Firenze SpA and Others, C-222/04, ECLI:EU:C:2006:8, paragraph 107. See also European Commission, Notice on the notion of State aid, C/2016/2946 OJ C 262, 19.7.2016, pp. 1–50.

[15] For a more detailed overview, see I. Richelle, W. Schön and E. Traversa (eds.), *State Aid Law and Business Taxation*, Berlin: Springer, 2016.

body of secondary legislation and guidelines including the General Block Exemption Regulation (GBER)[16] and the Procedural Regulation 2015/2019.[17]

From Case-by-Case Control to a Proper State Aid Policy

Despite establishing a case-by-case authorization process, State aid rules gave leeway to the European Commission to set more general policy orientations, that is the choice to accept or refuse certain types of state interventions. State aid control has both a "backward-looking" dimension (targeting existing measures that are considered particularly detrimental to the EU project) and a "forward-looking" dimension (ensuring that in the future Member States frame their aid scheme in accordance with EU standards).

Under State aid rules, the Commission may force Member States to recover aid up to ten years after the day of granting a measure, if it was not notified and cannot be considered as compatible with the internal market.[18] This is a consequence of the notification mechanism provided in EU law: apart from in instances where the proposed measure falls within an exemption provided by the Treaty or by a block exemption regulation, Member States must notify the Commission of any measure that qualifies as aid and wait for a green light before implementation pursuant to Article 108(3) TFEU. Outside obvious subsidies cases, many legal issues have arisen because European treaties only provided for a general prohibition of State aid without containing a proper definition. This absence of definition gave more freedom to the Commission[19] to define an advanced screening mechanism involving economic and legal assessments based on a large body of case law, secondary legislation, guidelines and communications, which constituted a sort of negative policy under which Member States were forbidden from using certain measures to implement their domestic industrial policy.[20]

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16 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, OJ L 187 26.6.2014, p. 1.

17 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, OJ L 248, 24.9.2015, p. 9 (hereafter the "Procedural Regulation"). References to all relevant legislation and soft law instruments are available at https://ec.europa.eu/competition/state_aid/legislation/legislation.html, last accessed 1 November 2020.

18 Article 17(1) the Procedural Regulation.

19 See in particular the 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, C/2016/2946, OJ C 262, 19.7.2016, pp. 1–50.

20 Pim Jansen, "The interplay between industrial policy and state aid: Natural combination or strange bedfellows?", *European State Aid Law Quarterly*, 15.4 (2016), p. 587.

Although based on individual decisions affecting generally only one Member State at a time, the Commission has tried to promote a uniform, more coherent pattern of supervision of Member States' industrial policies (at least those involving direct or indirect subsidies). Indeed, the assessment of the existence of any aid involves conditions regarding intra-European trade and a compatibility analysis of a national measure with common EU objectives contained in the TFEU. However, if limited to case-by-case decisions, the ten-year delay granted to the Commission, plus the duration of legal proceedings in case of appeal before EU courts, would reduce the disciplining effect of State aid enforcement.

Therefore, the Commission – with what we call a forward-looking approach – provides guidance to Member States and to undertakings regarding the future application of State aid rules (e.g., interpret the notion of aid and the various available exemptions) by issuing policy orientations such as guidelines, communications or speeches. The Commission has used these soft law instruments to clarify the conditions that subsidies must fulfil in order to be declared compatible with the internal market. A study of these policy orientations reveals a shift away from sectoral development (e.g., specific guidelines for a given sector) towards a more horizontal approach (e.g., guidelines applicable to certain types of aid to all sectors to pursue defined objectives).[21]

In more exceptional cases, the Commission has simultaneously launched individual investigations targeting similar types of subsidies towards undertakings in different Member States, for example in the motor vehicle sector in the 1980s[22] or more recently concerning tax rulings in favour of multinational groups of companies. In the latter case, it can be argued that those individual decisions were part of a deliberate general Commission policy aimed at curbing (unfair) tax competition.[23]

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21 See UNCTAD, 2018, p. 130; Ha-Joon Chang and Antonio Andreoni, *Industrial Policy in a Changing World: Basic Principles, Neglected Issues and New Challenges*, Cambridge: Cambridge University Press, 2016, pp. 52ff.

22 See in particular the string of cases opened by the European Commission in July 1989 against Spain and Germany which were opposed to the application of the motor vehicle framework. See E. Stuart and I. Roginska-Green, *Sixty Years of EU State Aid Law and Policy*, AH Alphen aan den Rijn: Wolters Kluwer, 2018, e-Book edition ISBN 978-90-411-8924-0, location 5466.

23 E. Traversa and P. M. Sabbadini, *State Aid Policy and Fight against Harmful Tax Competition in the Internal Market: Tax Policy in Disguise in EU Tax Law and Policy in the 21st Century*, EUCOTAX Series on European Taxation, Vol. 55, Wolters Kluwer, September 2017, pp. 107–155.

The Acknowledgement of Competences Related to Industrial Policy in the European Treaties and Their Relationship to State Aid Control

In 1992, the Maastricht Treaty included a new provision to promote coordination between Member States and the European Commission "to ensure that the conditions necessary for the competitiveness of the Union's industry exist" (Article 173 TFEU).[24] It provides a list of very general objectives, such as:

- speeding up the adjustment of industry to structural changes;
- encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings;
- encouraging an environment favourable to cooperation between undertakings; and
- fostering better exploitation of the industrial potential of policies of innovation, research and technological development.

The provision further establishes a coordination procedure between the European Union and Member States, and encourages the European Union to use other provisions of the treaties to achieve its objectives.

However, Article 173 TFEU also contains very limiting carve-outs, by expressly excluding any harmonization of the legislation of Member States in the area of industrial policy, as well as "any measure which could lead to a distortion of competition or contains tax provisions or provisions relating to the rights and interests of employed persons".

Article 173 TFEU is generally understood as acknowledging a common responsibility of the European Union and Member States for industrial policy, irrespective of the allocation of legislative powers. Depending on the delineation of the ambit of the concept of industrial policy as "domestic" or "European", there may, however, be diverging views between Member States and the European Union as to the objectives to be pursued and measures to be taken. This is especially the case in times of crisis where Member States may be tempted to adopt protective measures towards certain sectors of the industry which would jeopardize the European objectives of the internal market.[25]

It seems reasonable to assume that State aid rules contained in Articles 107–109 TFEU are included in those "other provisions" referred to in Article 173(3) TFEU and are therefore to be applied with an eye to EU industrial competitiveness. Some scholars have argued that the European Union has achieved a certain level of coordination of national industrial policies through

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[24] See Stuart and Roginska-Green, location 3376.
[25] Jansen, "The interplay between industrial policy and state aid", p. 2.

State aid control,[26] and the Commission has also acknowledged that State aid rules could contribute to the objectives of industrial policy. In a 2010 Communication,[27] the Commission recognized the supporting role of competition policy, and State aid policy in particular, in avoiding distortions of competition in the Single Market and helping investments by Member States to remedy identified market failures.[28] In a 2012 Communication on European industry,[29] it explained the importance of coordinating EU policies in areas contributing to the EU 2020 objectives including in competition policy, and recommended that Member States should provide support at the local, regional and national levels to facilitate industry's access to capital in compliance with State aid rules.[30] In a 2014 Communication on European industrial policy,[31] the Commission underlined the importance of a strong industrial base for the recovery and competitiveness of the European Union. It welcomed the integration of industrial policy in other European policies. Regarding State aid policy, it noted the modernization of State aid rules especially the research, development and innovation (RDI) Framework.[32]

In a 2020 Communication on industrial policy,[33] the Commission stated that the competitiveness of European industry requires competition at home and at the global level meaning that Member States should not support uncompetitive domestic industries. It highlighted the importance of an independent European competition policy and indicated that it would review competition

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26 Stuart and Roginska-Green, location 496.

27 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An Integrated Industrial Policy for the Globalization Era – Putting Competitiveness and Sustainability at Centre Stage*, COM(2010) 0614 final, pp. 34, (hereafter the "2010 Industrial Policy Communication")

28 2010 Industrial Policy Communication, pp. 9–10.

29 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Stronger European Industry for Growth and Economic Recovery* – Industrial Policy Communication update, COM(2012) 582 final, Brussels, 10 October 2012, pp. 33 (hereafter the "2012 Industrial Policy Communication").

30 2012 Industrial Policy Communication, pp. 24–28.

31 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *For a European Industrial Renaissance*, COM(2014) 14 final, Brussels, 22 January 2014, pp. 25 (hereafter the "2014 Industrial Policy Communication").

32 2014 Industrial Policy Communication, p. 10.

