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

Volume I

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DECLARATION

I declare that this thesis has not been submitted as an exercise for a degree at this or any other university and it is entirely my own work.

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Christopher McMahon
ABSTRACT

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

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

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

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

In order to evaluate the application of the State aid rules to tax measures, this thesis assesses the objectives of State aid control. It is argued that while State aid control serves different objectives, the application of the rules to tax measures has changed the dynamics of competition between Member States such that the State aid rules can be better understood as managing regulatory competition between Member States. This thesis goes on to provide an account of the developments in the law defining aid that have emerged from cases dealing with fiscal measures. The most prominent of these is the reorientation of the selectivity criterion around the discrimination standard. This
development increases the breadth of the notion of aid and the prohibition in Article 107(1) TFEU. There are also few effective tools available to insulate these developments to prevent them from having an impact on non-fiscal measures.

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

This thesis goes on to advance a more systematic and coherent approach to the selectivity criterion that will help to address the concerns identified in the literature about the incoherence of the selectivity criterion and the expansion of the notion of aid. It concludes that adopting the discrimination standard directly and clearly defining the limits on the objectives that can justify differential treatment is the best available approach. It proposes the notion of solidarity between Member States as an interpretive tool to define those objectives. This thesis proposes a further reform in the adoption of a more rigorous interpretation of other criteria for identifying aid: the distortion of competition and the effect on inter-state trade. These criteria should be applied separately and the relevant thresholds for identifying aid should be raised considerably. This change will prevent the excessive expansion of the notion of aid caused by the application of the discrimination standard, ensuring that an appropriate balance is struck between the interests of the Union and the autonomy of Member States over economic policy.
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<td>Business in Europe: Framework for Income Taxation</td>
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<tr>
<td>CCCTB</td>
<td>Common Consolidated Corporate Tax Base</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>Commission</td>
<td>European Commission</td>
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<td>ECSC</td>
<td>European Coal and Steel Community</td>
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<td>ECSC Treaty</td>
<td>European Coal and Steel Community Treaty</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-ordination and Development</td>
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<tr>
<td>SGEI</td>
<td>Service of General Economic Interest</td>
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<tr>
<td>TCA</td>
<td>Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L149/10</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>WTO</td>
<td>World Trade Organisation</td>
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1. INTRODUCTION

1.1. State Aid and Fiscal Measures

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

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

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¹ Aid implemented by Ireland to Apple (Case SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP)) Commission Decision (EU) 2017/1283 [2017] OJ L187/1. This was overturned on appeal in Cases T-778/16 and T-892/16 Ireland and Apple v Commission ECLI:EU:T:2020:338 but a further appeal remains pending before the CJEU.
authorities on their often opaque and intricate tax arrangements. While the Commission’s authority in this area is controversial, so too is the response of the Member States. The beneficent Member State governments involved often contest the allegations of unlawful aid as vigorously as the objects of their generosity, and cringe as national public debate looks incredulously at the State arguing that the money belongs to someone else. As the Commission tries to limit tax competition between Member States, the State aid rules appear to be an increasingly useful tool.

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


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

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

11 See Sections 3.2-3.3.
12 See Section 3.6
14 Juan Jorge Piernas López, ‘The Evolving Nature of the Notion of Aid under EU Law’ (2016) 15 European State Aid Law Quarterly 400, 408.
16 Organisation for Economic Co-operation and Development, ‘Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy’ (OECD, 8 October 2021).
whose tax affairs have been the subject of State aid investigations by the Commission have been the subject of high-profile competition law enforcement actions from the same institution\(^{17}\) and are likely to be classified as gatekeeper platforms under the EU’s new regulations for the digital economy.\(^{18}\)

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

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


\(^{19}\) Temporary Framework to support the economy in the context of the coronavirus outbreak [2020] OJ C911/1.

\(^{20}\) Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia [2022] OJ C1 131/1.
drive a more active role for government in the longer term.\footnote{For the argument that government spending is likely to increase in wealthy countries over the next few decades, see Marc Robinson, Bigger Government: The Future of Government Expenditure in Advanced Economies (Arolla Press 2020). See also Delia Ferri, ‘The Role of EU State Aid Law as a “Risk Management Tool” in the COVID-19 Crisis’ (2021) 12 European Journal of Risk Regulation 249 for discussion of the roles of State aid in immediate crisis responses as well as longer term risk management.} There is a narrative that the EU should strive for ‘strategic autonomy’ such that the EU will not be dependent on third countries for access to essential resources and infrastructure.\footnote{Mario Damen, ‘EU Strategic Autonomy 2013-2023: From concept to capacity’ (European Parliamentary Research Service Briefing, July 2022) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733589/EPRS_BRI(2022)733589_EN.pdf> accessed 25 July 2022.} This has already led to proposals for a ‘European Chips Act’ which will facilitate the approval of State aid projects for the manufacture of microchips, which are regarded as essential for technologies that are critical to the EU’s security and environmental goals.\footnote{Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a framework of measures for strengthening Europe’s semiconductor ecosystem (Chips Act)’ COM (2022) 46 final. See also Christopher McMahon, ‘Ireland stands to gain from new EU policy on microchip production’ The Irish Times (Dublin, 28 February 2022) <https://www.irishtimes.com/business/technology/ireland-stands-to-gain-from-new-eu-policy-on-microchip-production-1.4813619 > accessed 20 July 2022.} Energy supply is also an area where the need for strategic autonomy is felt to be particularly acute, with a consequently more substantial need for State intervention.\footnote{See for example European Council, ‘Versailles Declaration’ (11 March 2022) paras 14-19, <https://www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf> accessed 25 July 2022; Céline Charveriat and Tim Gore, ‘The case for green strategic autonomy’ (European Council on Foreign Relations, 2 March 2022) <https://ecfr.eu/article/the-case-for-green-strategic-autonomy/> accessed 25 July 2022.} Strategic autonomy in energy is important not only because of the risks of reliance on energy supplies from Russia but also because it will involve increased reliance on renewable energy sources such that the EU’s goal of producing ‘net zero’ carbon emissions by 2050 can be achieved.\footnote{Martin Sandbu, ‘The EU has a plan for a common energy policy – now it must deliver’ Financial Times (London, 22 May 2022) <https://www.ft.com/content/f14e1c1b-9c2e-4e22-8040-1577b0dc7de4> accessed 25 July 2022. Céline Charveriat and Tim Gore, ‘The case for green strategic autonomy’ (European Council on Foreign Relations, 2 March 2022) <https://ecfr.eu/article/the-case-for-green-strategic-autonomy/> accessed 25 July 2022.} Subsidies for such technologies in other large economies may also put pressure on the EU to follow suit.\footnote{See for example, Commission, ‘State aid: Commission consults Member States on proposal for a Temporary Crisis and Transition Framework’ (Press Release, 1 February 2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_513> accessed 5 February 2023. See also Sam Fleming, Henry Foy and Katie Martin, ‘EU makes green pitch to rival US subsidy splurge’ Financial Times (London, 17 January 2023) <https://www.ft.com/content/4177ee6-7f93-41da-aa1e-028af7601f8> accessed 29 January 2023.} Further,
demographic changes in the EU are producing older populations, which is likely to increase the need for more State investment and support for healthcare.27

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

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

27 Marc Robinson, Bigger Government: The Future of Government Expenditure in Advanced Economies (Arolla Press 2020). State aid is also likely to have an important role to play in developing technologies to assist with the care of elderly cohorts in the population as well as promoting universal design and accessible technology which may also become more relevant in light of these demographic trends. See Delia Ferri, ‘Subsidising Accessibility’ (2015) 14 European State Aid Law Quarterly 51.
aid and tax law is controversial and many suggest that classifying certain tax rules and practices as State aid under Article 107(1) TFEU is inappropriate.31 There is a suggestion that the State aid rules are not a very good fit for this task, that they are being applied in creative but unconvincing ways.32 Much of the literature thus far has contended that the drive to classify certain fiscal measures as aid has required the standards used for this to be strained and contorted.33 Much of the attention understandably focuses on what this means for the freedom of Member States to set their own tax policies and what it reveals about how the Commission and the CJEU will treat similar tax measures in the future.34

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

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

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

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36 See Sections 6.2-6.3.
of this provision also gives it an important role in structuring the inter-institutional dynamics of the EU in relation to State aid policy.

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

1.2. Primary Research Question

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

\(^{38}\) Both fiscal and non-fiscal measures can be construed as forms of regulation. This thesis adopts definitions of regulation provided by Robert Baldwin, Colin Scott and Christopher Hood, ‘Introduction’ in Robert Baldwin, Colin Scott and Christopher Hood (eds), \emph{A Reader on Regulation} (Oxford University Press 1998) 1-
to this question will have to contain various components that will be outlined and justified in this section. This section identifies a number of different research objectives determined by this primary question, including descriptive, evaluative, theory-building and recommendatory objectives.\textsuperscript{39}

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

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\textsuperscript{39} For this typology, see Lina Kestemont, \textit{Handbook on Legal Methodology: From Objective to Method} (Intersentia 2018) chapter 2.
Once these developments in the case law on fiscal aid have been identified, the research question requires consideration of the potential for these developments to have an impact on the application of the rules to other types of measure. This requires consideration of how the case law distinguishes between fiscal and non-fiscal measures to see if there are any tools available to the CJEU to limit the developments in the fiscal aid jurisprudence from having a broader impact on other measures. It will also examine if there are any elements of the doctrine that prevent the CJEU from developing different standards for fiscal measures, or particular types of fiscal measure. If there is potential for such an impact, this thesis must then proceed to examine precisely what form that impact will take. While this has an important descriptive aspect, it also has a normative component that will involve an evaluation of this impact.

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

1.3. Structure of Thesis

40 See Section 7.2.
41 See Sections 7.4-7.6.
The response to this primary research question outlined in this thesis is organised into nine chapters. This section will briefly review the structure of the thesis and the order in which different elements of the research question will be addressed. After this introductory chapter which sets out the research question, the structure of the thesis and an outline of the methodology employed, Chapter 2 will take the first steps towards answering the primary research question on the effect of the developments in the application of Article 107(1) TFEU to fiscal measures on the application of the State aid rules to non-fiscal measures by providing a brief outline of the basic features of the EU State aid control regime and its development. It will focus on highlighting distinctive features of the regime which are most important for the research question and the argument contained in this thesis. Chapter 3 will then give an outline of the different objectives that are thought to be served by the State aid control regime and will examine how the precise balance between these objectives has been reoriented in response to the challenge of regulating tax competition between Member States. Chapter 3 will make an original contribution by arguing that the increased application of the State aid rules against tax measures makes the largely neglected objective of managing regulatory competition a central rationale of the regime and will elaborate on this objective and its implications.

Chapter 4 will then proceed to consider the changes to the doctrine that have emerged from the growing body of case law and decisional practice applying the State aid rules to tax measures. These include the prohibition on reliance on increased tax revenues from inward investment as an argument that a tax exemption or subsidy is not aid, the stretching of the selectivity criterion and its reorientation around the discrimination standard and the emergence of the arm’s length principle in the law on selectivity. Chapter 4 will also try to explain these doctrinal developments as being, in part, a result of the shift in the objectives of State aid control identified in Chapter 3. It will also consider the potential of these
developments to expand the range of measures that are classified as State aid. Chapter 4 will also review the responses to these developments in the academic literature, highlighting the lack of emphasis on the effects on non-fiscal measures which is the focus of this thesis.

