

THE EU COMMISSION PLAN TO SUPPORT THE ECONOMY: THE COMPATIBILITY OF STATE AIDS IN EMERGENCY SITUATIONS

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ABSTRACT

The serious risk of a general economic crisis within the internal market, due to the development of the COVID-19 pandemic, has pushed the EU Commission to react in the context of the economic and financial support to the undertakings. The EU Communication of 13 March 2020 offers a first coordinated answer to the prospected crisis. Its most interesting aspect is the clarification of the financial and economic intervention in the economy. The EU Commission suggests that the best actor for the intervention to maintain the competition in the internal market is that of the State(s), but rush to subsidies shall be avoided. Therefore, parts of the Communications are devoted to the evaluation and to the compatibility of State aid projects, in the creation of a new Temporary Framework on State aids. This general approach has proved not-efficient as the pandemic had started affecting all the (Member) States, which reacted with different lock down measures. Therefore, the following amendments to the Communications focus on the future applicable criteria for the compatibility of State aids to face the economic crisis. This paper analyses the EU Commission Temporary Framework on State aid, in order to detect the extent to which it derogates or softens the previous system. For this purpose, the article analyses in depth the EU Commission's Communications in the light of regulation n. 651/2014. After a brief analysis of the practice, the continuity of the Temporary Framework with the common State aid regulation is stressed.

Keywords: *EU Commission communications, Health and economic crisis, State aid, State aid compatibility, Temporary Framework*

1. THE EUROPEAN UNION'S RESPONSE TO THE ECONOMIC CRISIS RESULTING FROM THE HEALTH EMERGENCY

The risk of a general economic crisis within the EU internal market, as a consequence of the COVID-19 epidemic and pandemic outbreak, induced the EU Commission to react on the side of the economic and financial support to the undertakings. The first Communication dates back to 13 March 2020¹ and provides a coordinated answer to the ongoing health emergency through some first economic and financial means devoted to the limitation of the negative effects of the crisis. In the light of the then epidemic situation, which hit particularly Italy and only started to spread in other European Countries, the EU Commission identified some temporary shock factors in the internal market economy.² In a framework, where the health situation seemed reasonably affordable, the EU Commission opted for a soft approach, calling the Member States to solidarity, rather the introducing extraordinary means, in order to face the emergency.

The Communication identified three main issues, for which it was necessary to find a coordinated response, as so to avoid hard rebounds on the Member States' economies and on the global financial markets: life and health of the people thought investments on health furniture; the protection of the undertakings and of the employees; the reduction of the impact of the crisis on the economy.

As regards the first objective, the Commission insisted on the existence of an internal market for the health products and equipment, too, in a solidarity approach. As for the second point, the Institution envisaged a temporary modification to the transport sector, with particular regard to air traffic, in order to avoid flights without passengers, and to the touristic sector.

Finally, the Commission introduced economic and financial supports, from the EU and the European Bank on Investments budgets, granting liquidity measures to support undertakings, economic sectors and areas particularly jeopardised, through programs to boost investments, imposing the suspension of the credits in favour of the hit undertakings, keeping liquidity to the economy through the banking sector and investments' initiatives.

Only at the end of the prospected interventions, the Communication dealt with the State aids' issue. The Commission observed that the main response must come

¹ Communication from the Commission, Coordinated economic response to the COVID-19 Outbreak, COM (2020) 112 final

² These are determined by the decline of the Chinese economy with impacts on the internal market, the interruption of the supply chain, the decrease of the demand and the problem of the liquidity of the undertakings

from the Member States, due to the limited extent of the EU budget.³ Furthermore, a national action could be quicker and more efficient, especially in favour of small and medium undertakings, avoiding *rush to subsidies* that would have favoured bigger Member States.

However, for these aspects the Communication constituted a sort of reminder of the actions already admissible pursuant to the Treaty. Indeed, it recalled that Member States could adopt measures favourable to the economy with general impact; or in favour of the consumers; or, alternatively, in application of Article 107(2) and (3) of the TFEU; or, finally, *de minimis* aids.⁴ Two elements were completely innovative compared to the pre-existing legal framework: the prospected flexibility in the control of the aid, especially on the basis of the impact of the epidemic on the economy of the concerned Member State, and the quick evaluation of the notified measures, possibly within a few days from the notification.⁵ After all, the Commission had already showed a few days before a commitment towards a particular readiness in the examination of the State aid projects linked with the epidemic, with the authorisation issued in 24 hours after the notification.⁶

The insufficiency of a generic response of this kind was soon detected. The exact impact of the economic crisis could not have been perfectly understood at the beginning of March 2020, but its hardness could not be anymore questioned when almost all Member States were hit by the pandemic. After numerous lock-down national provisions, the EU Commission has intervened in short time with the first Temporary Framework for State aid measures⁷, amended six times, up to No-

³ This remark did not impede the adoption of specific measures with EU funding, in the field of the cohesion politics: Ottaviano, I., *Il ruolo della politica di coesione sociale, economica e territoriale dell'Unione europea nella risposta alla COVID-19*, in Eurojus, Vol. 9, No. 3, 2020, pp. 123 ff.