33 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A New Industrial Strategy for Europe*, COM(2020) 102 final, 10 March 2020, pp. 17 (hereafter the "2020 Industrial Policy Communication").

rules including State aid rules by 2021 with a focus on those applicable to energy and environment aid.[34] This announcement was followed by a public consultation held in August 2021.[35]

In the field of investment, it underlined the possibility of using important projects of common European interest (IPCEI)[36] to combine private and public investments and announced that State aid rules applicable to IPCEI would also be revised by 2021.[37] IPCEIs are eligible under European primary law for an exemption under State aid rules by the Commission.[38] The Commission introduced new IPCEI guidelines in 2014 applicable to all types of activities and sectors.[39] In a nutshell, an IPCEI would be cleared under State aid rules if it clearly contributes to one or more objectives of the European Union, such as those defined in the EU 2020 Strategy, the Digital Agenda for Europe[40] or linked to the European industrial policy.[41]

In addition, it should involve more than one Member State and generate clearly defined benefits to a wide part of the European Union – not just to the financing Member States – and it should not be limited to a single undertaking or sector. The IPCEI must also be financed by the beneficiary. The Commission further provides positive indicators in its assessment of the

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34 2020 Industrial Policy Communication, pp. 3–6.

35 European Commission, DG Comp, Public Consultation on the revised Climate, Energy and Environmental Aid Guidelines (CEEAG), https://ec.europa.eu/competition-policy/public-consultations/2021-ceeag_en, last accessed 15 October 2021.

36 Communication from the Commission on Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ C 188, 20.06.2014, p. 4.

37 2020 Industrial Policy Communication, p. 12.

38 Article 107(3)(b) TFEU.

39 Communication from the Commission – Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ C 188, 20.06.2014, pp. 4–12 (hereafter the "IPCEI Communication"). The Commission had already outlined the conditions to secure an exemption for an IPCEI in the R&D&I Framework (European Commission, Community framework for Research Development and Innovation, OJ C 323, 30.12.2006, p. 1) and in the 2008 Environmental Guidelines (European Commission, Community guidelines on State aid for environmental protection, OJ C 82, 1. 04.2008, p. 1).

40 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A Digital Agenda for Europe", COM(2010) 245 final, 26.08.2010.

41 IPCEI Communication, § 15. See in particular the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "An Integrated Industrial Policy for the Globalisation Era – Putting Competitiveness and Sustainability as the Centre Stage", COM(2010) 614 final, 28.10.2012.

project, such as the possibility for other Member States to join the project or the involvement of entities of the European Union regarding its design, implementation and governance.[42]

The 2018 microelectronics project is one on-going example of IPCEI. It involves four Member States and 29 undertakings conducting research on various aspects of electronic chips, including energy efficient chips, smart sensors and semiconductors, etc.[43] Another project on innovative and sustainable lithium-ion batteries includes seven Member States, 17 undertakings and multiple partners.[44]

Another example of the use of State aid to pursue pan-European industrial policy goals is the 2014 Guidelines on State aid for environmental protection and energy.[45] They constitute the third set of guidelines[46] in this respect and apply to State aid granted for environmental protection or energy objectives based on a horizontal approach to all sectors. This guidance covers aid for a variety of purposes including early adaptation or going beyond Union standards, environmental studies, the remediation of contaminated sites, and the generation of renewable energy or energy infrastructure. Aid amounts exceeding 15 or 50 million euros, depending on the type of aid, are subject to the notification requirement. The Commission further imposes transparency requirements upon implementation of the aid declared compatible.[47]

By explaining the conditions under which aid measures that facilitate the development of certain economic activities are exempt,[48] the 2014

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42 IPCEI Communication, § 16–20.

43 European Commission press release: State Aid: Commission approves plan by France, Germany, Italy and the UK to give €1.75 billion public support to joint research and innovation project in microelectronics, IP/18/6862; Brussels, 18 December 2018.

44 European Commission press release, State aid: Commission approves €3.2 billion public support by seven Member States for a pan-European research and innovation project in all segments of the battery value chain, IP/19/6705, Brussels, 9 December 2019.

45 European Commission, Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, pp. 1–55, as amended by Corrigendum to Communication from the Commission – Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 290, 10.8.2016, p. 11, hereafter the "2014 Environmental Guidelines".

46 European Commission, Community Guidelines on State aid for environmental protection, OJ C 82; 01.04.2008, pp. 1–33; European Commission, Community Guidelines on State aid for environmental protection, OJ C 37, 03.02.2001, pp. 3–15.

47 2014 Environmental Guidelines, § 13, 18, 20 and 107.

48 The 2014 Environmental Guidelines rely on the exemption available under Article 107(3)(c) TFEU regarding "aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest".

Environmental Guidelines align the Commission's State aid policy with the environmental and energy objectives of the Europe 2020 Strategy.[49] The Commission also emphasized the link with the principles implemented in the framework of the State Aid Modernisation programme, and in particular with the objective of directing public spending via State aid towards objectives of common interest.[50] The 2014 Environmental Guidelines (initially due to expire in 2020) were part of a set of guidelines extended during the COVID-19 crisis to give the Commission the opportunity to later conduct a proper renewal process, including consultations to revamp the guidelines and incorporate the objectives of the European Green Deal.[51]

As stated by Commissioner Vestager, State aid rules will contribute to the transformation towards a greener and more digital European economy by helping fund this strategy efficiently.[52] Firstly, State aid enforcement should ensure that public investment does not crowd out private investment, but instead helps Member States remove obstacles to private investment. Secondly, State aid rules will support pooling of financial resources of several Member States to contribute to important projects of common European interest. Thirdly, State aid enforcement will always protect intra-European competition, which is the main driver for innovation. Based on these principles, the Commission is due to propose to amend several sets of guidelines accordingly, including the 2014 Environmental Guidelines.[53]

However, despite those elements pointing to an undeniable convergence between EU industrial policy objectives and State aid rules, it is not clear whether these initiatives suffice to consider the existence of a single European industrial policy, and if so, whether State aid policy has made significant contributions to its emergence.

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[49] 2014 Environmental Guidelines, § 3. These guidelines illustrate the point made by scholars arguing that State aid rules have been used to promote industrial policy objectives outlined in the Europe 2020 Strategy. See in this respect, Jansen, "The interplay between industrial policy and state aid", p. 596.

[50] 2014 Environmental Guidelines, § 12.

[51] The 2014 Environment Guidelines were extended up to 31 December 2021, pursuant to the Communication from the Commission regarding prolonging certain guidelines OJ C 224, 8.7.2020, pp. 2–4.

[52] Commissioner Vestager, Speech: State aid and a green, digital future, conference of Europe Ministers of the German Länder, Brussels, 30 January 2020.

[53] See the above-mentioned public consultations held by DG Comp.

THE EVOLUTION OF EU STATE AID CONTROL AND ITS RELEVANCE FOR INDUSTRIAL POLICY

The second part of this chapter analyses whether the evolution of the application of State aid rules by the European Commission and the European Court of Justice (hereafter the Court of Justice) mirrors industrial policy trends.

Construction of the Single Market and the Development of State Aid Rules: From the ECSC to the European Communities

Following the 1950 Schuman Declaration[54] calling for common French and German supervision of the production of coal and steel, the European Coal and Steel Community (ECSC) was created.[55] The ECSC Treaty entrusted supranational institutions[56] with significant competences in order to implement a common industrial and commercial policy in the strategic sectors of coal and steel. The goals of the ECSC were in particular to ensure regular supplies to the common market; guarantee equal access to sources of production for all users of the common market under comparable conditions; encourage enterprises to develop and improve their production potential; and promote the steady expansion and modernization of production.[57]

To achieve these goals, the ECSC High Authority (which would become later the European Commission) was granted powers of an indirect nature oriented towards the enhancement of cooperation between Member States to stabilize and improve the production and the implementation of mechanisms to regulate prices and quantities exchanged in steel and coal.[58] However, it also enjoyed the powers to directly intervene to limit production in case of a crisis, particularly featuring a decline in demand,[59] set maximum and minimum rates for customs duties, supervise the granting of import and export licences, and

[54] Declaration by Robert Schuman, 9 May 1950, available at https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en, last accessed 1 July 2020.

[55] Treaty establishing the European Coal and Steel Community (ECSC Treaty) signed in Paris on 18 April 1951, entered into force on 23 July 1952 and expired on 23 July 2002, accessible at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:xy0022, last accessed 1 July 2020.

[56] At the head of this supranational structure, the ECSC Treaty created several institutions including the High Authority, that would later become the European Commission, the Assembly (i.e., the future European Parliament), the Special Council of Ministers and the Court of Justice.

[57] Article 3 of the ECSC Treaty.

[58] Article 57 of the ECSC Treaty.

[59] Article 58 of the ECSC Treaty.

to grant financial aid to modernize or offset the possible negative effects of technological advances. The ECSC's budget was funded by a levy on the production of coal and steel, at a rate (less than 1 per cent) fixed by the High Authority and directly collected by it from undertakings active in these sectors,[60] as well as through loans.

Regarding competition policy, the ECSC Treaty dealt with three types of distortions: agreements, concentrations and abuses of dominant positions. The High Authority could cancel agreements or associations between undertakings that directly or indirectly prevented, restricted or distorted normal competition. The ECSC Treaty also provided for State aid control aimed at limiting the intervention of Member States by setting conditions regarding the amount, the conditions and the duration of the aid[61] and sometimes allowing for a transitory phasing out period.[62] However, in this area, it could only issue recommendations to Member States.