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

Chapter 7 tests the robustness of these conclusions by identifying trends and factors that may mitigate the effects on the law identified in Chapter 6 or make the changes arising from the fiscal aid case law irrelevant, including proposals for tax harmonisation. It will
argue that these will not do much to prevent the consequences outlined in Chapter 6. Chapter 7 will also identify two developments which will extend the reach of these developments and the impact on non-fiscal aid in the form of a regulation on foreign subsidies and the new State aid and subsidy control arrangements arising from the UK’s departure from the EU.

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

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

\textsuperscript{45} See for example, Mike McConville and Wing Hong Chui, ‘Introduction and Overview’ in Mike McConville and Wing Hong Chui (eds), \textit{Research Methods for Law} (Edinburgh University Press 2007) 1-15, 1, 3; Rónán Kennedy, ‘Doctrinal Analysis: The Real “Law in Action”’ in Laura Cahillane and Jennifer Schwppe (eds), \textit{Legal Research Methods: Principles and Practicalities} (Clarus Press 2016) 21-38, 22.
for this research as it is difficult to explain or critique this interaction without this type of inquiry.

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

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for particular policy objectives in a way that might overprescribe the law as a solution to various social problems.\footnote{Rob van Gestel and Hans-Wolfgang Micklitz, ‘Why Methods Matter in European Legal Scholarship’ (2014) 20 European Law Review 292, 300-303.}

This chapter cannot fully resolve the debate on the future of doctrinal research. However, it can offer a defence of the use of the doctrinal methodology employed in this thesis. Fundamentally, the primary research question posed asks about how the law works and how it might affect future cases. This requires the analysis to examine the law, at least to some extent, from an internal perspective that is guided by the norms and logic of the system of EU State aid control. It requires some attempt to synthesise and draw together different strands in the case law because this field of regulation is heavily dependent on the case law of the CJEU to make sense of relatively sparse legislative text. Providing a coherent account of the law in this area is worthwhile because, much like other worthy subjects of doctrinal analysis,\footnote{Christopher McCrudden, ‘Legal Research and the Social Sciences’ (2006) 122 Law Quarterly Review 632, 648.} the law is complex, uncertain and rapidly changing with significant consequences for European integration and the economies of the various Member States.

However, the analysis in this thesis goes beyond mere ‘case-law journalism’ in that it is not exclusively reactive in character. It does not just respond to the case law on the application of Article 107(1) TFEU to fiscal measures but seeks to consider novel arguments that might be made in future cases and consider how the law might respond to other forms of State intervention. Further, it seeks to evaluate these developments not only from the perspective of the State aid control regime itself, but also by drawing on economic and political science literature to understand the practical effects of this set of legal rules. It also uses these sources together with the case law and legislation to articulate criteria for evaluation of the State aid control regime that are not exclusively drawn from the doctrine...
It also makes proposals for reform that draw on the legal sources themselves as well as the insights from other disciplines. However, in order for the arguments outlined in this thesis and the proposals for reform to be useful to litigants, officials and the Union courts, it must remain grounded in the doctrine itself at least to some extent. Moreover, this thesis does not uncritically prescribe the law as a solution to a particular social problem or a means of pursuing a specific political or policy goal. Instead, it identifies problems in the way the law has been applied, evaluates them and proposes reforms that might resolve them.

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

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

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53 See Chapter 3.
54 See Section 2.3.1 for more detail on this point.
therefore understanding precisely what the Commission has decided will often be an important element of such litigation. The Commission’s argument about the correct interpretation of the law may also be more fully rehearsed in its initial decision. Second, Commission decisions reveal trends in State aid enforcement before those trends emerge in litigation. Third, not all questions about the application or interpretation of the State aid rules are the subject of litigation and so consulting these decisions expands the range of examples that interact with the argument of this thesis.

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

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

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55 Case 730/79 Philip Morris v Commission ECLI:EU:C:1980:209, [1980] ECR 2671, paras 17, 24. See further discussion on these guidelines in Sections 2.3.5, 2.4.3.
56 C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri v Commission ECLI:EU:C:2005:408, [2005] ECR I-5425, para 211; Oana Stefan, ‘Hybridity Before the Court: A Hard Look at Soft Law in the EU Competition and State Aid Case Law’ (2012) 37 European Law Review 49. However, the Commission cannot bind itself to guidelines in the field of State aid that are not inconsistent with the Treaties. See Joined Cases C-75/05 P and C-80/05 P Germany v Kronofrance ECLI:EU:C:2008:482, [2008] ECR I-6619, para 65; Case C-288/11 P Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission ECLI:EU:C:2012:821, para 38. See further discussion of the legal effects of the Commission’s soft law at Section 2.4.3.
authentic, and consulting other versions can sometimes assist in clarifying a point that is less than clear from the English version. Indeed, a similar interpretive process is employed by the Union courts in places. Much of the case law is available in English or French, if not both. Unlike legislation, decisions of the Union courts do have a single authentic language. The author has made efforts to consult the version in the language of the case in addition to any French or English translation on some occasions. This has been possible where the language of the case is Spanish, Italian or Portuguese.

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

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

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

1.5. Conclusion

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

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

2.1. Introduction

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

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

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

¹ See Paul Craig and Gráinne de Búrca, EU Law: Text, Cases and Materials (7th edn, Oxford University Press 2020) 3.
European Coal and Steel Community (the “ECSC Treaty”) integrated the coal and steel markets of the Member States. This was accompanied by a system of State aid control. Article 4(c) of the ECSC Treaty declared that all ‘subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever’ relating to coal and steel were incompatible with the common market and directed that they were ‘abolished and prohibited within the Community’. While State aid control is often considered to be a relatively distinctive feature of the European project, Piernas López identifies key characteristics of this system that bear some resemblance to international sector-specific rules controlling subsidies for sugar production, which may have influenced the development of this system. These features are an absolute prohibition on aid and subsidies in the relevant sector, a broad and flexible concept of subsidy and a supranational authority charged with enforcing these rules. The first two of these features offer interesting points of contrast and similarity with the modern system of State aid control.

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

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4 ibid 401-402.

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

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

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\(^{7}\) ibid 41.


\(^{10}\) Article 67(2) of the ECSC Treaty.
some narrow exceptions covered by sector-specific regimes.\textsuperscript{11} As observed in \textit{Steenkolenmijnen},\textsuperscript{12} the ECSC Treaty itself only envisaged partial market integration linked to a specific sector of the economy while the modern system of State aid control occurs in the context of a much more comprehensively integrated market.\textsuperscript{13}

The absolute nature of the prohibition in Article 4(c) of the ECSC Treaty must also be understood in the context of the effectiveness of its enforcement. Ehlermann describes the prohibition as being ‘excessive and unenforceable in the real world’, and as being largely ignored.\textsuperscript{14} However, this weakness in the enforcement of State aid control under this provision may not be entirely the result of its ambitious objectives. It seems that levels of State aid remained very high in Member States until the late 1980s, long after new State aid rules were introduced in the Treaty of Rome in 1957.\textsuperscript{15}

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

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


\textsuperscript{13} ibid.


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

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

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\(^{17}\) Ibid.


\(^{20}\) Ibid 20.

\(^{21}\) Ibid 19-20.
efficiency and the promotion of competition, the comments of AG Lagrange also emphasise the impact of aid in market integration.\textsuperscript{22} This early case also provides evidence of the multiplicity of purposes served by this area of the law.\textsuperscript{23}

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

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

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

This section will begin to outline the basic features of the modern Treaty provisions, starting with Article 107(1) TFEU which is the primary focus of this thesis and the research question that it seeks to answer. This section will consider the general prohibition on State aid as well as the categories of aid that are or may be compatible with the internal market.\textsuperscript{22} Case 30/59 De Gezamenlijke Steenkolenmijnen in Limburg v High Authority ECLI:EU:C:1960:41, [1961] ECR 3, Opinion of AG Lagrange, 41.\textsuperscript{23} See Sections 3.2-3.6 for further discussion of these different objectives.\textsuperscript{24} These provisions have been renumbered on numerous occasions by Treaty amendments. Following the Treaty of Amsterdam amendment in 1997 these provisions could be found at Articles 87-89 EC. The State aid rules were renumbered to Articles 107-109 TFEU after the Lisbon Treaty amendments came into force in 2009. To avoid confusion, these provisions will be referred to using the current numbering system, ie 'Articles 107-109 TFEU'.
aid contained by this provision and will outline the conditions developed by the case law for
the identification of aid within the meaning of this provision. Article 107(1) TFEU provides:

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

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

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Roemer, 627; Case 74/76 Ianelli v Meroni ECLI:EU:C:1977:51, [1977] ECR 557, para 11; Case 78/76 Steinike
Union (3rd edn, Penguin 1999) 501 describe what is now Article 34 TFEU in the same terms.
27 This structure of four main conditions is supported by the CJEU in Joined Cases C-393/04 and C-41/05
Air Liquide Industries Belgium ECLI:EU:C:2006:403, [2006] ECR I-5293, para 28. A similar account of the
relevant conditions is set out in the structure of Herwig Hoffmann and Claire Micheau (eds), State Aid Law of
the European Union (Oxford University Press 2013) part II and Commission Notice on the notion of State aid
These commentators separate the requirement that the beneficiary of the aid be an undertaking from the
economic advantage criterion. However, this author finds it more convenient to address those issues together.
This also echoes the approach of Conor Quigley, European State Aid Law and Policy (and UK Subsidy Control)
academic commentary that divide these conditions in different ways, this framework of four broad conditions will be used to structure the discussion that follows on the notion of aid within Article 107(1).  

2.3.2. Imputability to the State and State Resources

2.3.2.1. Early Case Law

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

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(4th edn, Hart 2022) 5-6 who emphasises the importance of distinguishing between economic advantage, selective advantage and competitive advantage.  
28 This formula strikes a reasonable balance for the purpose of this discussion between analytical precision on the one hand and the avoidance of repetition or confusion when dealing with tests that often overlap with one another. For alternatives, see for example Vincent Verouden and Philipp Werner, ‘Introduction – The Law and Economics of State Aid Control’ in Philipp Werner and Vincent Verouden (eds), EU State Aid Control: Law and Economics (Wolters Kluwer 2017) 7-62, 16 divide these into six conditions. Eugene Stuart and Iana Roginska-Green, Sixty Years of EU State Aid Law and Policy: Analysis and Assessment (Wolters Kluwer 2018) 10 also outline six conditions, one of which is ‘selective advantage’. For the author’s reservations on the use of the term ‘selective advantage’ and the conflation of the criteria of economic advantage and selectivity, see Section 5.4.2. Conor Quigley, European State Aid Law and Policy (and UK Subsidy Control) (4th edn, Hart 2022) 6 further subdivides these into nine separate conditions. Some cases see the CJEU adopt four conditions that are somewhat different to those listed above. See for example Case C-15/14 MOL v Commission ECLI:EU:C:2015:362, para 47; Joined Cases C-20/15 P and C-21/15 P Commission v World Duty Free Group ECLI:EU:C:2016:981, para 53. In all cases, the basic rules and points of interpretation are the same.  
29 For discussion of this condition elsewhere in the thesis, see Sections 4.2.1, 6.3.3.  
32 Case 78/76 Steinike und Weinlig ECLI:EU:C:1977:52, [1977] ECR 595, para 22. It should also be noted that in circumstances where a charge such as this is hypothecated and used for the provision of aid, the charge is
form of preferential tariffs by a gas company partially owned and substantially controlled by a Member State was also held to be State aid in *Van der Kooy*.

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

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35 ibid para 19.

36 ibid paras 21-22.

37 ibid paras 21-22.

2.3.2.2. *PreussenElektra* and its Aftermath

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

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

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\(^{40}\) Ibid para 58.