⁴ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid [2013] OJ L 352/1

⁵ The number of authorisation decisions has revealed very high from the beginning of the outbreak of the pandemic, Massa, C., *COVID-19 e aiuti di Stato: il Quadro temporaneo introdotto dalla Commissione e le misure di sostegno adottate dagli Stati membri*, in Eurojus, Vol. 9, special number: L'emergenza sanitaria Covid-19 e il diritto dell'Unione europea. La crisi, la cura, le prospettive, 2020, p. 161. The update of the decisions issued of this basis is available at: *Coronavirus Outbreak - List of Member State Measures approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework*, 17 May 2021, [https://ec.europa.eu/competition/state_aid/what_is_new/State_aid_decisions_TF_and_107_2b_107_3b_107_3c.pdf], Accessed 29 April 2022

⁶ EU Commission Decision, 12 March 2020, SA.56685 (2020/N) – DK – Compensation scheme for cancellation of events related to COVID-19 [2020] OJ C 125/1

⁷ Communication from the Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C 911/1

vember 2021⁸, aimed to clarify the national possibilities for the intervention in the economy in these unique circumstances. The State aid issue became key, and not just a mere part of a general solidarity program for the relaunch of the economy.

These Communications produce an indirect binding effect on the Commission in the exercise of its margin of appreciation. Indeed, the Institution must follow the criteria envisaged therein in the evaluation of the compatibility⁹, save a specific express motivation on the reasons that induced to disregard them in the case at stake¹⁰, under the control of the Court of Justice.¹¹ Therefore, Member States' interventions gain legal certainty, when the aid project respect the criteria established by the Commission; furthermore, it is possible to expedite the EU Commission control proceedings, under regulation 2015/1589.¹²

This is not the first occasion in which the Commission tries to face a global economic crisis through soft law measures with temporary limited efficacy. Already in 2009, the Institution had adopted a temporary framework¹³ in order to tackle the hard distress of the banking system after the financial crisis in the years

⁸ Communication from the Commission, Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C 112/1; Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C 164/3; Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C 218/3; Fourth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance [2020] OJ C 340I/1.; Fifth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance [2021] OJ C 34/6; Sixth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance [2021] OJ C 473/1

⁹ Case T-457/09 *Westfälisch-Lippischer Sparkassen und Giroverband v European Commission* [2014] ECLI:EU:T:2014:683, par. 218

¹⁰ Case T-135/12 *France v Commission* [2015] ECLI:EU:T:2015:116, par. 93-; Case C-667/13 *Estado português v Banco Privado Português and Massa Insolvente do Banco Privado Português* [2015] ECLI:EU:C:2015:151, par. 67-; Case C-93/15 P *Banco Privado Português SA and Massa Insolvente do Banco Privado Português SA v Commission* [2015] ECLI:EU:C:2015:703, par. 61

¹¹ Case 323/82 *Intermills v Commission* [1984] ECLI:EU:C:1984:345, par. 25

¹² Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ 248/9

¹³ Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis [2009] C 8/1

2007/2008. Nevertheless, the framework at the time differs from the current one due to the different effects of the crisis. Indeed, in that moment it was possible to identify an economic sector particularly jeopardised, the banking market, whose loss of stability affected the general market solidity. Therefore, the measures enacted by the Commission had as object the restoration of the stability and of the solvability of the banks, in order to grant again loans to the undertakings.¹⁴ The current pandemic-related crisis hit indiscriminately all kind of undertakings and productions, so that the prospected solutions needed to have a horizontal impact.

2. MEMBER STATES' SUPPORTS OUTSIDE THE SCOPE OF APPLICATION OF THE STATE AID RULES

The first tool for economic public support mentioned by the Commission is the approval of measures that do not qualify such as State aids. For this, the Communication has no innovative functions, since it is self-evident that an economic intervention that does not constitute aid is free from requirements, conditions and authorisations.

In order for the national support not to fall into the scope of application of Article 107(1) of the TFEU, any of the elements constituting the aid shall miss. Since the EU Commission analysis refers to the public intervention in the economy, the measures cannot but be dispensed by the State, or thought public resources. The first requirement of Article 107(1) is fulfilled. Therefore, the selectivity or the prejudice to competition or to the trade between Member States shall alternatively not be met.

This last element is normally presumed, once the existence of the other factors is demonstrated.¹⁵ Nevertheless, *de minimis* aids under regulation n. 1407/2013 are considered to be unsuitable to create harms.¹⁶ Outside the scope of application of

¹⁴ Wagner, L., *Aides d'État: la Commission européenne confrontée au risque systémique*, in *Juris Classeur Eur*, Vol. 19, No. 1, 2009, pp. 4 ff.