Unfortunately, the ECSC model could not be extended to other sectors of the European economy to set the basis of a common EU industrial policy. The Treaty of Rome constituted a missed opportunity in this respect, although it confirmed EU competences as regards State aid. Regarding industrial policy, the 1956 Spaak report did not favour a common general approach but advocated for convergence in certain aspects of transport and agriculture policies. However, the annex of the report, which contained a summary of the proposal constituting the basis for negotiations of the future Treaty of Rome, included indications of a willingness to entrust the Commission with extended powers as regards State aid control in general.[63] The prohibition of all financial assistance by states, whatever the form, was foreseen if it "distorts competition and the distribution of economic activities by favouring certain enterprises or certain types of production".[64] The only exceptions allowed were aid to individual consumers or to "disinterested institutions" such as schools and

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[60] Article 49 of the Treaty establishing the European Coal and Steel Community (ECSC), signed in Paris on 18 April 1951. See also High Authority Decision No. 2-52 ECSC of 23 December 1952 determining the mode of assessment and collection of the levies provided for in Articles 49 and 50 of the Treaty and High Authority Decision No. 3-52 ECSC of 23 December 1952 on the amount of and methods for applying the levies provided for in Articles 49 and 50 of the Treaty, available at www.cvce.eu.

[61] Article 4(c), 67 and 95(1) of the ECSC Treaty regarding state aid control.

[62] See the General Report of the High Authority, 10 August 1952 to 12 April 1953, p. 15, available at https://op.europa.eu/s/obPk, last accessed 1 July 2020.

[63] See the Intergovernmental Committee on European Integration, *The Brussels Report on the General Common Market* (the "Spaak Report"), 21 April 1956, p. 15, available at http://aei.pitt.edu/995/1/Spaak_report.pdf, last accessed 16 July 2020.

[64] See p. 13 of the Spaak Report.

hospitals as part of the implementation of a social policy or subsidies to help develop certain regions.[65]

It appears that two sets of considerations determined the design of State aid provisions in the Treaty of Rome: on the one hand, the control of state support to businesses was seen as a necessary addition to antitrust rules and on the other, it could limit negative spillover effects in the newly created common market resulting from interventions by Member States with deeper pockets.[66] European State aid policy can be considered more as an illustration of the lack of a common EU industrial policy than an instrument serving it, which could also explain why the former has been used as an imperfect substitute for the latter.

The Early Cases: Legitimating Supranational State Aid Control and Expanding Its Boundaries to Indirect Subsidies

The European Commission enforced State aid rules in a rather constrained way between the 1950s and the mid-1970s: fewer than ten decisions to block proposed State support measures were adopted before 1975.[67] During this period, the Commission rather directed its limited efforts towards the achievement of the internal market and applied State aid rules to investigate cases regarding subsidized exports to other Member States.[68]

Moreover, the decisional practices of the European Commission (and the High Authority) and the case law of the Court of Justice laid down important elements of State aid enforcement. In the *Gezamlijke Steenkolenmijnen* case, the Court of Justice ruled that under the ECSC Treaty, aid is a broader concept than subsidies as it not only includes positive benefits, such as subsidies consisting in payments in cash or in kind outside a commercial relationship, but also measures taking other forms and mitigating the charges that are in principle included in the budget of an undertaking and which display similar character and effects to subsidies.[69] In *Costa v. Enel*, the Court recognized

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65 See p. 13 of the Spaak Report.

66 Stuart and Roginska-Green, location 3355.

67 See the State aid register overview regarding the 1969-1994 period, available at https://ec.europa.eu/competition/state_aid/register/state_aid_negative_decisions_1969-1994_en.pdf, last accessed 15 June 2020.

68 Judgment of 17 September 1980 in case *Philip Morris Holland BV v. Commission of the European Communities*, C730/79, EU:C:1980:160, § 10–12.

69 Judgment of 23 February 1961 in case *De Gezamenlijke Steenkolenmijnen in Limburg v. ECSC High Authority,* C-30/59, EU:C:1961:2, p. 19. The concept of State resources was dealt with by the Court in case *Steinike & Weinlig* in which the Court ruled that aid could be granted directly by the State or public or private bodies established or appointed by the State to administer the aid. Judgment of 22 March 1977 in

the precedence of Community law over the laws of Member States and clarified the concept of "new aid" subject to the notification requirement to the Commission "in sufficient time" to allow a review of it and of existing aid that is kept under constant review. It also clarified that the State aid provisions of the Treaty do not create rights for individuals (save for lodging an action for failure by the State or the Commission to act).[70] In *Commission v. Germany*, the Court clarified the consequence of a Commission decision finding an instance of aid incompatible with the Treaty, as well as the level of details required for its implementation by the Member State.[71] In the *French exports* case, the Court laid down early indications regarding the application of the selectivity criteria for aid under the Treaty as it ruled sufficient that a measure applies to all national products for exports.[72]

The *Italian textile case* constitutes, among the early cases, an excellent illustration of the interplay between State aid and industrial policy. It started when the Commission issued a negative decision concerning a temporary reduction in the rate of the social charges applied to family allowances granted in the textile industry in Italy.[73] The Italian government challenged this decision before the Court of Justice.[74] In line with previous cases,[75] the Court took the view that the social aim or the fiscal nature of the measure did not prevent it from qualifying under the Treaty as State aid based on its effects. The Court noted that the reduction of social charges was only applicable to undertakings active in the textile sector while those financial charges arose from the normal application of the general social security system and that Italy had not provided any justification for this exemption based on the nature or general

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case *Steinike & Weinlig v. Federal Republic of Germany*, C-78/76, EU:C:1977:52, § 21–22.

70 Judgment of 17 July 1964 in *Costa v. Enel*, C-6/64, EU:C:1964:34, p. 594-596.

71 Judgment of 12 July 1973 in case *Commission v. Germany*, C-70/72, EU:C:1973:87.

72 Judgment of 10 December 1969 in case *Commission of the European Communities v. French Republic*, joined cases 6 and 11/69, EU:C:1969:68, § 20-21.

73 Commission decision 73/274 of 25 July 1973, Restructuring, reorganization and conversion of the textile industry – Italy, OJ L 254 of 11/09/1973, p. 14.

74 Judgment of 2 July 1974 in *Italy v. Commission* (*Italian textile)*, case C-173/73, EU:C:1974:71. In addition to procedural grounds, the Italian government argued firstly that the exercise of State aid control by the Commission encroached upon the reserved area of taxation; secondly, that the support measure displayed a social nature and was thus excluded from the scope of State aid control; thirdly, the measure would have in fact been compensating a disadvantage incurred by the Italian textile industry compared to those in other Member States; fourthly, the measure would not affect trade between Member States or distort competition in the common market.

75 Case *De Gezamenlijke Steenkolenmijnen in Limburg v. ECSC High Authority,* C-30/59.

scheme of the social security system.[76] With regard to the compensation of a disadvantage, the Court explained that the competitive position in place within the common market before the implementation of the measure had to be considered.[77] It further explained that the Treaty contained provisions to deal with distortions between Member States originating from tax and social security systems and considering sectoral structural issues. The Court decided that the modification of "a particular factor of the cost of production in a given sector of the economy of a Member State may have the effect of disturbing the existing equilibrium".[78] The Court noted that labour costs were already relatively low in the Italian textile sector compared to those of other Member States and it acknowledged that the reduction of social charges would further decrease labour costs in that sector. Since there is indeed competition between Italy and other Member States in the textile sector, the Court took the view that the reduction of social charges would affect intra-European trade.[79]

From a European industrial policy point of view, this period is interesting because the High Authority/European Commission applied State aid rules to production in steel and coal sectors, over which the Community also had full power to implement market integration. For example, the Commission had expressed concerns in the 1960s regarding the change in energy patterns showing that the share of hard coal in the total supply of primary energy in the community was contracting and other sources of energy, such as oil and natural gas, were taking over.[80] The Commission was concerned that differences in national energy policies and their impact on costs in the national economies, especially in basic industries, could endanger the functioning of the common market.[81]

State Aid Control, Economic Turmoil, and the Road to Maastricht (1980s–1990s)

In the 1980s, the Commission emphasized the need for Member States to comply with State aid rules at all stages and in a number of ways: underlining the importance of submitting notification of draft aid measures before their

76 Case *Italy v. Commission*, § 13 and 15.
77 Case *Italy v. Commission*, § 17.
78 Ibid.
79 Case *Italy v. Commission*, § 18–19.
80 Eighth General Report on the activities of the Community, 1 February 1959 – 31 January 1961, p. 70ff., available at https://op.europa.eu/s/obPn, last accessed 1 July 2020.
81 Ibid., pp. 93–94.

implementation, increasing the rate of formal investigation procedures,[82] and initiating for the first time, and with the support of the Court of Justice, procedures to achieve recovery of aid granted illegally.[83] Directive 80/723/EEC[84] was adopted in 1980 in order to provide greater transparency regarding the means used by states to finance public undertakings. Statistics show that during the 1980s there was a threefold increase in the number of notified measures.[85]

The importance of State aid rules for the completion of the internal market was further underlined during the preparatory steps leading to the adoption of the 1986 Single European Act. The Commission allocated more resources to State aid policy by creating a dedicated task force that was entrusted with the analysis of all State aid likely to impede the construction of the internal market. The task force also provided macro-economic data in its 1988 report showing the significance of State aid in the expenditures of European Member States, especially in the manufacturing sector.[86]

In addition, the Commission acknowledged that the evolution of European law would make State aid one of the remaining available options for Member States to implement measures to shield domestic sectors or undertakings. This led the Commission to increase its review of existing aid schemes and to reflect on new methods to analyse important categories of aid, such as investment aid, restructuring aid and aid to exports in third-countries.