\(^{42}\) Case C-677/11 *Doux Elevage and Coopérative agricole UKL-ARREE* ECLI:EU:C:2013:348, paras 32-36.
merely formalises or provides for an enforcement system for a private industry association, it appears that this criterion is not met.

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

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44 Case C-262/12 *Association Vent de Colère* ECLI:EU:C:2013:851. See also Joined Cases C-702/20 and C-17/21 ‘DOBELES HES’ SIA ECLI:EU:C:2023:1.
45 Case C-262/12 *Association Vent de Colère* ECLI:EU:C:2013:851, paras 22-37.
Commission to bring the CJEU to diverge from the approach in *PreussenElektra*.49 Bouchagiar helpfully synthesises the case law in light of *Commission v Germany* and the decision in *Achema*50 to identify three circumstances where a measure will be held to be granted through State resources.51 These are where the State imposes a compulsory charge that finances a public initiative or policy, where the manager of the resources is under the control of the State and where price regulation is combined with the assumption of the burden of that price regulation by the State.52

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

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51 Case C-706/17 *Achema* ECLI:EU:C:2019:407.
54 ibid.
used as an instrument of excessive deregulation. Neither of these positions are without difficulties. The charge of formalism levelled against PreussenElektra is clearly made from a perspective that views State aid law as a tool to preserve competition between undertakings. This view regards the impact on competition to be the same irrespective of whether the measure is funded directly by the State or by payments from private actors pursuant to an obligation imposed by the State, making the distinction drawn in PreussenElektra irrelevant. However, this argument may be less compelling if State aid law is regarded as a tool for the integration of the internal market. On this view, PreussenElektra may be regarded as following analogous developments in free movement law which seek to limit their deregulatory influence on national economies.

2.3.2.3. Imputability to the State

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

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

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


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

\textsuperscript{61}Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C262/1, para 5; Rein Wesseling and Marieke Bredenoord-Spoek, ‘State Measure’ in Philipp Werner and Vincent Verouden (eds), EU State Aid Control: Law and Economics (Wolters Kluwer 2017) 87-118, 87-88, 117.
\textsuperscript{62}See for example Case T-251/11 Austria v Commission ECLI:EU:T:2014:1060, para 87.
\textsuperscript{65}See Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C262/1, para 43. It was further held that this assessment may also consider the extent to which an official whose actions normally would be imputable to the State acted in excess of her powers and/or concealed the implementation of the measure and the likelihood that the public authorities would have blocked the decision if they had the opportunity to do so in Case C-242/13 Comerz Nederland NV v Havenbedrijf Rotterdam NV ECLI:EU:C:2014:2224.
While the imputability of a measure to the State is distinct from the requirement for a burden on State resources, these two conditions are more closely related than might first appear. In many cases, these two conditions blur together. Both conditions are concerned with assessing State control. It is likely that the same factors which might influence a decision on whether a given decision was taken subject to State control would also assist in determining whether the funds at issue were also under State control. Further, the most defensible interpretation of these two lines of case law views State control as a matter of degree, rather than a simple dichotomy. For example, the State resources criterion has been described as effectively amounting to a remoteness test, examining the strength of the link between the advantage and the commitment of public resources based on a range of indicators. The reliance on a wide range of indicators has also been observed in the treatment of the imputability of a measure to the State.

2.3.3. Economic Advantage

2.3.3.1. Definition of Undertaking

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

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

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

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

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


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

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

2.3.3.2. Economic Advantage

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

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84 Case C-318/05 Commission v Germany ECLI:EU:C:2007:495, para 68; Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C262/1, paras 28-32.
not have been obtained under ordinary market conditions.\textsuperscript{88} It has been described as referring only to the effect on the recipient undertaking.\textsuperscript{89} This involves a comparison of the financial position of the undertaking after the measure was implemented with the circumstances that would have prevailed without the intervention.\textsuperscript{90} As a result, an economic advantage can be conferred not only by a direct payment or subsidy to an undertaking, but also by relieving the undertaking from economic burdens or costs that it would normally have to bear as part of its budget, such as labour costs and social security charges,\textsuperscript{91} taxes,\textsuperscript{92} goods and services.\textsuperscript{93} Similarly, a State guarantee can also confer an economic advantage on an undertaking even if the guarantee is not enforced.\textsuperscript{94}

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

\textsuperscript{90} Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C262/1, para 66.
\textsuperscript{94} Joined Cases C-399/10 P and C-401/10 P Bouygues SA and Bouygues Télécom SA v European Commission and Others ECLI:EU:C:2013:175.
operator and any benefit accruing could have been obtained in the course of a transaction under normal market conditions. Where a national government makes investments or injects capital into a company, it may avoid the application of Article 107(1) TFEU if it can be established that a private investor of a similar stature to the State would have made such an investment. The mere fact that the company receiving the funds turns a profit does not prevent this being classified as aid. Further, a Member State may subsidise a loss of a company in which it has a shareholding, provided that there is a prospect of returning to profitability. The interpretation of this criterion appears to be more open to economics and quantitative evidence than the case law on other elements of Article 107(1) TFEU. However, the analysis extends slightly further than strict economic analysis, with the CJEU acknowledging that a comparable market operator may also take into account ‘other considerations, such as a desire to protect the group's image or to redirect its activities.’

2.3.3.3. Services of General Economic Interest

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

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

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

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

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

This decision was the subject of considerable debate over the extent to which it was consistent with previous case law. However, as *Altmark* has been repeatedly affirmed by...
the Union courts, another more important line of criticism has emerged regarding difficulties in its application. Some authors have suggested that it has not done much to clarify the practical application of the law in this area as it requires complicated economic assessments which may pose difficulties in particular for national administrations and national courts. It has also been suggested that the requirement that parameters for calculation of compensation be determined prospectively limits the flexibility of this exception and the ability of Member States to use it to respond to changing circumstances, as well as representing a relatively formalistic approach to the identification of advantage. Further, the uncertain and complicated nature of the calculations that must be made may dissuade Member States from relying on this exception, which may make it difficult for this rule to achieve its stated objectives.

However, it is submitted that the Commission and the Union legislator has sought to address this concern by adopting more specific legislation and guidance in this field, most recently as part of the Almunia Package in 2012. To that end, the Commission has adopted regulations that provide for de minimis exemptions from the notification requirement for aid was delivered shortly beforehand. See Adinda Sinnaeve, ‘State Financing of Public Services: The Court’s Dilemma in the Altmark Case’ (2003) 2 European State Aid Law Quarterly 351, 358; Andreas Bartosch, ‘Clarification or Confusion - How to Reconcile the ECJ's Rulings in Altmark and Chronopost’ (2003) 2 European State Aid Law Quarterly 375, 375; Alessandra Fratini and Andrea Carta, ‘Chronopost v. Ufex: The Paradox of the Competing Monopolist’ (2004) 24 Northwestern Journal of International Law and Business 773, 785-786. See for example Case C-206/06 Essent Netwerk Noord ECLI:EU:C:2008:413, [2008] ECR I-5497, paras 80-85; Case C-140/09 Fallimento Traghetti del Mediterraneo ECLI:EU:C:2010:335, [2010] ECR I-5243, paras 36-40; Joined Cases C-66/16 P to C-69/16 P Comunidad Autónoma del País Vasco v Commission ECLI:EU:C:2017:999, paras 45-46.


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

\textbf{2.3.4. Selectivity}

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

\begin{footnotesize}
\begin{itemize}
  \item[\textsuperscript{121}] Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L7/3.
\end{itemize}
\end{footnotesize}
among the most controversial criteria for identifying State aid.\textsuperscript{125} This criterion captures the extent to which the measure is targeted towards specific undertakings or industries and distinguishes selective, targeted aid measures from general measures which do not constitute aid.\textsuperscript{126} Therefore, measures granted to an individual undertaking can be presumed to be selective.\textsuperscript{127} Measures which apply to all undertakings without distinction will not be selective.\textsuperscript{128} However, this assessment is considerably more complex for measures that fall between these extremes. The CJEU has developed a three-stage test to identify selective measures in such cases.\textsuperscript{129} The first stage of the test identifies the reference framework or normal regime in the context of which the alleged aid measure occurs.\textsuperscript{130} Second, the test examines whether the impugned measure differentiates between undertakings who are in a comparable legal and factual situation from the perspective of the measure’s objectives.\textsuperscript{131} If it does so, then the test continues to the third stage. If it does not, then the measure is not selective. The third step considers whether the differentiation between comparable

\textsuperscript{125} This section provides a general overview of the relevant legal tests.


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


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

This aspect of the test has largely been developed in response to attempts to enforce
the State aid rules against fiscal measures, which are the primary focus of this thesis and the
research question that it seeks to answer. The difficulties that have arisen in the application
of the State aid rules, including the selectivity criterion, to fiscal measures will be examined
in greater detail in Chapter 4. It is sufficient at this juncture to note that it is not obvious
that fiscal policy was the primary target of the State aid rules when they were first drafted,
even if it was clear from early case law that the notion of aid was broader than that of
subsidy. However, it has been clear since the decision of the CJEU in Italian Textiles that
Article 107(1) TFEU does not allow the form of a measure to determine whether it
constitutes State aid. Instead, it is said that State aid is defined in relation to its effects.

As a result, the fact that an advantage is conferred through the tax system does not prevent
it from amounting to aid. Nevertheless, enforcement against fiscal measures was much

132 Case C-143/99 Adria-Wien ECLI:EU:C:2001:598, [2001] ECR I-8365, para 42; Case C-88/03 Portugal v
134 See Sections 4.3-4.6.
135 Tracy Kaye, ‘Corporate Blackmail: State Tax Incentives in the United States’ in Alexander Rust and Claire
Micheau (eds), State Aid and Tax Law (Wolters Kluwer 2013) 13-38, 21; Pierpaolo Rossi-Maccanico, ‘Fiscal
Aid Review and Tax Competition’ in Alexander Rust and Claire Micheau (eds), State Aid and Tax Law
136 Case 30/59 De Gezamenlijke Steenkolenmijnen in Limburg v High Authority ECLI:EU:C:1961:2, [1961]
ECR 3, 19.
138 ibid. See further discussion in Section 5.3.
139 ibid. Similarly, the mere fact that a measure relates to monetary policy will not allow it to evade the
prohibition in Article 107(1) TFEU in itself. See Case 57/86 Greece v Commission ECLI:EU:C:1988:284,
less aggressive before the mid-1990s, when the Commission adopted a much more interventionist approach to such measures. The interaction between the selectivity criterion and the expansion of the notion of aid to cover tax measures will be explored in greater depth throughout this thesis.