¹⁵ Case 730/79 *Philip Morris v Commission* [1980] ECLI:EU:C:1980:209, par. 11; Case C-667/13 *Estado português v Banco Privado Português and Massa Insolvente do Banco Privado Português* [2015] ECLI:EU:C:2015:151, par. 46; Case C-150/16 *Fondul Proprietatea SA v Complexul Energetic Oltenia SA* [2017] ECLI:EU:C:2017:388, par. 31

¹⁶ In the same framework, in order to grant the proper functioning the services of general economic interest, the Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest [2012] L 114/8 has been modified (Commission Regulation (EU) 2020/1474 of 13 October 2020 amending Regulation (EU) No 360/2012 as regards the prolongation of its period of application and a time-bound derogation for undertakings in difficulty to take into account the impact of the COVID-19 pandemic [2020] L 337/1). Its scope of application is widened, thus including undertakings in difficulty in the period from 1 January 2020 to 30 June 2021, and extended up to the 31 December 2023

the *de minimis* regime, it seems difficult to overcome the presumption of harm to the competition and to the trade between Member States. According to the Court of Justice¹⁷, the sole fact that the beneficiary operates at a local level, or, on the opposite, exclusively in third Countries, is not a proper element to exclude the negative impact of the aid in the internal market.

The selectivity condition is more sensitive, since its definition appears to be easy and clear-cut, but its practical application can give rise to difficulties. Indeed, on the basis of the Court of Justice and the General Court case law, this requisite is easily satisfied. A measure is deemed to be selective, if it meets one of the four following conditions.

The first is the determination of the beneficiaries, or of particular economic sectors. On this point the Court of Justice interprets widely the notion of selectivity, thus including regimes, although the beneficiaries or the granted amounts cannot be determined individually, and aids granted to wide categories of undertakings. In this regard, the judgment in the case *Adria Wien*¹⁸ remains meaningful, since it recognised a selectivity character of a measure in favour of undertakings manufacturing goods. The fact that the fiscal benefit gives advantages to a wide number of beneficiaries, not to be determined automatically, does not preclude the selectivity of the proviso. Nor the high number of beneficiaries allows to consider the national intervention such as a general ruling of political economy.¹⁹

Likewise, in the *CETM* case the General Court clarified that the mere exclusion of a sole category of undertakings from the benefit is suitable to satisfy the requisite of the selectivity.²⁰

A second useful element for assuming the selective character of the measure is determined by the margin of appreciation of the public body in the identification of the beneficiaries. It follows that not all undertakings or not all requesting subjects can benefit from the subsidy due to the national margin of appreciation²¹, nor are there means to grant its absolute general application and the admission to it for all the undertakings concerned.

¹⁷ Case 102/87 *France v Commission* [1988] ECLI:EU:C:1988:391, par. 19; Case C-142/87, *Belgium v Commission* [1990] ECLI:EU:C:1990:125, par. 35; Cases from C-278 to 280/92 *Spain v Commission* [1994] ECLI:EU:C:1994:325, par. 40

¹⁸ Case C-143/99 *Adria Wien GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten* [2001] ECLI:EU:C:2001:598, par. 53

¹⁹ Case C-75/97 *Belgium v Commission* [1999] ECLI:EU:C:1999:311, paras. 32 ff.

²⁰ Case T-55/99 *CETM v Commission* [2000] ECLI:EU:T:2000:223, par. 39

²¹ Case C-200/97 *Ecotrade Srl v Altiforni e Ferriere di Servola SpA* [1998] ECLI:EU:C:1998:579, par. 40; Case C-256/97 *DM Transport* [1999] ECLI:EU:C:1999:332, par. 27

Another hypothesis for the selectivity character subsists when it derogates to the general regulation of (private) law. Through an exceptional discipline it is indeed possible to exclude some undertakings or some productions from the application of the general national regulation, conferring them an advantage. Its allocation can be justified to the extent that it grants the coherence of the national juridical or fiscal system.²²

Finally, the geographical framework of reference can be relevant, if the aid is allocated by a local public entity.²³

An admissible national intervention must constitute a measure reforming the market or the financial system. As noted by the Commission in its Temporary Framework, these supports might stem from wage integrations, from the suspension from the payment of some taxes, from the economic support attributed directly to consumers for non-enjoyed services. This kind of intervention is always admitted, since it constitutes a reform of the fiscal, or of the commercial system, or it regards the bankruptcy or the work-related discipline law. Therefore, a configuration such as a State aid is precluded. Furthermore, special reasons for their adoption are not needed. The health crisis could be the opportunity for national and EU-level reforms useful for the economic recovery, but the link between the two can have a mere accidental character.