At the same time, the Commission developed a sectoral focus on the motor vehicle industry, considered in many Member States a strategic industry for the economy and so a recipient of significant amounts of aid. Therefore, by 1989, the Commission had adopted a specific European framework ensuring transparency of aid granted in the sector and applying a harmonized approach based on more stringent requirements applicable to all Member States in order to limit the negative effects of a subsidy race on the single market. The implementation of the framework constituted an opportunity for the Commission to overcome diverging views of Member States who either considered this initiative to err too much on the side of industrial policy or that such a framework would only be acceptable if it took place within a common industrial policy

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82 Stuart and Roginska-Green, location 5371.

83 Stuart and Roginska-Green, location 5382. See also European Commission decision no. 82/312/EEC, Aid to an industrial and commercial group manufacturing wall coverings – Belgium, 10 March 1982, OJ L 138, 19 May 1982.

84 Directive No. 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, OJ L 195 of 29 July 1980, pp. 35–37.

85 Stuart and Roginska-Green, location 5500.

86 Stuart and Roginska-Green, locations 5419, 5422, 5431.

applicable to the whole motor vehicle sector. The neighbouring sector of steel production was also subject to specific sectoral State aid rules designed by the Commission.[87]

With regard to the case law on State aid, the Court of Justice further developed the analysis of State aid as favouring an undertaking active in intra-European trade but also competing at the international level. The Court ruled that if aid makes an undertaking better off than other intra-European competitors, it meets the condition of affecting intra-European trade. The Court also confirmed that the Commission enjoyed a certain level of discretion in applying exemptions available under Article 92(3) EEC (currently Article 107(3) TFEU) including assessments based on social and economic considerations and that the compatibility assessment must indeed be determined in the context of the Community and not of a single Member State.[88] In other cases, the Court confirmed that State aid could be identified even in a situation where the state does not intervene directly but appoints a private body[89] and that the form of the aid is not relevant.[90] The Commission and Court of Justice also established that if a Member State behaves on the market in the same way as a private investor evolving in a market economy, this excludes the qualification of State aid.[91] Despite controversy surrounding this market economy investor principle (MEIP),[92] the Commission continues to apply it today.

A very interesting case was that of *Maribel*. Belgium had set up a general scheme in the early 1980s, under which undertakings in certain sectors could benefit from social security contribution reductions for manual workers.[93] Later versions of this scheme included further significant reductions of social

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[87] Stuart and Roginska-Green, locations 5442, 5451, 5460, 5479, 5490.

[88] ECJ, judgment of 17 September 1980, § 11, 24 and 26.

[89] See in particular the judgment of 30 January 1985, *Commission v. French Republic*, EU:C:1985:37, §14.

[90] Judgment of 14 November 1984, *Intermills v. Commission*, C-323/82, EU:C:1984:345, § 31.

[91] Commission communication on Government Capital Injections, Bulletin EC 9-1984. See also ECJ, judgment of 10 July 1986, *Belgium v. Commission*, C-234/84, EU:C:1986:302, § 14 and Ben Slocock, "The market economy investor principle", *Competition Policy Newsletter*, 2002, pp. 23ff.

[92] P. Anestis and S. Mavroghenis, "The market investor test", in M. S. Rydelski (ed.), *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade*, London: Cameron May, 2006; M. Cyndecka, "The applicability and application of the market economy investor principle: Lessons learnt from the financial crisis", *European State Aid Law Quarterly*, 16.4 (2017), 512–526; M. Cyndecka, "The applicability and application of the market economy investor principle", *European State Aid Law Quarterly*, 15.3 (2016), 381–399.

[93] European Commission press release: State aid – Belgium: the Maribel case, IP/96/269, 27 March 1996.

contributions especially for undertakings active in sectors "exposed to international competition". The Commission issued a negative decision finding that they constitute aid schemes incompatible with the internal market.[94]

The Belgian government appealed the decision before the Court of Justice on the grounds that the schemes did not embed State aid but constituted general measures of economic policy and that they had no effect on intra-European trade. The Court of Justice[95] excluded the justification put forward by Belgium as to the social objective of the measure and its general character[96] and rather focused on their effects, which it understood were that the Belgian schemes actually relieved the beneficiary undertaking from certain costs, thereby putting them in a more competitive position. The Court decided that the schemes were selective since certain sectors in which manual workers were employed were excluded.[97] The Court drew from the findings in the *Italian textile*[98] case regarding the existence of State aid where there was a reduction of financial charges deriving from the normal application of the general social security system without any justification for this exemption on the basis of the nature or general scheme of the system, and assessed that such a justification was not present. As to the impact on intra-European trade, the Court found that it was likely to be affected since the Belgian schemes aimed to benefit undertakings active in sectors exposed to international competition and referenced export markets in relation to undertakings established in other Member States.[99] Finally, based on the finding of the existence of aid schemes, the Court confirmed the order of recovery of aid granted under those schemes.[100]

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[94] European Commission decision 97/239/EC of 4 December 1996 concerning the aid granted by Belgium under the Maribel bis/ter scheme, OJ 1997 L95, p. 25.

[95] Judgment of the Court of Justice of 17 June 1999 in case *Kingdom of Belgium v. European Commission* (*Maribel bis/ter*), C-75/97, EU:C:1999:311.

[96] The Court noted that Belgium relied on previous publicly available positions of the European Commission to support its argument regarding the qualification of the schemes as general measures, i.e., applying to all undertakings in an objectively similar situation and to exclude the qualification of aid to measures automatically applicable and without discrimination in favour of certain categories of workers (Case C-75/97, § 15 and § 17). Those positions were expressed in the 24th Report on Competition Policy of 1994 and in the Communication 97/C1/05 on the monitoring of State aid and reduction of labour costs, OJ 1997 C1, p. 10.

[97] Case C-75/97, § 24, 25, 29–31.

[98] Case *Italian textile*, § 33.

[99] Case C-75/97, § 34, 39, 47–51.

[100] Case C-75/97, § 91–92.

After Maastricht: Global Legitimization of State Aid Control and Further Constraints on States' Intervention in the Economy (Public Interest Undertaking and Taxation)

State aid control as a globally recognized economic and trade policy instrument against State intervention

The 1990s also saw an expansion of the scope of European State aid control, firstly to EFTA countries[101] and secondly to new Member States (including during the accession period). From an international point of view, the conclusion of the Subsidies and Countervailing Measures Agreement (SMCA) in 1994[102] at the World Trade Organization reinforced the legitimacy of State aid control in the EU.

During this period, State aid rules both on procedure and substance evolved significantly, through legislation as well as case law.[103] Following lengthy negotiations between the Council and the Commission, a procedural regulation no. 659/1999[104] and a regulation enabling the Commission to adopt block exemption regulations[105] reinforced the rule-making capacity and authority of the Commission in the domain of State aid control. The Commission also continued to regulate certain types of aid via soft law instruments[106] under the supervision of the Court of Justice.[107] This wave of soft law instruments also reflected a more favourable approach on the part of the Commission regarding aid measures displaying a horizontal character[108] and therefore a less sector-specific focus, as the tightened conditions tied to the granting of aid to

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[101] Agreement on the European Economic Area, OJ L 1, 3.1.1994, pp. 3–522.

[102] Agreement on Subsidies and Countervailing Measures, signed in Marrakesh on 15 April 1994, in force since 1 January 2005, OJ L 336 of 23.12.1994, p. 156.

[103] Judgment of 17 March 1993, Sloman Neptune, joined cases C-72/91 and C-73/91, EU:C:1993:97. The scope of the notion of State aid also increased under the impulse of the Court of Justice which ruled, in the Sloman Neptune case, that any measure that is attributable to the state that grants an economic advantage to a specific undertaking qualifies as State aid whether there is a transfer of State resources or not.

[104] Council Regulation No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83 of 27 March 1999, pp. 1–9.

[105] 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, OJ L 142, 14.5.1998, pp. 1–4.