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

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

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

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

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


145 However, some earlier remarks suggested a greater willingness to contemplate a measure failing to satisfy this criterion. See Case 40/75 Produits Bertrand v Commission ECLI:EU:C:1975:168, [1976] ECR 1, Opinion of AG Reischl, 16; Case 52/76 Benedetti v Munari ECLI:EU:C:1976:184, [1977] ECR 163, Opinion of AG Reischl, 190-191; Case 61/79 Amministrazione delle finanze dello Stato v Denkavit italiana ECLI:EU:C:1980:2, [1980] ECR 1205, Opinion of AG Reischl, 1235. It had been accepted that measures
prove the existence of any actual distortion of competition, but only that the measure is liable
to distort competition. The substantive threshold for a distortion of competition is very
low, with even a very minor distortion of competition being capable of satisfying this
condition. The case law has repeatedly contrasted the ‘extremely broad definition’ of
distortion of competition under Article 107(1) TFEU with the interpretation of similar
wording in Article 101 TFEU and other areas of competition law which normally requires
that the distortion of competition be appreciable in character. Unlike in the application
of Article 101 TFEU, there is no obligation on the Commission to carry out a detailed market
definition or economic analysis. In particular, it is clear that the small size of any grant of
aid cannot exclude the possibility of a distortion of competition. Similarly, the relatively
small size of the recipient undertaking and its market share cannot guarantee that this
condition will not be fulfilled. In some limited circumstances in which the measure
designed to promote exports would distort competition in Joined Cases 6/69 and 11/69 France v Commission ECLI:EU:C:1969:51, [1969] ECR 523, Opinion of AG Roemer, 553. This earlier approach appears to have been superseded by the decision in Case 730/79 Philip Morris v Commission ECLI:EU:C:1980:209, [1980] ECR 2671. See also Section 8.3.1. 146
148 Case C-385/18 Arriva Italia Srl ECLI:EU:C:2019:647, Opinion of AG Tanchev, para 120.
benefits undertakings operating on a market that has not been liberalised or opened up to
competition, the Commission considers that there is no competitive distortion.\textsuperscript{153}
Nevertheless, the threshold is incredibly low and will almost always be satisfied by any
measure being assessed by the Commission or the Union judicature.\textsuperscript{154}

The requirement that aid have an effect on trade between Member States has been
given a similar interpretation and is also easily satisfied.\textsuperscript{155} The Commission need only prove
that a measure is liable to affect trade between Member States rather than an actual effect,\textsuperscript{156}
and no detailed economic analysis or evidence is required from the Commission.\textsuperscript{157} The
substantive threshold for this criterion is also very low. An effect on inter-state trade can
arise where the payment is very small.\textsuperscript{158} Even if the recipient undertakings conduct all or
most of their trade with third countries, there may be a sufficient effect on trade between
Member States.\textsuperscript{159} However, the Commission has adopted a more demanding approach to
the effect on inter-state trade criterion in its guidance and decisional practice that has led it
to find that this criterion is not satisfied in some cases and that it is distinct from the distortion of competition. Under this approach, the Commission will conclude that there is no effect on trade between Member States if the recipient supplies goods or services only to a limited area within a Member State, the recipient is unlikely to attract customers from other Member States and the measure would not have any foreseeable, more-than-marginal effect on conditions of cross-border investment and establishment. While the Commission can bind itself using guidelines in this way such that the guidelines have legal effect, there is some debate on whether this particular change is consistent with the existing case law of the CJEU on Article 107(1) TFEU.

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

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

2.4.1. Exemptions from the Prohibition on Aid

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

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

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


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

\textbf{2.4.2. Exemptions in Article 107(2) TFEU}

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


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

\textsuperscript{174} Article 107(2)(a) TFEU.


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

### 2.4.3. Exemptions in Article 107(3) TFEU

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

\textsuperscript{178} Article 107(2)(b) TFEU.


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


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


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

The Commission is free to supplement the open-ended language defining these categories in the Treaties with more detailed guidelines providing criteria for compatibility with the internal market.\textsuperscript{190} The Commission is bound to apply the wide range of guidelines that it has adopted,\textsuperscript{191} unless it can point to economic developments that render those guidelines irrelevant\textsuperscript{192} or any provisions of the guidelines are inconsistent with the Treaties.\textsuperscript{193} Following various initiatives to modernise the patchwork of different guidance documents available,\textsuperscript{194} the Commission has adopted a set of common principles for the


assessment of compatibility that is incorporated into all revised guidelines and considers these as part of a balancing test, weighing up the positive and negative effects of the aid.

These documents allow the State aid control regime to respond to changing economic conditions and competing political developments in a flexible manner. This is particularly apparent from the various temporary frameworks that were adopted by the Commission to facilitate the swift approval of large amounts of aid in response to a number of different

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


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

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200 Communication from the Commission – Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia [2022] OJ C1131/1 as amended by
2.5. Modern State Aid Control: Article 108 TFEU, Enforcement and Procedure

2.5.1. Procedural Issues

Any assessment of the State aid rules cannot be undertaken without some evaluation of the methods through which they are enforced. This section will examine the procedural rules governing the enforcement of the prohibition in Article 107(1) TFEU and the derogations in Article 107(2)-(3) TFEU. First, the text of Article 108 TFEU, which gives a general outline of the system for enforcing the State aid rules and some of the case law that supplements it. While the case law remains important for determining the procedures that must be adopted by the Commission in reviewing and investigating State aid, the Union legislator has also produced secondary legislation that codifies these rules. Therefore, this section will move on to consider the adoption of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (the ‘Procedural Regulation’) and its predecessors which provide a more comprehensive synthesis of the case law and the relevant Treaty provisions.\(^{201}\)

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

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


\(^{202}\) This is seeks to ensure that only aid that is compatible with the internal market is implemented. See Case C-349/17 Eesti Pagar ECLI:EU:C:2019:172, para 84; Case C-510/16 Carrefour Hypermarchés ECLI:EU:C:2018:751, para 30.
Commission conducts an initial review of a measure and if it considers that the aid may be incompatible with the internal market, it must open the formal investigation procedure in Article 108(2) TFEU.\textsuperscript{203} Under this procedure, the Commission will allow the parties concerned to submit comments before deciding whether the relevant measure is aid and whether any such aid is compatible with the internal market.\textsuperscript{204} If the aid is found to be incompatible, the Commission must order the alteration or abolition of the aid.\textsuperscript{205} This will normally require the aid to be recovered by the Commission from the recipient undertaking save in exceptional circumstances.\textsuperscript{206} If a Member State refuses to comply with the Commission’s directions, the Commission or any other Member State may refer the matter to the CJEU.\textsuperscript{207} Article 108(2) TFEU also provides for an exceptional procedure whereby a Member State may apply to the Council to determine whether or not a particular aid measure is compatible with the internal market ‘if such a decision is justified by exceptional circumstances’.\textsuperscript{208} This application suspends the Commission investigation for up to three

\begin{itemize}
  \item Article 108(2) TFEU.
  \item Article 108(2) TFEU.
  \item Article 108(2) TFEU; Case 290/83 \textit{Commission v France} ECLI:EU:C:1985:37, [1985] ECR 439, para 17.
\end{itemize}
months, after which the Commission may proceed to reach a decision.\textsuperscript{209} The Council must act unanimously to exercise this power.\textsuperscript{210} Decisions of the Commission pursuant to Article 108 TFEU can be challenged in an action for annulment pursuant to Article 263 TFEU.\textsuperscript{211}

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

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

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

\textsuperscript{210} Article 108(2) TFEU.

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

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


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


\textsuperscript{216} Francesco de Cecco, State Aid Law and the European Economic Constitution (Hart 2013) 45.

\textsuperscript{217} See also Section 7.3.2.
implementing it until the Commission clears the aid evidently support the consolidation of power by the Commission, this provision also gives an important role to national courts. These obligations have been held to be directly effective and capable of being invoked before national courts. While this might appear to give national courts a role in enforcing an ancillary procedural obligation, it gives an important role to these courts in requiring them to identify aid within the meaning of Article 107(1) TFEU. Further, it requires national courts to suspend aid that has been granted in breach of Article 108(3) TFEU. This allows private litigants to restrain the disbursement of aid that has not been notified or approved by the Commission through national courts and even obtain compensation for harm arising from the unlawful grant of aid. This role played by national courts is supported by procedural rules that allow them to request information or opinions from the Commission on the State

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

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

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aid rules.\footnote{Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, article 29(1). See also Communication from the Commission – Commission Notice on the enforcement of State aid rules by national courts [2021] OJ C305/1, paras 104-130.} The Commission may also make non-binding observations to national courts on State aid issues and may request information from the court for the purpose of preparing these submissions.\footnote{Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, article 29(2). These observations are not binding on the national court. See Conor Quigley, \textit{European State Aid Law and Policy (and UK Subsidy Control)} (4th edn, Hart 2022) 760. The Commission may also make its observations orally before the national court with the permission of that court under article 29(2).} While it is important not to overstate the import of this process,\footnote{Fernando Pastor-Marchante, ‘The Protection of Competitors under State Aid Law’ (2016) 15 European State Aid Quarterly 527, 534; Francesco de Cecco, \textit{State Aid and the European Economic Constitution} (Hart 2013) 44-45. These commentators suggest that the inquiry into the notion of aid by national courts is made ancillary or instrumental to the Commission’s supervision. There are also concerns that national courts may lack the required expertise to effectively adjudicate on some of the criteria in Article 107(1) TFEU. See Patricia Ypma and others, \textit{Study on the enforcement rules and decisions of State aid by national courts} (European Commission 2019) 102-103.} there is evidence that attempts to enforce the State aid rules are becoming more frequent.\footnote{Patricia Ypma and others, \textit{Study on the enforcement rules and decisions of State aid by national courts} (European Commission 2019) 88-90.}  

\section*{2.5.2. Procedural Regulation}  

\subsection*{2.5.2.1. Disagreement before Adoption of Regulation}  

The preceding paragraphs have referred to case law in which the CJEU has elaborated on the procedure and enforcement regime briefly described in Article 108 TFEU. This case law was of great importance for a very significant portion of the history of the State aid rules in part because of the brevity of Article 108 TFEU for the complex subject which it regulates and because of the refusal of the Union legislator to adopt more detailed secondary legislation in this area. Article 109 TFEU enables the Council to adopt secondary legislation on the application of Articles 107-108 TFEU. However, the Council refused to adopt such a regulation, despite requests to do so from the Commission until the late 1990s.\footnote{Claus-Dieter Elsherrm, ‘State Aid Control in the European Union: Success or Failure?’ (1994) Fordham International Law Journal, 1210, 1214-1215; Umut Aydin, ‘Issue Framing in the European Commission: State aid policy and the single market’ (2014) 12 Comparative European Politics 141, 148. See Mitchell Smith ‘How}
suggested that the Commission used the impetus from the completion of the single market and the Economic and Monetary Union in favour of tighter regulation of market rules to secure the approval of the Council for regulations governing the procedure for State aid enforcement and allowing for exemptions from the notification requirement.\footnote{Umut Aydin, ‘Issue Framing in the European Commission: State aid policy and the single market’ (2014) 12(2) Comparative European Politics 141, 153. Imelda Maher, ‘Competition Law Modernization: An Evolutionary Tale?’ in Paul Craig and Gráinne de Búrca (eds), \textit{The Evolution of EU Law} (2nd edn, Oxford University Press 2011) 717-741, 727 suggests that this phase in the development of EU competition law (broadly construed) can be characterised as focusing on developing rules to regulate State interventions in the market, including State aid, public procurement and State monopolies.}

amendments, a substantive amendment was made in 2013 that was quickly followed by a consolidated version of these regulations in the Procedural Regulation.

2.5.2.2. Clarity on Procedural Rules

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

Under the formal investigation procedure provided by article 6 of the Regulation and Article


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


236 ibid article 4.

237 ibid article 5.
108(2) TFEU, the Commission will invite comments from interested parties and the relevant Member State and will give the Member State a right of reply to other submissions. The Commission is subject to a general time limit of 18 months in carrying out the formal investigation and may either clear the aid, clear it subject to conditions or prohibit it.\textsuperscript{238}

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

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

\textsuperscript{238} ibid article 9.
\textsuperscript{239} ibid article 7.
\textsuperscript{240} ibid articles 8-9.
\textsuperscript{242} Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, article 25. To date the Commission has exercised these powers only once to launch an investigation into aid to electricity producers. See Philip Torbøl and Alessandro di Mario, ‘First Ever State Aid Sector Investigation: Electricity Producers Targeted by the European Commission’ (2015) 6 Journal of European Competition Law & Practice 656. This process does not give any formal powers to the EU to take action arising from the sector investigation which contrasts with the powers available for similar investigations in the UK’s domestic competition law regime. See Enterprise Act 2002, Part 4.