Since these measures do not constitute aids, they do not need to be notified to the Commission pursuant to Article 108(3) of the TFEU. A precautionary approach would suggest to proceed to the notification in any case. The control proceedings might be extremely quick and be concluded in two months after the preliminary examination, according to Article 4 of the regulation 2015/1589, or through the simplified procedure in 20 days.

3. THE AUTOMATIC COMPATIBILITY OF STATE AIDS: NATURAL DISASTERS AND EXCEPTIONAL OCCURRENCES

The Temporary Framework recalls the application of some legal basis in the TFEU, concerning the compatibility of State Aids. The objective of the Temporary Framework consists in clarifying the scope and the impact of these provisions to the current pandemic circumstances.

The compatibility clause within of Article 107(2) is automatic, but the Commission controls its correct application. Therefore, in the scope of lit. b) definitions

²² Cases T-515/13 and 719/13, *Spain v Commission* [2015] ECLI:EU:T:2015:1004, par. 83

²³ Case C-88/03 *Portugal v Commission* [2006] ECLI:EU:C:2006:511, paras. 55 ff.

of *natural disasters*²⁴ and *exceptional occurrences* have been necessary. Furthermore, the scope of these derogations is restrictive²⁵, due to their exceptional character, under several standpoints. Firstly, the event must be non-foreseeable, or outside the control of the concerned people, such as a maritime accident²⁶ or a terrorist attack.²⁷ Secondly, the economic harm must be a direct consequence of the non-foreseeable events.²⁸ Finally, the amount of the aid must correspond with the amount of the harm produced by the non-foreseeable events, since the former has a compensatory function.²⁹

This last condition has been recalled in the fifth amendment, which reaffirms at point 19 that the aid shall not over-compensate the harm. Therefore, its rigorous quantification shall be proved, and the aids shall cover the losses up to the non-gained profits. For example, the mere length of the crisis; or the social distancing; or the ban to create aggregations is not as such a cause that gives effect to a harm to be compensated pursuant to Article 107(2)(b).

In the Temporary Framework, the Commission lingers on the scope of application of Article 107(2)(b), widening it in the further amendments to the first version of the Temporary Framework. In order to tell this kind of compatible aid, the Institution focuses on the directly jeopardised economic sectors, such as, for example, transports, tourism, culture, detail commerce or the organisation of events. These are immediately harmed by the mere pandemic outbreak, because their customers are reduced as a consequence of the infectious risk. Due to this rationale, the third amendment to the Temporary Framework makes it clear that this kind of aid can

²⁴ Landi, N., *Exemptions from the General Incompatibility Principle under Article 87(2) and (3) of the EC Treaty*, in: Santa Maria, A. (ed.), *Competition and State Aid: An Analysis of the EC Practice*, Alphen aan den Rijn, 2007, p. 51; for further references: Sacker, F-J., *European State Aid Law: A Commentary*, Hart, Beck, 2016

²⁵ Case C-156/98 *Germany v Commission* [2000] ECLI:EU:C:2000:467, par. 46-; Case C-301/96, *Germany v Commission* [2003] ECLI:EU:C:2003:509, par. 106 ff.- *Amplius*: Orzan, M. F., *De jure Compatible Aid under Article 107(2) TFUE*, in: Hofmann, H.C.H.; Micheau C. (eds.), *State Aid Law of the European Union*, Oxford University Press, Oxford, 2016, pp. 236 ff.

²⁶ State aid NN 62/2000 concerning an oil spill caused by the sinking of oil tanker Erika [2000] OJ C 380/9

²⁷ Communication from the Commission to the European Parliament and the Council: The repercussions of the terrorist attacks in the United States on the air transport industry, COM (2001) 574/F1

²⁸ Case C-278/00 *Greece v Commission* [2004] ECLI:EU:C:2004:239, par. 81; Case T-268/06 *Olympiaki Aeroporia Ypiresies AE v Commission* [2008] ECLI:EU:T:2008:222, par. 52-. As a consequence, a State aid to reinsurance undertakings against natural disaster does not fall in the scope of the rule, because the direct link between the event and the harm misses, case T-135/17 *SCOR SE v Commission* [2019] ECLI:EU:T:2019:287, paras. 97 ff.

²⁹ Case T-423/14 *Larko Geniki Metalliftiki kai Metallourgiki AE v Commission* [2018] ECLI:EU:T:2018:57, par. 142

be granted to all undertakings, notwithstanding the harmed economic sector in which they operate. At the time of its adoption, July 2020, the direct effects of the health crisis on the economy could not be anymore distinguished on the basis of the relevant economic field. The expressly considered case is the prohibition to exercise economic and commercial activities after national lock down measures (par. 13).