[106] See in particular European Commission Guidelines on aid to employment, OJ C 334 of 12 December 1995, p. 4; Guidelines on State aid to SMEs, OJ C 213 of 23 July 1996, pp. 4–9; Community Framework on Training Aid, OJ C 343 of 11 November 1998, pp. 10–16; Guidelines on National Regional Aid, OJ C 74 of 10 March 1998, pp. 9–31.

[107] Judgment of 24 March 1993, *CIRFS v. Commission*, C-313/90, EU:C:1993:111.

[108] Stuart and Roginska-Green, location 5739.

the shipbuilding sector[109] show. However, certain sectors, such as the motor vehicle sector, continued to receive specific attention due to their strategic role in the European economy and its competitiveness against international players.[110]

In addition, based on an analysis of the nature of the majority of notified measures that received approval, the Commission adopted the first *de minimis* notice applicable to SMEs[111] and later extended it to all undertakings,[112] clarifying thresholds below which it considered that a measure would not qualify as State aid. Despite the diverging view of the Court of Justice on this issue,[113] the underlying ideas were that aid measures involving limited amounts were less likely to produce an appreciable effect on trade between Member States and that such an exemption would free up the Commission's resources to deal with more important cases.

As to the relationship between State aid rules and industrial policy during this period, the Commission considered State aid policy to contribute to the competitiveness of the European Union at the global level and to the achievement of the single market.[114] In its newly adopted rescue and restructuring guidelines, the Commission indicated that State aid rules support structural adjustments of the European economy by applying strict enforcement to prevent the granting of public support to undertakings that would not be viable in the long term and in light of community interest.[115] Furthermore, in its 1996 R&D guidelines,[116] the Commission clearly stated that competition rules should contribute to the industrial policy objectives contained in Article 130 of the EC Treaty.

Following a review of national tax policy throughout the European Union, the Commission explained in the Monti Package[117] and it its 1997 Notice on

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[109] Council Regulation No. 1540/98/EC of 29 June 1998 establishing new rules on aid to shipbuilding, OJ L 202 of 18 July 1998, pp. 1–10.

[110] European Commission, Community Framework for State aid to the motor vehicle industry, OJ C 279 of 15 September 1997, p. 1.

[111] European Commission, Community Guidelines on State aid for small and medium-sized enterprises (SMEs), OJ C 213 of 19 August 1992, p. 2.

[112] Commission Notice on the de minimis rule for State aid, OJ C 68, 6.3.1996, p. 9.

[113] See in particular the judgment of 11 November 1987, *French Republic v. Commission*, C-259/85, § 24.

[114] Stuart and Roginska-Green, location 5667.

[115] European Commission, Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 288 of 9 October 1999, pp. 2–18.

[116] European Commission, Community Framework for State aid for Research and Development, OJ C 45 of 17 February 1996, p. 516.

[117] Communication from the Commission to the Council: Towards Tax Coordination in the European Union – A Package to Tackle Harmful Tax Competition in the European Union, COM (97) 495 (1997), hereinafter the "1997 Monti Package Communication").

direct business taxation,[118] that it had initiated a policy against harmful tax competition including the use of State aid rules to eliminate State aid taking the form of tax base reduction, tax reduction or any delay in the payment of taxes.[119] The Commission also issued a code of conduct for business taxation to which Member States pledged compliance through the adoption of a Council resolution that they would stop using certain tax measures flagged in the code as constituting harmful taxation (some of which were also considered State aid).[120]

Later on, the Commission launched the 2005 State Aid Action Plan (SAAP) designed to implement the principles of a reduction of the overall amount of State aid and a more horizontal approach to promote objectives of common European interest (e.g., environmental protection, R&D promotion, regional development, etc.), coupled with enhanced transparency regarding the granting of State aid by Member States.[121] The Commission also implemented a new set of reforms under the 2012 State Aid Modernisation (SAM) programme.[122] Under both the SAAP and SAM, the Commission revamped most of the rules supporting State aid enforcement to make more efficient use of its internal resources and to contribute to the objectives defined by the European Union at the time (e.g., in the EU Lisbon Strategy[123] and the EU 2020 Strategy[124]).

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[118] Commission notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384 of 10 December 1998, p. 3.

[119] 1997 Notice on business taxation, § 9.

[120] Conclusions of the ECOFIN Council Meeting of 1 December 1997 Concerning Taxation Policy – Resolution of the Council and the Representatives of the Governments of the Member States, Meeting within the Council of 1 December 1997 on a Code of Conduct for Business Taxation – Taxation of Saving, OJ C 2 of 6 January 1998, pp. 1–6.

[121] European Commission, State aid action plan: Less and better targeted State aid: a roadmap for State aid reform 2005–2009, COM (2005) 107 final, Brussels, 7 June 2005.

[122] European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU State aid Modernisation, COM/2012/0209 final, 8 May 2012.

[123] See the conclusions of the Lisbon European Council of 23 and 24 March 2000, available at https://www.europarl.europa.eu/summits/lis1_en.htm, last accessed 1 July 2020.

[124] European Commission, Europe 2020: Commission proposes new economic strategy in Europe, Press release, IP/10/225, Brussels, 3 March 2010.

Refining the balance between State aid control and the setting of public policy objectives

The *Altmark* case, concerning financial support granted to an undertaking to compensate for the loss of operating a local public transport service,[125] proved to be the opportunity for the Court of Justice to "reconcile the Member States' interest in using certain undertakings as an instrument of economic, fiscal or social policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market".[126] More specifically, the Court established that, although the local character of the services did not preclude the application of State aid rules,[127] there was no real financial advantage for an undertaking discharging public service obligations if the associated compensation did not put it in a better position compared to its competitors.[128] It laid down more precise criteria to ensure that financial support to undertakings discharging public service missions did not lead to disguised subsidies. The principles established by the Court in *Altmark* were later included in 2005[129] and 2012[130] guidance documents issued by the European Commission to further clarify the exemption.

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[125] Judgment of 24 July 2003, Altmark Trans GmbH Regierungspräsidium Magdeburg & Nahverkehrsgesellschaft Altmark GmbH, C-280/00, EU:C:2003:415.

[126] Opinion of 19 March 2002 of AG Léger in *Altmark*, C-280/200, EU:C:2002:188, § 80 and cited case law.

[127] See the previous judgment of 7 February 1985, *Procureur de la République v. ADBHU*, C-240/83, EU:C:1984:59, § 16–20.

[128] Judgment of 24 July 2003, § 87–93.

[129] Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 312, 29.11.2005, pp. 67–73; Community framework for State aid in the form of public service compensation, OJ C 297, 29.11.2005, pp. 4–7.

[130] 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, OJ C8, 11.01.2012, pp. 4–14; Commission Decision of 20 December 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, OJ L7, 11.01.2012, pp. 3–10; Communication from the Commission, European Union framework for State aid in the form of public service compensation (2011), OJ C8, 11.01.2012, pp. 15–22; Commission Regulation 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, OJ L 114 of 26.4.2012, p. 8, as extended by Commission Regulation (EU) 2018/1923 of 7 December 2018 amending Regulation (EU) No 360/2012 as regards its period of application, OJ L 313 of 10.12.2018, pp. 2–3.

State aid rules, harmful tax competition and the digital economy

Although the relationship between taxation and the enforcement of State aid rules is complex and goes beyond the scope of this chapter,[131] it is worth pointing out that the EU Commission has devoted specific attention to tax subsidies over the last few decades. By the 1990s, the Commission had already conducted several inquiries into preferential tax regimes subject to potentially selective conditions, such as the size of the undertaking, the nature of the activity, or the discretionary granting of prior authorization. In the mid-2010s, in the wake of media investigations and domestic public enquiries concerning tax planning strategies of multinational groups of companies – some of them active in the digital sector[132] – the Commission launched another series of investigations regarding administrative decisions adopted by national administrative bodies (tax rulings).[133]

Some authors argue that these procedures were not motivated by the willingness to apply European State aid rules but were driven by policy objectives aiming at harmonizing Member States' tax systems through the backdoor in the name of "fair tax competition".[134] Even if these critiques are perhaps excessive, it is a fact that the removal of regulatory barriers in the internal market over the years, and in particular after Maastricht, has facilitated businesses' locational strategic decisions regarding capital and investment allocation aimed at exploiting differences between domestic tax systems. In that sense, tax competition between States affects competition between undertakings and

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[131] For a detailed overview, see Richelle et al., *State Aid Law and Business Taxation*, as well as Traversa and Sabbadini, *State Aid Policy and Fight against Harmful Tax Competition in the Internal Market*, pp. 107–155.

[132] Speech of director general of DG COMP, Mr Johannes Laitenberger, ICF, St. Gallen, 20 May 2016, available at http://ec.europa.eu/competition/speeches/text/sp2016_06_en.pdf, last accessed 28 June 2016. See, for example, the transcripts of the UK Public Account Committee meeting held on 12 November 2012 with representatives of Starbucks, Amazon and Google, available at http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/121112.htm, last accessed 28 June 2021 and the testimony of Apple's CEO during the hearing of the US Permanent Subcommittee on Investigations held on 21 May 2013, available at http://www.hsgac.senate.gov/subcommittees/investigations/hearings/offshore-profit-shifting-and-the-us-tax-code_-part-2, last accessed 28 June 2021.