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

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244 ibid articles 13(1)-(2).
245 ibid article 13(2).
246 ibid article 14.
247 ibid article 15.
248 ibid article 16.
249 This may allow the Commission to use this power more assertively. See Nikolaos Zahariadis, ‘Discretion by the Rules: European State Aid Policy and the 1999 Procedural Regulation’ (2010) 17 Journal of European Public Policy 954.
250 See for example Case T-473/12 Aer Lingus v Commission ECLI:EU:T:2015:78, paras 86, 108-109. It is often stated that the Commission generally has no discretion to determine the remedial consequences and is normally compelled to order recovery.
251 The bar for impossibility is quite high. It may arise where the beneficiary of the aid has been liquidated or no longer exists as in Case C-499/99 Commission v Spain ECLI:EU:C:2002:408, [2002] ECR I-6031, paras 36-46. It may also occur if the aid was granted to a publicly-owned company that has subsequently been sold, meaning that the benefit has already been recovered to the State. See Case C-390/98 Banks ECLI:EU:C:2001:456, [2001] ECR I-6117, paras 77-79. The financial difficulties of undertakings do not amount to impossibility, neither does the prospect of social unrest, administrative difficulties in recovery or the large numbers of undertakings involved. See respectively Case C-404/97 Commission v Portugal ECLI:EU:C:2000:345, [2000] ECR I-4897, para 53; Case C-63/14 Commission v France ECLI:EU:C:2015:458, para 52; Case C-378/98 Commission v Belgium ECLI:EU:C:2001:378, [2001] ECR I-5107, para 42; Case C-280/95 Commission v Italy ECLI:EU:C:1998:28, [1998] ECR I-259, paras 12-15.
where it made a very novel finding that could not have been predicted\textsuperscript{252} or where it has revoked a decision to clear the aid.\textsuperscript{253} While some commentators suggest that recovery is an ineffective remedy in that it simply returns the funds at issue to the Member State that has breached the law and propose alternatives such as the recovery of the aid by the EU institutions themselves,\textsuperscript{254} such a remedy is likely to be considered to be contrary to Article 108(2) TFEU.\textsuperscript{255}

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

The Member State can agree to the Commission’s proposals, which then become binding on

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


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

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


\textsuperscript{257}ibid articles 21-22.
It.\textsuperscript{258} If an agreement cannot be reached, the Commission is empowered to open the formal investigation procedure.\textsuperscript{259}

\textbf{2.5.2.3. Rights of Affected Undertakings}

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

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

\textsuperscript{258} ibid article 23(1).
\textsuperscript{259} ibid article 23(2).
\textsuperscript{260} See the discussion on the options available to undertakings to participate in the enforcement of the State aid rules in Section 7.3.2.
of undertakings who might be affected by the granting of aid, particularly beneficiaries and competing undertakings. Article 24(2) allows interested parties to submit a complaint about unlawful aid or misuse of aid by a prescribed form and gives an interested party who does so the right to receive a copy of any decision taken on the matter. A beneficiary of aid will also be sent a decision on that aid as a matter of course. Interested parties are also entitled to copies of decisions taken under the Regulation upon request. The Commission must consider any complaint that is correctly submitted and it must undertake a preliminary examination of the aid. However, these rules have been criticised for the limited rights that they afford undertakings affected by investigations. Interested parties are only entitled to participate once the formal investigation procedure is opened and have no procedural rights at the preliminary examination stage. Interested parties also have no access to the file in State aid investigations, and no right to respond to the comments of other parties. Some commentators suggest that this is insufficient in circumstances where undertakings bear heavy burdens of being compelled to provide information to the Commission. These rules preserve the largely bilateral character of investigations between

263 ibid article 24(1).
264 ibid article 24(3).
265 ibid article 12(2).
Despite these weaknesses, undertakings do have some influential levers to influence decision making, by submitting complaints, challenging decisions not to open the formal investigation procedure before the Union courts and restraining the grant of unlawful aid through national courts. While undertakings have only limited control of State aid enforcement, they nevertheless have a range of tools at their disposal which can exert considerable pressure on the Commission to investigate and take formal decisions. This operates at the very least as a practical constraint on the Commission’s enforcement powers.

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

2.6.1. Legislative Power and Legislative Change


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

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

275 See Section 7.3.2 for a more detailed exposition of this argument.
The text of the State aid rules has changed little since it was drafted as part of the Treaty of Rome. Indeed, the scarcity of legislative developments of any sort relating to the State aid rules is striking with no substantive changes to the Treaties or secondary legislation in this field being enacted until the 1990s. This may in part reflect disagreements between the Member States on how to proceed and may also reflect the flexibility of the relatively open-ended and ambiguous text of the State aid rules which has allowed them to adapt and develop through the case law of the CJEU and the decisional practice of the Commission without any direct change. The delay in enacting any secondary legislation on State aid has not been the result of any obstacle in the text of the Treaties themselves. Article 109 TFEU empowers the Council to make regulations for the application of Articles 107 and 108 TFEU. The Procedural Regulation which was discussed above is one enactment adopted under this legal basis. Article 109 TFEU also expressly enables the Council to adopt secondary legislation to ‘determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.’ While the purpose of such an exemption will vary according to its content, they are generally thought to reduce the administrative burden on the Commission and Member States, allowing more focused enforcement from the Commission and swifter implementation of policy by national governments.\(^{276}\) While the Council has adopted legislation of this type, it simply confers powers on the Commission to adopt detailed rules outlining these exemptions.\(^{277}\) It appears that some delegation of this type may have been envisaged by the Treaties, with Article 108(4) providing that ‘Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by [Article 108 TFEU]’. This section considers the two important forms of exemption from the obligation


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

2.6.2. De Minimis Regulations

2.6.2.1. Adoption and Structure of De Minimis Regulations

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

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

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

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

### 2.6.2.2. Evaluation of De Minimis Regulations

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

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


engine of market integration or a mechanism for managing regulatory competition. Further, authors calling for a more streamlined and economics-focused enforcement of State aid control with optimal decision-making architecture have argued in favour of the introduction of safe harbours for measures which are least likely to be harmful to reserve more detailed analysis for less clear cases.\footnote{Hans Friederiszick, Lars-Hendrik Röller and Vincent Verouden, ‘European State Aid Control: An Economic Framework’ in P Buccirossi (eds), \textit{Advances in the Economics of Competition Law} (MIT Press 2006) 625–669; Ulrich Schwalbe, ‘European State Aid Control – The State Aid Action Plan’ in Jürgen Basedow and Wolfgang Wurmmest (eds), \textit{Structure and Effects in EU Competition Law} (Wolters Kluwer 2011) 161-192.} This is likely to reduce the administrative burden for the Commission and for Member States granting aid.\footnote{Adinda Sinnaeve, ‘The Complexity of Simplification: The Commission’s Review of the de Minimis Regulation’ (2014) 13 European State Aid Law Quarterly 261, 265.} However, some doubts have been raised with the purely quantitative approach of the De Minimis Regulations with some authors describing it as overly simplistic.\footnote{Michael Berghofer, ‘The New De Minimis Regulation: Enlarging the Sword of Damocles?’ (2007) 6 European State Aid Law Quarterly 11, 22; Rainer Nitsche and Paul Heidhues, \textit{Study on methods to analyse the impact of State aid on competition} (European Commission 2006) 11.} However, it should be observed that Commission Regulation (EC) No 1407/2013 does go slightly beyond the quantitative approach to exclude its application to export aid, which might be regarded as particularly damaging.\footnote{Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1, recital (9) article 1(d)-(e).} It is also important not to overstate the utility of the De Minimis Regulations in creating legal certainty. This is particularly the case in circumstances where the boundaries of the notion of aid in Article 107(1) TFEU are unclear and it may be difficult for Member States to precisely quantify the relevant amount in advance for fiscal aid and some other forms of aid.\footnote{Adinda Sinnaeve, ‘Block Exemptions for State Aid: More Scope for State Aid Control by Member States and Competitors’ (2001) 38 Common Market Law Review 1479, 1499. See also Raymond Luja, ‘Do State Aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty?’ (2016) 25 EC Tax Review 312.}

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


\textsuperscript{293} Michael Berghofer, ‘The New De Minimis Regulation: Enlarging the Sword of Damocles?’ (2007) 6 European State Aid Law Quarterly 11, 14

\textsuperscript{294} ibid.


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

This infirmity in the De Minimis Regulations may be easily remedied by re-enacting them as block exemption regulations that consider the relevant measures to be aid, albeit compatible with the internal market and exempt from obligation to notify. The De Minimis Regulations could be re-enacted in this form with substantially the same effect with relative ease to cure this defect.\footnote{Michael Berghofer, ‘The New De Minimis Regulation: Enlarging the Sword of Damocles?’ (2007) 6 European State Aid Law Quarterly 11, 21-22.} Van de Casteele observes that De Minimis Regulations may be capable of having retrospective effect,\footnote{Koen Van de Casteele, ‘De Minimis Aid’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot, (eds), \textit{EU State Aids} (6th edn, Sweet & Maxwell 2021) 205-216, para 6-043. This position is confirmed in the Communication from the Commission — Commission Notice on the recovery of unlawful and incompatible State aid [2019] OJ C247/1, para 101.} a reality which may reduce the consequences of any lacuna emerging if the existing regulations were challenged and may explain the failure on the part of the EU institutions to correct this defect.

\subsection{2.6.3. General Block Exemption Regulations}

\subsubsection{2.6.3.1. Enactment and Extension}

The other type of secondary legislation that seeks to exempt certain measures from the obligation to notify in Article 108(3) TFEU takes the form of general block exemption regulations. Much like the De Minimis Regulations, this seeks to reduce the administrative burden for the Commission and Member States arising from notifications and to provide legal certainty for Member States and undertakings.\footnote{Phedon Nicolaides, ‘An Economic Assessment of the Usability of the New General Block Exemption Regulation for State Aid (Regulation 651/2014)’ (2014) 10 European Competition Journal 403, 417; Koert van Buijen and Alexander Rose, ‘General Block Exemption Regulation’ in Philipp Werner and Vincent Verouden (eds), \textit{EU State Aid Control: Law and Economics} (Wolters Kluwer 2017) 221-260, 223.} This scheme was also introduced through Council Regulation (EC) No 994/98 which empowers the Commission to adopt
further regulations exempting certain categories of aid from the notification requirement including regional aid, aid to SMEs and aid for research and development, employment and training and environmental protection. Legislative reform in this area has sought to progressively streamline enforcement in a manner consistent with the Commission’s State Aid Action Plan in the late 2000s and the later State Aid Modernisation scheme. The Commission adopted a number of different block exemption regulations on that basis before expanding and consolidating them into a single regulation in 2008. This was then replaced by Commission Regulation (EU) No 651/2014 (the ‘GBER’) which remains in force. The GBER covers a more expansive range of aid measures including aid for culture and heritage, dealing with natural disasters, regional transport, broadband infrastructure, sport and other types of infrastructure.