The principle of immediacy has been expressly recalled in the Fifth amendment to the Temporary Framework, which includes in the direct relevant harm those prejudices stemming from the impossibility to exercise the economic activity, fully or partly, due to the lock down measures, enacted temporally, or locally, or with sensitive limitations to the access to events/places. This consists of restrictions to the benefit of these services for determined categories of customers, such as, for example, the tourists in the hospitality industry. Other measures, such as social distancing, do not seem to comply with the conditions set forth in Article 107(2). The characteristic element in the application of Article 107(2)(b) is thus determined by the immediacy of the harm as a direct consequence of the pandemic diffusion. Therefore, aids can be granted with a margin of flexibility, including favouring undertakings which had already benefited from rescue aids or restructuring aids.

The extension of the application of Article 107(2)(b) constitutes an element of flexibilization. Indeed, the economic difficulty is not a direct consequence of the pandemic exceptional occurrence, but depends on the national restrictions' measures. Nevertheless, the slightly wider interpretation of the Treaty rule set forth by the third amendment appeared – and indeed is – useful, since the closing of the commercial activities had been imposed with the considered prevailing scope of protection of everybody's health, entrepreneurs' and their employees', too. With this clarification in mind, it is possible that those Member States, enacting stronger lock down measures, could more easily grant aids in favour of non-operating activities.

4. THE APPLICATION OF THE RULES ON COMPATIBILITY DURING THE HEALTH CRISIS

The EU Commission's margin of appreciation is clearer within the scope of Article 107(3), since the compatibility is not automatic. Nevertheless, these exceptions must be interpreted restrictively, too.³⁰ The character of immediacy in the causality becomes irrelevant in the scope of Article 107(3). Lit. b) has been interpreted

³⁰ Evans, A., *EC Law of State Aid*, Oxford University Press, Oxford, 1997, pp. 107 ff.

in the sense that the whole national economy shall be affected³¹, although in the context of the internal market. Lit. c), on the under development of some productions or economic activities, or geographical areas, grants a wider margin of appreciation.³² Indeed, it is applicable to each economic sector or geographical area, even at a national level. Although the difficulty condition can be evaluated on the basis of national criteria, the impact of the aid on the internal market must be verified.³³ Furthermore, the aid must be strictly linked to initial investments, to the creation of new jobs, or to the entrepreneurship reconstruction. It is not possible to envisage aids with only one beneficiary. For this reason, the Commission had devoted a large part of regulation n. 651/2014³⁴ to investments aids and adopted the Guidelines on restructuring aids.³⁵

Lit. c) has been the legal basis in order to overcome the financial crisis in 2008. Up to that moment, it had been rarely applied.³⁶ At that time, the Commission initially refused to recognise the applicability of lit. b), because the economic harm hit particularly the sole banking sector in the first stage of that crisis.³⁷ Therefore, it was preferred to take advantage of the Guidelines on rescuing and restructuring undertakings in difficulty, based indeed on lit. c). Under this legal ground, rescue supports were granted in favour of the Roskilde Bank³⁸, of the Hypo Real Estate³⁹ and of Bradford & Bingley.⁴⁰ Only in a further stage of the financial crisis, its general rebounds were clearer, thus admitting exceptions to the aids' prohibition pursuant to lit. b), too.

³¹ Cases T-132/96 and T-143/96 *Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH v Commission* [1999] ECLI:EU:T:1999:326, par. 167; Cases C-57/00 P and C-61/00 P, *Freistaat Sachsen Volkswagen AG and Volkswagen Sachsen GmbH v Commission* [2003] ECLI: EU:C:2003:510, par. 93

³² Craig, P., De Búrca G., *EU Law. Text, Cases, Materials*, Oxford University Press, Oxford, 2020, p. 1173

³³ Cases T-126/96 and T-127/96 *Breda Fucine Meridionali SpA (BFM) and Ente partecipazioni e finanziamento industria manifatturiera (EFIM) v Commission* [1998] ECLI:EU:T:1998:207, par. 79

³⁴ Commission Regulation (EU) No 651/2014, of 17 June 2014, declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1

³⁵ Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty [2014] OJ C 249/1

³⁶ Karpenschif, M., *Manuel de droit européen des aides d'État*, Bruylant, Bruxelles, 2019, p. 166

³⁷ Further, on the subsidies in the financial sector: Ianus, R., Orzan, F., *Aid Subject to a Discretionary Assessment under Article 107(3) TFEU*, in *State Aid Law of the European Union, State Aid Law of the European Union*, Oxford University Press, Oxford, 2016, pp. 267 ff.

³⁸ State aid NN 36/2008 – Denmark - Roskilde Bank A/S, Brussels, C (2008) 4138 final

³⁹ Commission Decision of 18 July 2011 on the State aid C 15/2009 (ex N 196/2009), which Germany implemented and is planning to implement for Hypo Real Estate [2010] OJ C 13/58

⁴⁰ State aid NN 41/2008 – United Kingdom Rescue aid to Bradford & Bingley Brussels C (2008) 5673 final

The 2008 experience demonstrated the opportunity to take immediately advantage of both legal grounds in the pandemic crisis, in favour of the harmed undertaking or the jeopardised production, and globally, too, in order to overcome the prejudice of a Member State market. Therefore, the scope of application of both derogations is detailed in the first version of the Temporary Framework.