[133] European Commission Press Release of 11 June 2014, "State aid: Commission investigates transfer pricing arrangements on corporate taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg)", http://europa.eu/rapid/press-release_IP-14-663_en.htm, last accessed 1 July 2020. Antonio Carlos do Santos, *L'Union Européenne et la Régulation de la Concurrence Fiscale*, Brussels: Bruylant, 2009, pp. 432ff.

[134] For a discussion of these arguments, see Traversa and Sabbadini, *State Aid Policy and Fight against Harmful Tax Competition in the Internal Market*, pp. 126–132.

weakens the Single Market.[135] However, applying State aid rules to corporate tax systems can prove difficult and uncertain, as illustrated by the *Ireland/Apple* case,[136] one of many opened by the Commission, which has also targeted Belgium, Cyprus, Luxembourg, Malta, the Netherlands and the United Kingdom.[137]

In August 2016, the Commission concluded that the Apple group had received illegal and incompatible State aid through tax rulings granted to its Irish subsidiaries, and it sought recovery.[138] The position of the European Commission was that Apple had lowered its taxes by artificially channelling sales and profits among various entities of the group with the approval of the Irish tax authorities. The Commission also noted in its decision that recording all its sales in Ireland allowed Apple to circumvent tax rules in the other Member States where it sold its products, although it acknowledged that this fell outside the scope of State aid enforcement.[139]

According to the Commission, the rulings secured by Apple set in advance the percentage of the net profit for the subsidiaries of Apple based in Ireland at a level that was below that applicable under normal Irish tax rules. The Irish tax authorities had considered that since the subsidiaries were managed from the US and incorporated under Irish law, they were not Irish residents and therefore that – by application of standard international tax rules – only the profits attributable to their Irish branches were taxable in Ireland. However, due to a difference in tax legislation, the "Irish" subsidiaries of Apple subject to the ruling were not considered as resident in the US either, with a result

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[135] In 2014, Commissioner Almunià, in charge when the tax rulings investigations began, had already acknowledged that some companies apply aggressive tax planning practices as they move their activities in the EU and exploit gaps in national tax systems by reaching out to certain countries to secure tax rulings and shift their profits there to avoid paying their proper share of taxes. See J. Almunia, "Fighting for the Single Market", Speech/14/119, European Competition Forum, Brussels, 11 February 2014.

[136] European Commission decision of 30 August 2016, State aid implemented by Apple, OJ L/187/2017. See also the European Commission's press release, State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion, IP/16/2923, 30 August 2016.

[137] See the status board on DG Comp's website regarding ongoing cases regarding tax rulings available at http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html, last accessed 15 August 2020. See also P. Sabbadini and J. Luts, "Évaluation institutionnelle des actions de la Commission en matière d'aide d'État contre la concurrence fiscale passive", *Revue des affaires européennes*, 4 (2018), 627–652.

[138] Commission decision 2017/128 of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple (notified under document C(2007) 5605), OJ L/187/2017, p. 1.

[139] European Commission, press release, State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion, IP/16/2923, 30 August 2016.

that most of their profits would be considered "stateless income"[140] and so remain untaxed. The Commission focused on the profit allocation method covered by the rulings and concluded based on the *Belgium and Forum 187 v. Commission*[141] case law that it did not result in a reliable approximation of a market-based outcome in line with the arm's length principle that applies to intra-group transactions and its internationally agreed on interpretation as resulting from OECD practice.[142]

In July 2020, after an action for annulment introduced by Apple subsidiaries and Ireland, the General Court annulled the decision of the Commission considering that it had not proved that all conditions for the existence of State aid were met,[143] in particular that Apple had benefited from a selective advantage under Irish law.[144] At the time of writing, the case is pending before the Court of Justice.[145]

The Return of the State as Investor of Last Resort in Times of Crisis (2008–2021)

The rather strict application of State aid rules by the Commission in "normal" times has been counterbalanced by a much more relaxed approach in times of crisis. This was the case during the 2008–11 financial crisis and more recently, during the COVID-19 pandemic.

State aid during the 2008 financial and economic crisis

To support the financial sector following the economic and financial crisis that started in 2008, the Commission had adopted sector-specific State aid rules based on Article 107(3)(b) that exceptionally apply in cases of a "serious disturbance to the economy".[146] The Commission published several

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[140] E. Kleinbard, "Stateless Income", *Florida Tax Review*, 11 (2011), p. 699.

[141] Judgment of 22 June 2006, *Belgium and Forum 187 v. Commission*, C-182/03 and C-217/03, EU:C:2006:416.

[142] Commission decision 2017/128, § 319 et seq. and § 411. See also the *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, Paris: OECD, 10 August 2010, 408 pp. See also the Model Tax Convention on Income and on Capital (v. 15 July 2014), OECD, 9 ed., 3 March 2016, available at https://dx.doi.org/10.1787/9789264239081-en, last accessed 9 September 2020.

[143] Judgment of 15 July 2020 in Case T-778 and T-892/16, *Apple*, EU:T:2020:338.

[144] Case T-778 and T-892/16, *Apple*, § 165, 187, 200, 229, 245, 249, 312, 478, 505–506.

[145] The appeal was brought on 25 September 2020 (Case C-465/20 P).

[146] The European Commission had also adopted a Communication regarding the conditions under which European businesses in difficulty in all sectors (save for fisheries and agriculture) could receive State aid during the crisis. See the consolidated

"crisis Communications"[147] in 2008–2009 containing the detailed rules tied to the support and restructuring of credit institutions. These rules were updated in 2010 based on the evolution of the risk profile of beneficiaries and partly phased out by the end of 2011[148] until the adoption of the Banking Communication in 2013 which introduced new rules.[149] The Commission's objective was to avoid negative spillover effects to the whole banking system that would prevent it from continuing to play its role of lending to the real economy, as well as other sectors.[150] In addition, the Commission sought to restructure the banking sector by ensuring long-term viability of banks and reducing distortions of competition between banks. To do so, it set general principles regarding the commercial policy of the beneficiaries (e.g., limitation of aggressive behaviours on the market, cap on benefits, etc.) and minimum requirements regarding burden-sharing to be included in the restructuring plans to qualify for state support. Burden-sharing meant that, in addition to limiting the amount of aid to the minimum, the beneficiaries of the aid (the financial institution itself and its capital holders) had to contribute to the cost

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version of the Communication from the Commission – Temporary framework for State aid measures to support access to finance in the current financial and economic crisis, OJ C 83, 7.4.2009, p. 1.

[147] Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ("2008 Banking Communication") (OJ C 270, 25.10.2008, p. 8); Communication on the recapitalization of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition ("Recapitalization Communication") (OJ C 10, 15.1.2009, p. 2); Communication from the Commission on the treatment of impaired assets in the Community financial sector ("Impaired Assets Communication") (OJ C 72, 26.3.2009, p. 1); Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules ("Restructuring Communication") (OJ C 195, 19.8.2009, p. 9); Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis ("2010 Prolongation Communication") (OJ C 329, 7.12.2010, p. 7) and Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis ("2011 Prolongation Communication") (OJ C 356, 6.12.2011, p. 7).

[148] See §2 of the Communication from the Commission 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, OJ C 356, 6.12.2011, p. 7.

[149] 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, OJ C 216, 30.7.2013, pp. 1–15.

[150] See §15 of the Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270, 25.10.2008, pp. 8–14.

of its restructuring. The Commission also aimed to reduce fragmentation of the banking sector across the internal market. It had witnessed a divergence in fiscal capacity across the EU, leading some Member States to impose only minimum burden-sharing requirements under State aid rules, while others facing a weaker fiscal position had required significant contributions from creditors and investors. Therefore, in 2013, the Commission decided to adapt the degree of burden-sharing requirements by stipulating the conversion of several types of debt and participation of certain capital holders before the granting of any State aid.[151] Alongside setting conditions to restructuring where a return to long-term viability was not realistic, the Commission produced guidance on state support provided in the framework of a liquidation process and on winding-up procedures to maintain financial stability by streamlining the exit of players.[152]

Since the beginning of the financial and economic crisis, the Commission adopted more than 300 decisions regarding individual credit institutions or sectoral schemes.[153] In most cases, the Commission did not raise any objections because proposed aid complied with its guidelines.[154]

State aid rules in COVID-19 times

COVID-19 has also impacted the Commission's State aid practice. The national economic support measures adopted by Member States affected undertakings and were therefore subject to Commission State aid scrutiny. In March 2020, in a general Communication[155] outlining steps of a coordinated economic response to address both a supply and demand shock, as well as

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[151] 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 ("Banking Communication"), OJ C 216, 30.7.2013, pp. 1–15.

[152] See § 65 et seq. of the 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, OJ C 216, 30.7.2013, pp. 1–15.