2.6.3.2. Comparison between GBER and De Minimis Regulations

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

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

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

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

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307 ibid article 6.
308 Koert van Buijen and Alexander Rose, ‘General Block Exemption Regulation’ in Philipp Werner and Vincent Verouden (eds), EU State Aid Control: Law and Economics (Wolters Kluwer 2017) 221-260, 239 suggest that it covers aid designed to address market failures as well as aid designed to promote equity concerns such as regional aid, disaster aid and aid for broadband and transport infrastructure.
310 ibid articles 9, 11.
Member States must keep detailed records relating to each aid measure to allow compliance with the conditions set out in the GBER to be verified.\(^{311}\) The GBER also contains express provision for fiscal aid granted automatically following a declaration from the undertaking concerned and requires Member States to verify compliance with the conditions of the aid afterwards by assessing samples of the aid recipients.\(^{312}\) For aid schemes with an annual budget exceeding €150 million, Member States must also submit a plan on how the aid and its performance will be evaluated.\(^{313}\) It has been suggested that the GBER devolves many of the monitoring responsibilities to the Member States and that this must be accompanied by rigorous enforcement and active cooperation from the Commission to ensure that it is not abused.\(^{314}\) National courts must also apply the GBER when inquiring into whether aid was granted unlawfully under Article 108(3) TFEU.\(^{315}\) However, it has been suggested that there are obstacles to the competitors of the beneficiaries of aid using this tool as national courts may have difficulty in applying such densely technical legislation.\(^{316}\) While the GBER

\(^{311}\) ibid article 12.

\(^{312}\) ibid article 12(2).

\(^{313}\) ibid article 1.


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

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

\textbf{2.7. Conclusion}

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

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


\textsuperscript{318} Imelda Maher and Oana Stefan, ‘Delegation of powers and the rule of law: Energy Justice in EU energy regulation’ (2019) 128 Energy Policy 84, 89-90 highlight the legal obstacles to delegating any of the Commission’s functions to more specialised regulatory agencies, such as those responsible for energy regulation, posed by the division of competences envisaged by the Treaties.
prohibition on aid. The Commission is notified of a broad range of national economic policies before they are implemented to determine whether they are aid and, if they are, whether they are compatible with the Treaties. In most disputes on State aid, the Commission will have made the first formal decision on the matter. While some of the secondary legislation defining procedural rules circumscribes the Commission’s powers, others have given the Commission further powers to issue secondary legislation identifying exemptions to the obligation to notify aid.

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

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

3.1. **Introduction**

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

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


\(^2\) See also Sections 2.2, 2.3.1.

\(^3\) See Koen Lenaerts, ‘Interpretation and the Court of Justice: A Basis for Comparative Reflection’ (2007) 41 The International Lawyer 1011, 1017. However, the role of teleological interpretation remains controversial. See Stephen Brittain, ‘Justifying the Teleological Methodology of the European Court of Justice: A Rebuttal’ (2016) 55 Irish Jurist 134. It has also been claimed that the CJEU does not apply a teleological approach consistently. See Gunnar Beck, ‘Judicial Activism in the Court of Justice of the EU’ (2017) 36 University of Queensland Law Journal 343, 352-353.
law in the EU,\(^4\) there are likely to be multiple competing and overlapping rationales and objectives that serve to justify State aid control and the order of priority between them may shift with changing market conditions.

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

3.2. Market Integration

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

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\(^5\) While this thesis assumes that the rules are designed to serve some useful purpose and actually do to some extent actually serve these purposes, it is worth noting that the utility of State aid or subsidy control has been doubted by some scholars. See Alan Sykes, ‘The questionable case for subsidies regulation: A comparative perspective’ (2010) 2 Journal of Legal Analysis 473.
The most obvious rationale for State aid control in the EU that emerges from the early case law of the CJEU and the enforcement activity of the Commission is the integration of the EU’s internal market and the removal of obstacles to trade that might partition that market. This rationale is clear from the remarks of AG Lagrange in the early case of *Steenkolenmijnen*, that: ‘there is no common market if there are national customs duties. In the same way there is no real common market in an industry straddling several countries if one of those countries subsidizes its own industry’. In the early years of European market integration, the Commission and the CJEU were particularly concerned with this objective, and enforcement prioritised overtly discriminatory measures and export aid. State aid was viewed as one of many different ways in which Member States could disrupt the integration of the internal market, just like customs charges, discriminatory taxation and quantitative restrictions on imports which are also prohibited by the Treaties.

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

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6 Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1960:41, [1961] ECR 3, Opinion of AG Lagrange, 41. See also discussion in Section 2.2.
7 Juan Jorge Piernas López, ‘The Evolving Nature of the Notion of Aid under EU Law’ (2016) 3 European State Aid Law Quarterly 400, 403.
Similarly, a parafiscal levy imposed on both domestic and imported products that is used to fund the promotion of domestic goods was capable of engaging Article 107 TFEU together with either Article 30 TFEU or Article 110 TFEU. It is also clear that the Commission has a duty to ensure that the State aid measures it reviews comply with other Treaty provisions, including those on free movement. It has been argued that these overlaps between State aid and the free movement provisions in the Treaties demonstrate that they share a common function. State aid has been used to extend the reach and effectiveness of the free movement provisions.

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

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14 Francesco de Cecco, State Aid and the European Economic Constitution (Hart 2013) 43.
another with goods at an artificially low price that pushes other firms out of those markets.\textsuperscript{16} Further, use of these subsidies by one Member State to promote its own industry intensifies the incentives of others to behave similarly to counteract the negative effects for their own industries.\textsuperscript{17} This can create self-reinforcing trends of escalating subsidies. There are nevertheless important differences between aid and other trade barriers such as tariffs and quotas. While trade barriers such as tariffs and subsidies tend to increase consumer prices, subsidies often have the reverse effect.\textsuperscript{18} While tariffs and quotas are an instrument of trade policy primarily designed to influence the flow of trade, subsidies often serve a broader range of domestic objectives beyond protectionism.\textsuperscript{19} Further, it has been suggested that the financing and effects of subsidies are more transparent than those of other trade barriers.\textsuperscript{20}

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

\textsuperscript{17} Phedon Nicolaides ‘The Economics of State Aid and the Fundamental State Aid Trilemma’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), \textit{EU State Aids} (6th edn, Sweet & Maxwell 2021) 23-42, para 2-022. However, competition for investment and location decisions from multinational companies (as opposed to the subsidisation of domestic industry) has become a more prominent feature of the competition between Member States following the integration of the internal market. See discussion in Section 3.5.6.
\textsuperscript{21} Joined Cases C-20/15 and C-21/15 P \textit{Commission v World Duty Free Group} ECLI:EU:C:2016:981. This conclusion was ultimately upheld following its remittal to the General Court in Case T-219/10 RENV \textit{World Duty Free Group v Commission} ECLI:EU:T:2018:784 and subsequently by the Grand Chamber of the CJEU on appeal in C-51/19 P and C-64/19 P \textit{World Duty Free and Spain v Commission} ECLI:EU:C:2021:793
in foreign companies was capable of being State aid. While this may well affect cross-border trade in some way, it does not seek to repress such trade. In fact, it may encourage cross-border trade in the form of acquisitions of foreign shareholdings at the expense of equivalent transactions within the domestic Spanish market. Therefore, while State aid control has played an important role in market integration in the EU, market integration cannot explain all of what it does.

3.2.2. Market Integration and Competition between Member States

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


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

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

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

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27 Leigh Hancher, ‘EU State Aid Law – Déjà Vu All Over Again’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), EU State Aids (5th edn, Sweet & Maxwell 2016) 3-29, para 1-029.
29 The prohibition in Article 107(1) TFEU is limited in principle to measures ‘in so far as [they affect] trade between Member States’. However, the threshold for this effect in the case law is very low. See for example, Case C-518/13 Eventech v The Parking Adjudicator ECLI:EU:C:2015:9, para 68; Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union.
supranational control of aid policy. Supranational control will allow one central authority with information on multiple jurisdictions and the cross-border effects of national rules to coordinate policies so that there are no obstacles to trade. \(^{30}\) Further, as Member States will have incentives to impose trade barriers on other States while seeking to free ride on the advantages of the internal market, \(^{31}\) a supranational authority may be an appropriate means of policing Member State behaviour and overcoming problems of mutual trust. \(^{32}\)

### 3.3. Competition Rationales

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

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

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\(^{30}\) [2016] OJ C262/1, para 192; Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International 2014) 207; Case C-142/87 *Commission v Belgium (Tubemesse)* ECLI:EU:C:1990:125, [1990] ECR I-959, para 35; Case C-494/06 P *Commission v Italy and Wam Spa* ECLI:EU:C:2009:272 [2009] ECR I-3639, para 62. For more complete discussion, see Sections 2.3.5, 8.3.1, 8.3.2.


\(^{32}\) Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart 2013) 43.


\(^{34}\) Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1961:2, [1961] ECR 3, 19.
of the State aid rules was described as preventing the distortion of competition on the internal market and discrimination between undertakings.\textsuperscript{35}

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


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

\textsuperscript{39} Laura Parret, ‘The multiple personalities of EU competition law: time for a comprehensive debate on its objectives’ in Daniel Zimmer (ed), The Goals of Competition Law (Edward Elgar 2012) 61-84, 66-67; Frank Maier-Rigaud, ‘On the normative foundations of competition law – efficiency, political freedom and the
school of thought regards market law as a means of constraining capricious and arbitrary exercises of State power. On this view, the granting of aid clearly pre-empts this process by giving certain competitors privileged access to resources that they would not have been able to obtain on the market.

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

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

3.3.2. Relationship between Competition and Market Integration

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

\textsuperscript{50} Vincent Verouden and Philipp Werner, ‘Introduction – The Law and Economics of State Aid Control’ in Philipp Werner and Vincent Verouden (eds), \textit{EU State Aid Control: Law and Economics} (Wolters Kluwer 2017) 7-64.
first appear. Some authors argue that State aid is primarily about protecting the internal market and not the process of competition between undertakings. However some authors who take this view also describe the objective of State aid law as securing free trade in the internal market under normal conditions of competition, which suggests a link to competition goals. Further, it has been suggested that market integration increases the likelihood of cross-border externalities from State intervention and amplifies their effects, which may help to support some of the contentions of competition rationales. Some authors emphasise the competition goals of the State aid rules. However, the competition scholarship in the EU and the early case law of the CJEU has often acknowledged that the competition rules in the Treaties play some role in defending the integrity of the internal market. The relationship between these two objectives is therefore somewhat ambiguous.

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

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


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

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

\(^{62}\) Phedon Nicolaides ‘The Economics of State Aid and the Fundamental State Aid Trilemma’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), EU State Aids (6th edn, Sweet & Maxwell 2021) 23-42, para 2-005.
efficiency losses against the pursuit of some non-market objective or equitable concern, it is
difficult to systematically assess this trade-off using economic methods.\(^63\) This may support
criticisms of European economic law that argue that it leads to centralising, deregulatory
integration.\(^64\) It also appears somewhat inconsistent with the commitment of the EU to a
‘social market economy’ in Article 3(3) TEU, which envisages a greater need for State
intervention. Despite these impulses in State aid law, some commentators suggest that State
aid law has been reasonably effective in responding to non-market values.\(^65\)

3.4. National Government Failure and Regulatory Capture

3.4.1. Member State Vulnerabilities

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

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\(^63\) Vincent Verouden and Philipp Werner, ‘Introduction – The Law and Economics of State Aid Control’ in
Philipp Werner and Vincent Verouden (eds), *EU State Aid Control: Law and Economics* (Wolters Kluwer
2017) 7-64, 37; Ulrich Schwalbe, ‘European State Aid Control – The State Aid Action Plan’ in Jürgen Basedow
\(^64\) Pedro Caro de Sousa, ‘Negative and positive Integration in EU Economic Law: Between Strategic Denial
\(^65\) Anna Gerbrandy, Willem Janssen, Lyndsey Thomsin, ‘Shaping the Social Market Economy After the Lisbon
Treaty: How ‘Social’ is Public Economic Law?’ (2019) 15 Utrecht Law Review 32; Delia Ferri and Juan Jorge
European Legal Studies 75.
\(^66\) Mathias Dewatripont and Paul Seabright, “Wasteful” Public Spending and State Aid Control’ (2006) 4
\(^67\) Phedon Nicolaides ‘The Economics of State Aid and the Fundamental State Aid Trilemma’ in Leigh
Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (6th edn, Sweet & Maxwell 2021) 23-42,
paras 2-023, 2-026.
might waste resources more than direct grants.\(^6^8\) Piernas López considers that the increased application of the private investor test in the 1980s was a result of the Commission’s desire to reduce investment in inefficient public undertakings.\(^6^9\) Kerber praises EU State aid control for removing much of Member States’ ‘previous discretion for arbitrarily granting State aid to all kinds of firms and industries.’\(^7^0\) Kühling asserts that even when their policies do not have harmful cross-border effects, ‘national authorities tend to damage national economies by giving too many State aids and central authorities such as the Commission might be in a better position to solve such problems.’\(^7^1\)

This understanding of State aid law is not confined to the academic literature, but appears frequently in the Commission’s rhetoric on State aid. When announcing that the Commission would appeal the decision of the General Court in *Ireland and Apple v Commission*,\(^7^2\) Margrethe Vestager, Executive Vice-President of the Commission echoed this rationale in stating that the application of the State aid rules was necessary to prevent a situation where ‘the public purse and citizens are deprived of funds for much needed investments – the need for which is even more acute now to support Europe's economic recovery.’\(^7^3\) When commenting on the application of the State aid rules to recovery and support measures implemented by Member States in response to the Covid-19 pandemic, Vestager stated that

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\(^6^9\) Juan Jorge Piernas López, ‘The Evolving Nature of the Notion of Aid under EU Law’ (2016) 15 European State Aid Law Quarterly 400, 405.