Concerning lit. c), the Guidelines on rescue and restructuring aids are once more recalled. These could be useful in order to support undertakings in financial difficulty. The crisis could be determined or only aggravated by the pandemic. Clearly, regional aids have no relevance here, since the final objective is not the support of a geographic underdeveloped area in a State⁴¹, but rather to maintain a minimum level of competition and competitiveness in the market.

More room is reserved to the analysis of lit. b), which is considered as a main tool. The cross-impact of the crisis and the horizontal character of the economic and financial difficulties stem clear from the beginning of the pandemic outbreak. The general reference to a serious disturbance in the economy of a Member States, within lit. b), appears proper so as to face a situation, where it is not possible to predetermine a sector or groups of sectors particularly affected, different from those initially already considered in the field of Article 107(2)(b).

A commonality with the 2008 crisis is constituted by the involvement of all Member States, since the lock down measures impact on all undertakings, crossing the whole internal market. A partial geographic distinction can depend on the strictness and on the duration of the national restrictive measures. Nevertheless, in the internal market a full closing of the exercise of economic activities in a Member State necessarily impacts on other States, even if these adopted more flexible solutions. The grave repercussion mentioned in lit. b) is therefore interpreted in order to include economic harms to the internal market globally considered, within which each Member State is free to introduce autonomously lock down, and, symmetrically, recovery measures (within the coordination envisaged by the Commission).

The general criterium for the compatibility evaluation is the adequacy of the measure, in the two prongs of its suitability to reach its target and of its proportionality. The last amendment to the Temporary Framework expressly insists on this last condition. Although the State aid creates distortions to the competition, these must be limited to what is necessary in order to recover the repercussion to the Member State economy. Therefore, the support measures must be suitable to reach their incentivisation targets, and be structured in a way so that to supply the ben-

⁴¹ Case 248/84 *Germany v Commission* [1987] ECLI:EU:C:1987:437, par. 19

eficiary with the objectively needed tools.⁴² In any case, overcompensations must be avoided. These characteristics summarise the preceding practice and case law, in the restrictive perspective of the applications of the prohibition's exceptions.

The Commission details the objective conditions to be met in order to presume the compatibility requisites of Article 107(3)(b). These are distinguished on the basis of the form of the aid⁴³, with potential possible aggregations among different kind of aids.⁴⁴ The amendments to the Temporary Framework further widen the number and the kind of measures falling into its scope of application⁴⁵ and the interpretation of the compatibility requirements, in order to grant legal certainty to the supplying Member State and to the beneficiaries, and to allow the maintenance of economic activity in the internal market notwithstanding total or partial lock down measures.

5. THE DETERMINATION OF THE BENEFICIARIES

It is only in the framework of the clarifications on the applicability of Article 107(3)(b) that the EU Commission submits some specifications over the potential beneficiary of the aid.⁴⁶ Their scope consists in the individuation of undertakings that are in a difficulty situation strictly linked with the health and economic crisis, so that the aids can be suitable in order to overcome the grave repercussion envisaged in the proviso. On the opposite, the public support would risk to be almost casual and therefore useless for the economic recovery. Therefore, it seems correct that these guidelines on the determination of the beneficiary do not apply in the scope of Article 107(2)(b), due to its compensation purpose.

⁴² Ahlqvist., V., Claici, A., Tizik, S., *How to Estimate the COVID-19 Damages? Economic Considerations for State Aid During a Time of Crisis*, in *European State Aid Law Quarterly*, Vol. 19, No. 2, 2020, p. 153 submit that the harmed undertakings could prove the prejudices suffered because of the crisis, in order to allow the State to enact immediately the best favourable measures

⁴³ EU Commission therefore distinguishes direct grants, repayable advances or tax breaks; loan guarantees; subsidized interest rates for loans; guarantees and loans conveyed through credit institutions or other financial institutions

⁴⁴ Honoré, M., *State Aid and COVID-19 - Hot topics*, in *European State Aid Law Quarterly*, Vol. 19, No. 2, 2020, pp. 111 ff.; Massa, C., *op. cit.*, note 5, pp. 155 ff.; Riedel, P.; Wilson, T.; Cranley, S., *Learnings from the Commission's Initial State Aid Response to the COVID-19 Outbreak*, in *European State Aid Law Quarterly*, Vol. 19, No. 2, 2020, p. 115

⁴⁵ From the characterisation view point, paras. 18 ff. of the first amendment appear interesting, since they determine tools to sustain research and innovation on COVID-19. Although its premise refers to lit. c), it seems that these measures fall within the scope of lit. b), since they are oriented towards the promotion and the execution of an important project of common European interest, which is the health and care rights