[153] See the overview of decisions adopted during between 2008 and 2018 available at https://ec.europa.eu/competition/recovery/banking_case_list_public_en.pdf, last accessed 10 July 2020.

[154] A notable exception was the decision of the European Commission of 3 July 2014 on State aid SA.33927 (12/C) (ex 11/NN) implemented by Belgium – Guarantee scheme protecting the shares of individual members of financial cooperatives, OJ L 284, 30 September 2014, pp. 53–76 which was subsequently appealed before European courts in judgment of 7 December 2018, *Belgium v. Commission*, T-664/14, EU:T:2018:890; judgment of 21 December 2016, *Paul Vervloet e.a. v. Ministerraad*, C-76/15, EU:C:2016:975; judgment of 9 February 2018, *Arcofin e.a. v. Commission*, T-711/14, EU:T:2018:80.

[155] Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank

liquidity constraints resulting from the COVID-19 outbreak, the Commission identified three scenarios under which domestic support measures could be cleared under State aid rules.[156]

Firstly, Member States may implement measures that do not constitute State aid, either because they are not selective (e.g., universal measures relieving undertakings from otherwise applicable financial burdens such as VAT, social contributions, corporate taxes, etc.) or because they are directly granted to consumers (e.g., reimbursement of plane tickets not covered by airlines' policies). Secondly, Member States may adopt measures constituting State aid that are exempted under current State aid regulations.[157] Thirdly, the national measures taken may be covered under specific treaty provisions, whether to support certain sectors (e.g., transport, tourism, event planning, hospitality, etc.),[158] to address the urgent need for liquidity of undertakings on the verge of bankruptcy[159] or to "remedy a serious disturbance in the economy".[160]

Regarding serious disturbances to the economy, the Commission adopted a temporary framework[161] providing details on the assessment of proposed aid notified by Member States. Under the Temporary Framework, Member States

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and the Eurogroup on Coordinated economic response to the COVID-19 Outbreak, COM(2020) 112 final of 13.3.2020.

156 See the Communication on a Coordinated economic response to the Covid-19 Outbreak, Section 5 on pp. 9–10.

157 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, OJ L 352, 24.12.2013, pp. 1–8. 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, OJ L 187, 26.6.2014, pp. 1–78, amended by Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No. 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No. 702/2014 as regards the calculation of eligible costs, C/2017/4213, OJ L 156, 20.6.2017, pp. 1–18.

158 Article 107(2)(b) of the TFEU.

159 Article 107(3)(c) of the TFEU. See also the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249, 31.07.2014, p. 1.

160 Article 107(3)(b) of the TFEU.

161 European Commission, Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak, C(2020) 1863 final, Brussels, 19 March 2020, OJ C 91I, 20 March 2020, pp. 1–9. This temporary framework was amended five times on 3 April 2020 (OJ C 112I, 4.4.2020, p. 1–9), on 8 May 2020, (OJ C 164, 13.05.2020, pp. 3–5), on 29 June 2020 (OJ C 218, 2.7.2020, pp. 3–8), on 13 October 2020 (OJ C 340I, 13.10.2020, pp. 1–10) and on 1 February 2021. See the informal consolidated version available at https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html, last accessed 07 March 2021 (hereafter the "Temporary Framework").

may grant aid under the form of (i) direct grants, selective tax advantages and advance payments, (ii) state guarantees for loans taken by companies from banks, (iii) subsidized public loans to companies, (iv) safeguards for banks that channel State aid to the real economy and (v) short-term export credit insurance. To secure clearance from the Commission, Member States must meet all the conditions set out in the Temporary Framework and show evidence that the proposed aid is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of the Member State.[162] In addition, the Commission published informal guidance for the air, land and maritime transport sectors to help Member States assess which measures constitute State aid and require notification.[163]

Since March 2020, the Commission has adopted more than 500 decisions allowing State support following the COVID-19 crisis, in particular for the tourism, travel and leisure sectors, transport sector, R&D activities, companies active in export and foreign trade, SMEs, hospitality and catering sectors. For example, on 25 June 2020, to mitigate the effects of several state measures affecting airlines, such as travel bans, the Commission approved Germany's acquisition of various types of shares for a total worth of 6 billion euros of the capital of Lufthansa AG, the mother company of the Lufthansa Group's carriers including German, Swiss, Belgian, Austrian and Italian airlines.[164] In addition, on 22 March 2020, the Commission authorized a guarantee on the part of Germany to secure Lufthansa AG a 3 billion euro loan as individual aid under the German scheme.[165] To support its decision, the Commission clearly acknowledged Lufthansa AG's "major role in the German economy", its "international connectivity" and the significant contribution it makes to foreign trade. The Commission also imposed a set of conditions regarding governance, financial planning, limitation of acquisitions and commitments to maintain effective competition in exchange for the granting of these

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[162] See paragraph 19 of the Temporary Framework.

[163] European Commission, https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html, 2020.

[164] Decision of 25 June 2020 in case COMP SA.57153, *Lufthansa AG* (forthcoming publication in the OJ). See also European Commission, Press release: State aid: Commission approves €6 billion German measure to recapitalize Lufthansa, IP/20/1179, 25 June 2020.

[165] European Commission, Decision SA.56714 (*Kreditanstalt für Wiederaufbau*), 22 March 2020 (forthcoming publication in the OJ).

measures. Several Member States including Austria,[166] Belgium,[167] Cyprus,[168] Denmark,[169] France,[170] Hungary,[171] Latvia,[172] the Netherlands,[173] Portugal[174] and Sweden[175] also provided support to the airline sector and received clearance from the European Commission, which highlighted the importance to national economies of companies active in this sector.

The approach of the Commission has led to criticism from some Member States that the volume of aid cleared under the temporary rules applicable during the period of the COVID-19 crisis reflected the unequal economic strength of Member States within the European Union.[176] Certain authors also take the view that the flexible application by the Commission of State aid rules required to address the consequences of the COVID-19 outbreak on the econ-

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166 Decision of the European Commission in case SA.57539, 6 July 2020 (forthcoming publication in the OJ). See also, European Commission, press release: State aid: Commission approves €150 million Austrian subordinated loan to compensate Austrian Airlines for damages suffered due to coronavirus outbreak, IP/20/1275, 6 July 2020.

167 Decision of 10 June 2020 in case SA.57637, Recapitalization of Aviapartner (forthcoming publication in the OJ).

168 Decision of the European Commission in case SA.57691, *Incentive Scheme towards Airlines for addressing the effects of COVID-19 on the connectivity of Cyprus and the development of the aviation sector*, OJ C 236, 17.7.2020, pp. 1–12.

169 Decision of 15 April 2020 of the European Commission in case SA.56795, Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines, OJ C 220 of 3 July 2020, p. 7.

170 Decision of the European Commission of 20 April 2020 in case SA.57082 (forthcoming publication in the OJ). See European Commission, press release: Commission approves French plans to provide €7 billion in urgent liquidity support to Air France, IP/20/796, 20 April 2020.

171 Decision of the European Commission of 7 July 2020 in case COMP SA.57767, *COVID-19: Scheme to provide payroll related exemptions in the aviation industry*, OJ C 236, 17.7.2020, pp. 1–12.

172 Decision of 3 July 2020 of the European Commission in case COMP SA.56943, COVID-19: Recapitalization of Air Baltic (forthcoming publication in the OJ). See also European Commission, press release: State aid: Commission approves €250 million Latvian measure to recapitalize airBaltic, IP/20/1274, 3 July 2020.

173 Decision of the European Commission of 13 July 2020 in case SA.57116, State loan guarantee and State loan for KLM (forthcoming publication in the OJ).

174 Decision of the European Commission of 10 June 2020 in case SA.57410, COVID – recapitalization of Finnair (forthcoming publication in the OJ). See also, European Commission, press release: State aid: Commission approves €286 million Finnish measure to recapitalize Finnair, IP/20/1032, 10 June 2020.

175 Decision of the European Commission of 24 April 2020 in case SA.57061, Sweden – Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines, OJ C 220 of 3 July 2020, p. 9.

176 See in particular Lena Hornkohl and Jens van ‘t Klooster, “Covid-19 state-aid rules harm poorer member states”, 11 May 2020, available at https://www.socialeurope.eu/covid-19-state-aid-rules-harm-poorer-member-states, last accessed 17 July 2020.

omies of Member States may create distortions of competition and constitute a missed opportunity to impose requirements to contribute to the objectives of the EU Green Deal.[177]

An Unresolved Issue: State Aid Control and the Protection of European Undertakings from Global Competitors

Despite the decade-long practice of the Commission in the area of State aid, and the impressive number of cases and guidelines, it cannot be said that State aid policy has been primarily influenced by industrial policy concerns. This can be seen, for example, in the Commission's refusal in its practice to take into account justification based on the need to shield or protect certain undertakings from third country competitors. A good example is the Commission's approach adopted in two competition cases (one under State aid, the other under merger control) dealing with the same undertaking, active in sectors heavily subject to global competition: Alstom.