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

Many of these comments appear linked to a competition rationale in viewing aid as harmful in interfering with the market. Others go further and imply that even if some subsidies are not particularly harmful to competition, they may nonetheless be largely ineffective and therefore a wasteful and imprudent use of public money by Member States and that this justifies the application of the State aid rules. Taken to its logical conclusion, this rationale would justify a much more centralised system of State aid control than currently exists and does not provide any obvious limits to supranational control. For example, it is not clear why national governments should have the right of initiative on granting aid under this rationale and why measures without any impact on trade should be excluded from scrutiny.  

More fundamentally, the rationale is premised on two flawed explanations as to why Member States would introduce policies contrary to their own interests and, crucially, why the Commission might effectively guard against this. The first is the vulnerability of national governments to interest group capture. The second relates to their incompetence relative to the Commission. This section will interrogate these propositions and argue that they are not particularly convincing.

3.4.2. Member States’ Supposed Vulnerability to Interest Group Capture

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

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75 See for example Mathias Dewatripont and Paul Seabright, “Wasteful” Public Spending and State Aid Control’ (2006) 4 Journal of the European Economic Association 513, 521 who suggest a need for State aid control even where there are not international spillover effects. They consider that the allocation of supervisory powers to the Commission in respect of aid without international effects might be desirable because the Commission has the relevant expertise to review State aid and that it is likely to be more easily made independent from domestic political pressure.
interest groups. Nicolaides observes ‘domestic tendencies for interventionist or discriminatory policies which generally benefit small but organised, politically influential groups’ and claims that the State aid rules can counteract these tendencies by constraining national governments and making them ‘less vulnerable to domestic lobbying by special interest groups.’ It has further been argued that the risk of regulatory capture by interest groups is much higher if the task of controlling aid policy is left to national governments.

One commentator suggests that the selectivity criterion for identifying aid is designed to ensure that measures falling outside the prohibition are broadly applicable and costly, making it less likely to be the result of interest group capture.

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

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


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

3.4.3. Relative Competence of EU and Member State Government

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


\textsuperscript{85} Phedon Nicolaides, ‘The Economics of State Aid’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), \textit{EU State Aids} (6th edn, Sweet & Maxwell 2021) 23-42, para 2-023; Caroline Buts, Tony Joris and Marc Jegers, ‘State Aid Policy in the EU Member States: It’s a Different Game They Play’ (2013) 12 European State Aid Law Quarterly 330; David Spector, ‘State Aids: Economic Analysis and Practice in the EU’ in X Vives (ed), \textit{Competition Policy in the EU: Fifty Years on from the Treaty of Rome} (Oxford University Press 2009) 176-202, 178. It has also been suggested that Member States can avoid such domestic pressures by emphasising the extent to which they are constrained by EU rules. See Phedon Nicolaides ‘The Economics of State Aid and the Fundamental State Aid Trilemma’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), \textit{EU State Aids} (6th edn, Sweet & Maxwell 2021) 23-42, para 2-023.
the economies of scale and expertise derived from centralised regulation. Indeed, the Commission has been praised for its role as a ‘valuable and sceptical external scrutineer of the frequently unrealistic evaluations performed by the member states themselves.’ However, in respect of measures with little or no cross-border externalities, these arguments appear to be based on inappropriately pessimistic assumptions about the behaviour, competence and motivation of Member State governments. Spector argues that there is no reason to assume that national officials are less competent than their counterparts in the EU institutions. The Commission’s expertise and economies of scale come at the a cost of lack of local knowledge which may help to inform such decisions. Further, sensitivity to domestic political pressure is an inevitable feature of national democracy that is at least to some extent desirable. It is not clear that the difference in the relative competence of Member State governments and the Commission is so pronounced as to make a meaningful contribution towards justifying supranational State aid control. Further, if this rationale prescribes independent scrutiny for spending decisions, then it might also justify the review of the subsidies administered by the EU itself by some other independent institution.

3.5. The Challenge of Fiscal Measures

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

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

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

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


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


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

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

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

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

99 See discussion in Section 5.2.
taxes. Further, aid granted in the form of non-fiscal regulatory scheme, such as through the grant of a permit or licence may pose quite similar questions to fiscal measures.

3.5.2. Regulating Non-intervention

The first distinctive feature of fiscal aid measures is that they take the form of non-intervention by the State, whereas many forms of non-fiscal aid such as direct grants, loans and guarantees can be understood as interventions by a Member State in the market. This means that instead of requiring Member States to refrain from intervening in the internal market, State aid law may act to compel Member States to intervene. To avoid the application of the State aid rules, a Member State may be compelled to impose a heavier tax burden on an undertaking or broaden the category of undertakings that are subject to a particular tax.\footnote{There is an exception to this in narrowly defined circumstances where the tax or charge itself may be regarded as forming part of the aid measure. This will occur where such a charge is hypothecated for the provision of aid. See Conor Quigley, European State Aid Law and Policy (and UK Subsidy Control) (4th edn, Hart 2022) 190-192; Case C-449/14 P DTS Distribuidora de Televisión Digital SA v Commission ECLI:EU:C:2016:848, para 68; Joined Cases C-393/04 and C-41/05 Air Liquide Industries Belgium ECLI:EU:C:2006:403, [2006] ECR I-5293, para 46; Case C-333/07 Régie Networks ECLI:EU:C:2008:764, [2008] ECR I-10807, para 99. This also appears to apply to situations where there is an asymmetrical tax such that there are two categories of undertakings in competition with one another, one of which is subject to the tax while the other is not. In these circumstances, the tax itself will be regarded as part of the aid measure and subject to challenge. See Case C-526/04 Laboratoires Boiron ECLI:EU:C:2006:528, [2006] ECR I-7529, para 39; Case C-449/14 P DTS Distribuidora de Televisión Digital SA v Commission ECLI:EU:C:2016:848, para 75. However, it has been suggested by Helmut Brokelmann and Mariarosaria Ganino, ‘DTS v Commission: When is a Tax Measure State Aid?’ (2017) 8 Journal of European Competition Law and Practice 102 that the CJEU has been unwilling to extend the principle too far beyond the facts of Laboratoires Boiron.} This can be distinguished from the case of direct grants, where the rules will simply require that the Member State refrain from paying out the grant or recover a grant that was unlawfully paid out. It could be argued that this distinction is illusory because it is equally open to a Member State to pay out an impugned grant to a wider category of undertaking, perhaps including all undertakings, to avoid the prohibition in Article 107(1) TFEU. While this option is indeed open to Member States with non-fiscal aid, the ordinary budget constraints on Member States will often make this impossible. Instead, Member
States will more often have to withdraw the aid measure. For fiscal aid, the option of further intervention by increasing taxation on some undertakings will increase revenues, which may make it preferable to the alternative of broadening the tax exemption.

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

3.5.3. Benchmarks and Assessment

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

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

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

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

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


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

### 3.5.4. Fiscal Measures and Member State Sovereignty

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

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\(^{108}\) See Section 3.4 above.

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


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

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

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

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

\subsection*{3.5.5. Fiscal Measures and Economic Effects}

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

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\textsuperscript{120} Raymond Luja, ‘Do State Aid Rules Still Allow European Union Member States to Claim Fiscal Sovereignty?’ (2016) 25 EC Tax Review 312, 322. Although Luja contends that State aid law should not seek to disrupt this complicated system that regulates international taxation. However, there is recent evidence of an approach that is more accommodating towards rules on double taxation in Case C-705/20 Fossil (Gibraltar) Ltd v Commissioner of Income Tax ECLI:EU:C:2022:680, paras 61-62.
\textsuperscript{122} See Sections 5.5.2, 7.3.3 for discussion on how this difference may allow differentiation between the standards applied to fiscal and non-fiscal measures to determine whether they amount to aid within the meaning of Article 107(1) TFEU.
\end{flushright}
distortion of competition in the market where it is granted, but it may also cause distortions arising from its method of financing. This is because the funds required to finance the aid will generally be raised through taxation. Taxation is often described as causing a deadweight loss, reducing overall welfare and economic efficiency by distorting the incentives of consumers and producers. Indeed, it has been argued that the Commission’s processes for the review of the compatibility of State aid does not account sufficiently for the additional distortion that may be caused by the financing of the measure by taxation elsewhere in the economy. This additional distortion does not necessarily arise for tax exemptions. Unlike direct grants, the tax exemption is essentially an omission on the part of the State to collect taxes. A tax exemption does not require a heavier tax burden elsewhere in the economy to finance itself. However, even if it is financed in this way, the extent of the State’s intervention may still be more limited than the collection of tax revenues followed by direct payments to undertakings. Under the competition rationales, which are concerned with market distortions, fiscal measures may be considered less harmful than many non-fiscal measures.

Another important difference between fiscal aid and other types of aid is identified by Nicolaides who argues that direct subsidies are likely to be more effective than tax exemptions encouraging undertakings to undertake a specific investment projects. Unlike Phedon Nicolaides and Ioana Eleanora Rusu, ‘The “Binary” Nature of Economics of State Aid’ (2010) 37 Legal Issues of Economic Integration 25; Phedon Nicolaides, ‘The Economics of State Aid and the Fundamental State Aid Trilemma’ in Leigh Hancher, Tom Ottovanger and Piet Jan Slot (eds), EU State Aids (6th edn, Sweet & Maxwell 2021) 23-42, para 2-059; Vincent Verouden and Philipp Werner, ‘Introduction – The Law and Economics of State Aid Control’ in Philipp Werner and Vincent Verouden (eds), EU State Aid Control: Law and Economics (Wolters Kluwer 2017) 7-64, 40, 48.


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

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

\begin{flushleft}
\textsuperscript{127} ibid.
\textsuperscript{128} ibid.
\textsuperscript{129} ibid. See also Ken Woodside, ‘Tax Incentives vs. Subsidies: Political Considerations in Governmental Choice’ (1979) 5 Canadian Public Policy 248.
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the latter appears to have a stronger affinity for inter-state competition for foreign investment and location decisions.