⁴⁶ Further: Riedel, P.; Wilson, T.; Cranley, S., *op. cit.*, note 44, p. 122

The individuation of the beneficiary has incurred into modifications in the amendments of the Temporary Framework. The first communication required the undertaking not to be in difficulty at the date of 31 December 2019.⁴⁷ This condition served the purpose to grant a strict link between the economic difficulties and the crisis, so that the aids could be granted to sound undertakings. The negative development of the events imposed a flexibilization of this requirement. The third amendment to the Temporary Framework admits to all kind of supports small businesses and undertakings already in difficulty, too. The closing of many economic activities open to the general public, usually organized such as small undertakings, has probably induced to open the access to the public support. The sole fact that these undertakings employ a small number of employee, or are conducted within a family, has not hidden the high number of this kind of enterprises and the economic, financial and social repercussions of their potential liquidation or bankrupt. Neither in this case can the public support be generalized. Indeed, these undertakings shall not be under any insolvency proceedings according to national law, nor have benefitted from any rescue or restructuring aid.⁴⁸ Therefore, with respect to the definition of undertaking in difficulty, the grave loss of capital stock or of funds becomes irrelevant. In July 2020, at the adoption of the third amendment, this effect on the structure and the solidity of the small undertaking was practically unavoidable, so that the application of these criteria for the determination of the beneficiary would have been too preclusive.

Nevertheless, due to the strict link between the grave economic difficulty of these undertakings and the lock down measures, it is submitted that at least a consistent part of these small enterprises could benefit from the aids granted according to the para. 2(b), at least as clarified by the third amendment, if not from *de minimis* aids. The economic loss seems to be easily proved, and at the same time it seems efficient to support the undertakings with a financially limited aid.

Despite the general and understandable economic and financial difficulty, the Temporary Framework has not introduced any exception the *Deggendorf* rule⁴⁹, that is the prohibition to grant new aids to a beneficiary that has not restored

⁴⁷ The notion of difficulty is defined pursuant to Article 2(18) of the regulation n. 651/2014, which differs according to the undertaking being a SME or a big undertaking

⁴⁸ Nevertheless, it is provided that the undertaking, having benefitted from rescue aids, can receive other kind of aids within the Temporary Framework to the extent that it has paid back the loan or cancelled the warranty; or, having received restructuring aids, it is not subject to a restructuring plan anymore

⁴⁹ Case C-355/95 P *Textilwerke Deggendorf GmbH (TWD) v Commission and Germany* [1997] ECLI:EU:C:1997:241

previous illegal aids.⁵⁰ The solution appears consonant with Article 1(4)(a) and (b) of the regulation n. 651/2014, that excludes from its scope of application beneficiaries subject to an outstanding recovery order. The Temporary Framework seeks not to introduce exceptions to the general State aids discipline, thus envisaging a potentially dangerous precedent. Despite the fact that every kind of undertaking risks serious harm, therefore needing a public support, the principle of correctness within the market prevails even within the Temporary Framework, so that new aids cannot be granted to whom shall give back public subsidies. Since the beneficiary of an illegal aid is already in a position of (incorrect) advantage with respect to its direct competitors on the market, it cannot be further favoured. If it received other aids, its market position would never be rebalanced with that of its competitors.

The Court of Justice has recently clarified that the State has no duty to grant aids, and can impose further procedural conditions with respect to the requirement imposed by the Commission in its authorization decision.⁵¹ Among these, a declaration from the beneficiary, stating that it is not subject to an outstanding recovery order, can be included, in order to grant a reasonable certainty about the respect of the conditions established by the regulation n. 651/2014.⁵² The judgment is interesting not only because it clarifies the trilateral relationship Commission – Member State – beneficiary as regards the effects of the Commission decision and the role of the State, but especially because of its date. On 6 May 2020 Europe was gradually going out of the first lock down period, whose consequences could not be perfectly clear. The margin of appreciation of the States leaves them the

⁵⁰ The Italian legislator has introduced a derogation to this rule, on which: Ciprandi, A., *Aiuti di Stato nell'emergenza COVID-19: il legislatore italiano sospende la c.d. "clausola Deggendorf". Deroga giustificata o deviazione eccessiva da un principio fondamentale?*, in Aisdue, 15 July 2020, pp. 43 ff., [<https://www.aisdue.eu/agnese-ciprandi-aiuti-di-stato-nellemergenza-covid-19-il-legislatore-italiano-sospende-la-c-d-clausola-deggendorf-deroga-giustificata-o-deviazione-eccessiva-da-un-princi/>], Accessed 29 April 2022

⁵¹ Cases from C-415/19 to C-417/19 *Blumar SpA and Roberto Abate SpA v Agenzia delle Entrate* [2020] ECLI:EU:C:2020:360, par. 23