The restructuring of Alstom illustrated that it is possible to support a major European player facing international competition in several markets – notably in the US, Canada and Asia – while complying with State aid rules and protecting competition at European level. In 2004, the European Commission cleared a set of measures implemented by France to restructure the French engineering group Alstom active in the design, manufacture and maintenance of products and systems in the power generation, rail transport and shipbuilding sectors.[178] France had explained that Alstom was facing difficulties due to several factors including the post-2001 economic downturn, technical problems with gas turbines purchased from a supplier, declining orders particularly for cruise ships and the insolvency of one of its clients, as well an increase in financing and insurance costs.[179] The Commission analysed in particular whether the

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[177] See in particular C. Maczkovics, "How flexible should State aid control be in times of crisis?", *European State Aid Law Quarterly*, 19.3 (2020), 271–283, available at https://doi.org/10.21552/estal/2020/3/4, last accessed 1 November 2020.

[178] Commission Decision of 7 July 2004 on the aid measures implemented by France for Alstom (notified under document number C(2004) 2532), OJ, L 150, 10 June 2005, p. 24.

[179] A first restructuring plan including some real estate sales and divestments was partially implemented in 2002 under which Siemens acquired its industrial turbines business and Areva purchased most of its transmission and distribution business. France wished to support another broader plan including industrial reorganization of the group and six refinancing measures which were subject to the scrutiny of the European Commission. Under that plan, France would commit to subscribe to an issue of fixed-term subordinated bonds reimbursable with shares reserved for the State for an amount of €300 million. Additional support measures included granting short-term

four conditions were met. These were: (i) the existence of a plan that would restore long-term viability, (ii) the avoidance of distortions of competition, (iii) a limitation of the amount of aid to the minimum and (iv) a full implementation of the restructuring plan. The Commission acknowledged the significant contributions made by Alstom, banks and private investors, and based on assurances given by France on several important aspects of implementation of the proposed measures, it agreed with most of France's proposed plan and cleared the restructuring of Alstom.[180] At no point in the decision did the Commission appear to take into account the fact that support to Alstom would have positive implications for the EU's global position in certain key industrial markets.

The activities of Alstom were later scrutinized by the Commission when it reviewed and ultimately blocked the proposed merger with Siemens in February 2019.[181] The Commission raised concerns regarding impediments to competition in the internal market which were not met by sufficient remedies from the merging parties.[182] The German and French ministers of economy, who were both in favour of the creation of a European champion, in particular to prevent a potential takeover by a Chinese company, reacted to the Commission's negative decision by issuing a manifesto for European industry which included a call to amend European competition rules and implement a European industrial strategy.[183] Regarding State aid rules, the manifesto welcomed the possibility of granting State aid for Important Projects of Common European Interest (IPCEI) but it noted that it is complex to implement and called for guidelines that provide a clear framework taking into account the need to develop industrial capacity in Europe.[184]

There are however counterexamples. A less-known area where concerns relating to the industrial competitiveness of Member States have played a role

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liquidity facilities, a syndicated bank guarantee counter-guaranteed by the state, a fixed-term subordinated loan from the state, the subscription by the state to fixed-term subordinated bonds, an issue of mandatorily convertible bonds with preferential subscription rights for existing shareholders and a capital increase. The Commission decided that most measures constituted State aid which it needed to assess in light of the guidelines on rescue and restructuring aid.

[180] Commission Decision of 7 July 2004, § 28–30, 32–33, 34–36, 37–50, 39–41, 43, 46, 47, 48, 49, 54, 147, 158, 215–216.

[181] Commission Decision of 6 February 2019 in case COMP M.8677, Siemens/Alstom, OJ C 300, 5 September 2019, p. 14.

[182] European Commission, press release, Mergers: Commission prohibits Siemens' proposed acquisition of Alstom, IP/19/881, 6 February 2019.

[183] See the press release and text of the manifesto available on the website of the French Ministry of Economy, https://www.tresor.economie.gouv.fr/Articles/2019/02/19/manifeste-franco-allemand-pour-l-industrie, last accessed 6 July 2020.

[184] Altmaier – Le Maire manifesto, 19 February 2019, p. 4.

is the maritime sector. Under the 2004 Guidelines on State aid to maritime transport,[185] the Commission has indeed allowed several Member States to apply a specific (favourable) tax regime to maritime undertakings, called tonnage tax, to prevent the flagging out of vessels and even relocation of shipping companies to third countries where they can enjoy a more favourable tax regime.[186] This approach, which gives clear precedence to competitiveness concerns over strict application of neutrality considerations typical of State aid control, appears to be sector-specific and is unlikely to be extended and cannot therefore be considered as part of a broader industrial policy.[187]

CONCLUSION

The evolution of State aid control by European institutions is not entirely independent from industrial policy concerns. However, the influence is limited, because of the very nature of the powers that have been granted to the European Union in the industrial policy domain. State aid policy is primarily aimed at "policing" Member States' interventions that favour specific undertakings, by enforcing a general prohibition (with an up to ten-year recovery obligation) and by applying an authorization procedure in limited cases, generally on a case-by-case basis.

The European Commission emphasized the limitations of competition policy in 2020, including State aid, as it can only help markets achieve efficient and competitive market outcomes and act as a supplement to regulation and taxation.[188] Indeed, while the Commission can exercise its powers through guidelines and other soft law instruments to orient industrial choices – by determining the conditions upon which domestic measures can be declared

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185 OJ C 13, 17.1.2004, p. 3.

186 See for example Decision of the European Commission of 12 July 2000 case SA.15810 – United Kingdom Tonnage Tax, OJ C/258/2000; Decision of the European Commission of 19 December 2017, case SA.33829 Tonnage tax scheme and other State measures in favour of shipping companies in Malta, OJ L 176 of 1 July 2019, p. 7.

187 In the cultural sector, the Treaty (Article 107(3)(d) TFEU) allows the Commission to grant derogations for Member States to adopt favourable measures to domestic production. Although this policy has clear economic consequences, it appears to be primarily motivated by the willingness to protect national culture and languages-related activities from market mechanisms (*exception culturelle*), due the global market dominance of Anglo-Saxon cultural products. See Communication from the Commission on State aid for films and other audiovisual works (Text with EEA relevance) (2013/C 332/01) (OJ C 332, 15 November 2013, p. 1). B. de Witte, "Market integration and cultural diversity in EU law", in *Culture and International Economic Law*, ed. V. Vadi and B. de Witte, London: Routledge, 2015, pp. 193, 195.

188 European Commission, DG Competition, Competition Policy supporting the Green Deal – Call for contributions, 13 October 2020, p. 5.

compatible with the internal market – State aid control is more about limiting Member States' room for manoeuvre in terms of favouring their own national industries rather than implementing a common European industrial policy.

Indeed, State aid control cannot be used as a tool to harmonize the legal and tax environment under which European undertakings operate or to channel private or public investment to certain economic sectors. It may, however, constitute a useful instrument to ensure that common industrial policy choices are properly implemented by Member States in their own domestic subsidy and tax policies. Commissioner Thierry Breton acknowledged the new role the Commission played during the COVID-19 pandemic by coordinating industrial production of medical products in Europe. He also called for a refined approach to the application of competition rules to support strategic choices decided under the remit of industrial policy regarding certain sectors, technologies, and natural resources to strengthen Europe's position and independence at global level.[189]

In this respect, EU programs such as the projects of common European interest and the COVID-19 recovery package Next Generation EU constitute far better tools to implement a common European industrial policy.[190] This EU-backed funding solution may also appease criticism that a relaxation of State aid rules would only favour the undertakings of the wealthier Member States, able to inject more financial support into their economies.

The increase of EU-funded support measures does not mean that State aid control will become obsolete, since Member States – whether central, regional or local authorities – will still play a predominant role as investors and players in the domestic economy. However, as EU direct investment grows, coordination with domestic public support measures will become key to the success of EU industrial policies. State aid will therefore become one of the main tools in the hands of EU institutions to ensure that Member States take these European objectives into account in their domestic industrial policy plans. This will probably imply a shift from the current situation in which many Member States' individual aid and schemes with a very broad focus have been cleared as part of the response to the COVID-19 outbreak, although the Commission has emphasized the need to design "national support measures in a way that meets the EU's policy objectives related to green and digital transformation of their economies".[191] Difficult decisions lie ahead when some sectors, industries

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[189] Commissioner Thierry Breton, *Reindustrialising Europe: Lessons from the Health Crisis*, Schuman Foundation, 11 February 2021.

[190] Some might say that this is bypassing State aid law as European financial support – assumed to pursue European objectives – is exempted from State aid law review.

[191] European Commission, Internal Consolidated Version of the Temporary Framework for State Aid Measures to Support the Economy in the Current Covid-19 Outbreak (consolidated version), 13 October 2020, § 45.

and undertakings that have been hardest hit by the pandemic ask for public financial support without being in a position to sufficiently contribute to new green and digital European objectives.