⁵² This practice can rise doubts on the efficacy of the vigilance duty of the State concerning the use of the aids, which can be inferred from Article 20 of the regulation 2015/1589, on abusive aids. If the beneficiary uses the aids in a different way with respect to what established in the Commission authorization decision, the institution can start a formal investigation procedure, the same envisaged for illegal aids. Here, the State is fully part of the procedure and the addressee of the final decision. If, after an abuse of the beneficiary, the State is subject to a Commission decision, a duty of vigilance can be derived, Keppenne, J.K., *Une vue d'ensemble des règles de procédure de l'art. 88 CE et commentaires sur leur application depuis l'entrée en vigueur du règlement 659/1999*, in: AEA – Association Européenne des Avocats (ed.), *Droit européen de la concurrence: un nouveau rôle pour les Etats membres*, Bruylant, Bruxelles, 2001, p. 242. If the State is not aware of restitution duties from the undertaking, the vigilance is most probably non-effective

evaluation of the opportunity to grant aids and their implementation within the Temporary Framework, too.

6. SOME FINAL REMARKS

The Temporary Framework and its amendments use the notion of exceptional circumstances from their very beginning. It is meaningful that the terms of Article 107(2)(b) of the TFEU, and in particular that of *exceptional occurrences*, are not used.⁵³ The definitions stemming from the precedent practice and case law could have allowed a characterization of the pandemic such as an exceptional occurrence, which would have covered all the State aids granted in order to face the crisis, safe the respect of the principle of necessity and proportionality. The automatic compatibility would have allowed the States to act even more quickly.

Nevertheless, this open approach would have produced some difficultly manageable consequences. The Member States would have felt free to grant subsidies, making less controls on the adequacy and the proportionality of the measures. From the Commission, only authorisation decisions would have been expected, quickly issued after simplified procedures or after preliminary examinations. A decision of a different kind would have been probably contested, thus following an expansion of the time needed to grant the aid, a prejudice to the legal certainty and practically a grave harm to the undertakings.

The Commission has therefore preferred a third way, based on its consistent practice.⁵⁴ The notions used in Article 107 of the Treaty and in the Temporary Framework must have a different interpretation and refer to diverging notions. Therefore, not all aids granted due to the pandemic can fall within the scope of application of Article 107(2)(b). With this, the EU Commission maintained the peculiarity of the automatic compatibility, at the same time softening the substantial conditions for the issue of a positive decision according to Article 107(3).⁵⁵ In this way it has balanced two needs. The first one relates to the serious control on the notified measures. The pandemic situation cannot justify national reactions outside the (EU) law, where Member States grant unconditionally subsidies. The

⁵³ The analysis of the other linguistic versions confirms the deliberate difference in the two texts. In Article 107 we can read *eventi, acontecimientos, Ereigniss, événements*; in the Temporary Framework: *circostanze, circunstancias, Umstände, circonstances*

⁵⁴ According to Quinley, C., *The European Commission's Programme for State Aid Modernization*, in *Maas-tricht Journal of European and Comparative Law*, Vol. 20, No. 1, 2013, p. 43 the Commission's practice makes it possible to define *a priori* which aids are compatible

⁵⁵ Ciprandi, A., *op. cit.*, note 50; Nicolaidis, P., *No New Aid to Undertakings that Have not Yet Repaid Incompatible Aid*, 19 May 2020, available at: [www.lexxion.eu/en/stateaidpost/no-new-aid-to-undertakings-that-have-not-yet-repaid-incompatible-aid/], Accessed 29 April 2022

second one is the quick and certain answer to the objective difficulties of the undertakings. The individuation of the applicability conditions of Article 107(3) is useful for the Member States in order to draft measures certainly satisfying them, thus realizing the certainty of the compatibility, and for the Commission in order to close the control proceedings quickly, after the preliminary examination. The envisaged limits, as, for example, in the determination of the beneficiaries, are once more useful in order to prevent frauds, that divert from the final objective to face the economic crisis.

Only the persisting health crisis has induced the Commission to extend the scope of application of Article 107(2)(b), nevertheless clarifying its applicability conditions in the fifth amendment. This choice can be justified by a new evaluation of the proportionality *in abstracto*, needed because of the new health and medical discovers, the availability of vaccines and of health treatment, that allowed a gradual reopening of the economic and social activities. Furthermore, the global impact of the crisis limits the risks of abuses by Member States.

The last (worrying) limitation is that of time. The amendments of the Temporary Framework keep extending its applicability of the Temporary Framework, which is fixed on 30 June 2022 by the sixth amendment, safe some further exceptions according to the scope of the aid. The current situation induces to ask whether a continuous extension of the Temporary Framework is the best way to face the economic impact of the health crisis, since it should be temporary in nature and suitable to solve specific problems. On the opposite, it risks being applicable for a long time, perduring those exceptional circumstances that allows the automatic grant of a proportionate and compensatory aid.

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