3.5.6. Changing Dynamics of Competition between Member States

The effectiveness of fiscal aid in locational competition also suggests another way in which the dynamics of inter-state competition may be different for such aid when compared to direct grants or other types of non-fiscal aid. It has been argued that competition of this type favours small countries and less advanced economies.\footnote{Francesco de Cecco, \textit{State Aid and the European Economic Constitution} (Hart 2013) 130.} Advanced economies are thought to benefit from agglomeration effects which attract businesses to areas with a high density of advanced economic activity and allow them to retain investment even when tax rates remain high.\footnote{Richard Baldwin and Paul Krugman, ‘Agglomeration, integration and tax harmonisation’ (2004) 48 European Economic Review 1.} However, these agglomeration effects may constrain such economies from raising tax rates beyond a certain threshold because the loss of these effects beyond that threshold will amplify the negative effects for that economy.\footnote{Richard Baldwin and Paul Krugman, ‘Agglomeration, integration and tax harmonisation’ (2004) 48 European Economic Review 1; Gonzalo Fernández, ‘A note on tax competition in the presence of agglomeration economies’ (2005) 35 Regional Journal of Economics 837.} Further, smaller countries are thought to benefit from tax competition because any capital transfer that it stimulates will be larger in proportion to the size of that country’s economy.\footnote{Nicolas Chatelais and Mathilde Peyrat, ‘Are Small Countries the Leaders of the European Tax Competition?’ (2008) CES Working Paper 2008.58, 25 <https://halshs.archives-ouvertes.fr/halshs-00332479/document> accessed 21 November 2022; Michel Devereux and Simon Lorentz, ‘What Do We Know About Corporate Tax Competition?’ (2013) 66 National Tax Journal 745, 765.} It has been suggested that this is more true of competition on general tax rates than more targeted aid measures.\footnote{Achim Kemmerling and Eric Seils, ‘The Regulation of Redistribution: Managing Conflict in Corporate Tax Competition’ (2009) 32 West European Politics 756, 770.} However, it is submitted that the line between these two types of competition is difficult to
delineate with precision and remains one of the most contested issues in the cases dealing with fiscal measures.138

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


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

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

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

142 Article 30 TFEU; Article 34 TFEU. For an overview of the case law, see Paul Craig and Gráinne de Búrca, EU Law: Text, Cases and Materials (7th edn, Oxford University Press 2020) 698-705, chapter 20.
is because this rationale is more focused on trade barriers preventing cross-border movement rather than incentives to stimulate such movement.

3.6. Managing Regulatory Competition and Fiscal Competition

3.6.1. Regulatory Competition: Advantages, Disadvantages and Alternatives

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

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

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

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

\begin{itemize}
\item Jeanne-Mey Sun and Jacques Pelkmans, ‘Regulatory Competition in the Single Market’ (1995) 33 Journal of Common Market Studies 67, 68-69. See also the more general definition proposed by Robert Baldwin, Martin Cave and Martin Lodge, \textit{Understanding Regulation: Theory, Strategy and Practice} (2nd edn, Oxford University Press 2012) 356 which encompasses ‘competitive adjustment of regulatory regimes in order to secure some advantage’. Joel Paul, ‘Competitive and Non-Competitive Regulatory Markets: The Regulation of Packaging Waste in the EU’ in William Bratton, Joseph McCahery, Sol Picciotto and Colin Scott (eds), \textit{International Regulatory Competition and Coordination} (Oxford University Press 1996) 355-379, 356 explains that in the context of the EU, regulatory competition is a by-product of the reduction of trade barriers, some harmonisation of national standards and delegation of some policy areas to supranational authorities. For a general discussion of regulatory competition in the EU, see William Bratton, Joseph McCahery, Sol Picciotto and Colin Scott, ‘Introduction’ in William Bratton, Joseph McCahery, Sol Picciotto and Colin Scott (eds), \textit{International Regulatory Competition and Coordination} (Oxford University Press 1996) 1-55. This definition obviously relies on a definition of regulation, which, following Robert Baldwin, Colin Scott and Christopher Hood, ‘Introduction’ in Robert Baldwin, Colin Scott and Christopher Hood (eds), \textit{A Reader on Regulation} (Oxford University Press 1998) 1-55, 3-4, can generally be understood in the economic and legal literature as ‘the promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with the rules’ (‘regulation in the narrow sense’). This will include fiscal measures, as well as non-fiscal mandatory rules governing the behaviour of undertakings on the market (‘market rules’). Baldwin, Scott and Hood also acknowledge another widely used definition of regulation that includes ‘all the efforts of State agencies to steer the economy’ and would therefore extend to most forms of aid, such as direct subsidies, grants, loans guarantees and market transactions (‘regulation in the broad sense’). These definitions include intentional acts on the part of the State. There are also broader definitions which extend to ‘all mechanisms of social control’ including social norms, unintentional acts and the independent behaviour of private actors, but such definitions are less instructive for the purpose of this thesis, which deals with rules governing State interventions.
\end{itemize}
individuals are free to migrate to jurisdictions with regulations that they prefer, leading to individuals and companies with similar preferences gathering in the same area and enjoying the benefits of their preferred level of regulation.\textsuperscript{146} This process of competition can reach the most economically efficient outcome in at least some circumstances.\textsuperscript{147} Further, it is suggested that this process exerts a disciplining influence on Member States, requiring them to adopt more efficient and less wasteful rules to avoid losing investment.\textsuperscript{148} The diversity between Member States can also facilitate experimentation and innovation in regulatory design with migration offering some indicator of the success of novel regulatory strategies.\textsuperscript{149}

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


\textsuperscript{151} Francesco de Cecco, State Aid and the European Economic Constitution (Hart 2013) 129.

unable to engage in arbitrage on a meaningful scale.\textsuperscript{153} The effectiveness of regulatory competition may also be undermined by the reality that there are relatively few State actors in the EU\textsuperscript{154} and decisions on regulations are often resistant to immediate change.\textsuperscript{155}

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

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\item ibid.
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harmonisation in some areas of law, rejecting any dichotomy between anarchic regulatory competition and total centralisation.\textsuperscript{160}

3.6.2. Regulatory Competition through Aid

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

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


\textsuperscript{164} Case C-308/01 GIL Insurance ECLI:EU:C:2003:481, [2004] ECR I-4777, Opinion of AG Geelhoed, paras 65-67. These provisions include the general legislative competence of the EU to react to distortions of competition on the internal market in Articles 116-117 TFEU.
indeed by the revenues saved by forbearance on subsidies. Schön suggests that tax competition provides a bundle of public goods that are more difficult to tailor specifically to a particular category of undertakings than other types of regulation. Further, it is possible to assume the existence of a floor for fiscal competition because businesses are consumers of public services and are presumably willing to pay for some minimum non-zero amount for a basic level of public services, which is not necessarily the case for other types of regulation. Fiscal and subsidy policies may also be more easily translated into a price of doing business in a particular jurisdiction. They are by their nature more easily quantifiable and this may ease comparison and intensify competitive pressures. In addition, the fungible nature of State revenue and expenditure may mean that intense regulatory competition will not lead to a lower tax burden overall, but merely that the burden will be shifted to less mobile factors of production, such as labour. This possibility poses a threat to the commitment of the EU in Article 3(3) TEU to achieving a highly competitive social market economy as it risks placing a disproportionate share of the tax burden on workers.

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

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

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

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

The management of regulatory competition offers an effective explanation for supranational State aid control that improves on the deficiencies of the market integration rationale and the protection of competition between undertakings. Like the market integration rationale, it offers a clear justification for supranational control of State aid. It seeks to address the cross-border externalities of the policy decisions of Member States that may allow Member States to benefit themselves at the expense of their neighbours. A supranational authority such as the Commission with an interest in defending the interests of the Union as a whole\textsuperscript{173} is therefore best placed to police these decisions.\textsuperscript{174} However, it improves upon the market integration rationale in providing some explanation for the limits of supranational control. This justification for State aid control understands some national

\textsuperscript{173} Article 17(1) TEU provides that ‘[t]he Commission shall promote the general interest of the Union and take appropriate initiatives to that end.’
regulatory diversity in some circumstances to be beneficial and simply seeks to confine regulatory competition to those areas where it does not cause harm.

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

\subsection*{3.6.4. Structure of Enforcement Regime and Regulatory Competition}

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

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  \item \textsuperscript{175} There is a wide variation in the amounts spent on aid as a proportion of national GDP across EU Member States. See for example, Raj Chari, ‘Evolution of Aid in the EU: Classifying Different Types of Countries, and the Financial and Economic Crisis’ in Herwig Hofmann and Claire Micheau (eds), \textit{State Aid Law of the European Union} (Oxford University Press 2016) 12-17; Marco Schito, ‘East Wind, West Wind: An Analysis of the Differences in State Aid Allocations between Old and New Member States’ (2021) 20 European State Aid Law Quarterly 200.
  \item \textsuperscript{176} See in particular Sections 2.3-2.5.
  \item \textsuperscript{177} Conor Quigley, \textit{European State Aid Law and Policy (and UK Subsidy Control)} (4th edn, Hart 2022) 4.
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notifying the Commission and obtaining its approval.\textsuperscript{178} National courts may also interpret the notion of aid to determine whether a measure should have been notified and approved before its implementation.\textsuperscript{179} This general prohibition on aid is a qualified and conditional one.\textsuperscript{180} Article 107(2) TFEU provides a list of circumstances where certain types of aid will be regarded as compatible with the internal market. Article 107(3) TFEU outlines further circumstances where aid may be regarded as compatible with the internal market. The Commission has a broad discretion to determine whether or not aid is compatible under one of the categories in Article 107(3) TFEU subject to the review of the CJEU\textsuperscript{181} and national courts are precluded from determining whether or not aid is compatible with the internal market.\textsuperscript{182} Exceptionally, a Member State may apply to the Council for a derogation from the State aid rules.\textsuperscript{183}

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


\textsuperscript{183} Article 108(2) TFEU.
of national governments is more limited, the Council does have powers to legislate on State aid and has the power to grant a derogation from the rules in exceptional, individual cases.

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

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

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

3.6.5. Regulatory Competition and Solidarity

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

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

One possible solution to this may be to consider that the State aid rules seek to manage regulatory competition in order to secure solidarity between Member States. This is a concept that is to some extent built into the Treaties.\(^{190}\) There are numerous references to solidarity in the TEU. While some of these refer to solidarity between citizens or people within the EU,\(^{191}\) Article 3(3) TEU identifies ‘solidarity among Member States’ as an objective of the Union.\(^{192}\) Other references insist that solidarity between Member State shall be an important part of the Union’s common foreign policy and defence.\(^{193}\) There are also numerous references to solidarity in the TFEU including a general affirmation in the Preamble\(^{194}\) and more specific references in respect of the immigration and border control,\(^{195}\) energy policy,\(^{196}\) financial and energy solidarity for disasters and exceptional events.\(^{197}\) Article 222 TFEU also contains a specific ‘solidarity clause’ requiring the Union and its Member States to act ‘in a spirit of solidarity’ to assist a Member State which is the victim of a terrorist attack or natural or man-made disaster.\(^{198}\) Solidarity in a more general sense forms part of the Charter of Fundamental Rights of the European Union,\(^{199}\) with the title on

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

\(^{191}\) Articles 2, 3(5) TEU.

\(^{192}\) Article 3(3) TEU.

\(^{193}\) Articles 21(1), 24, 31(1), 32, 41, 42 TEU.

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

\(^{195}\) Articles 67, 80 TFEU.

\(^{196}\) Article 194 TFEU.

\(^{197}\) Article 122 TFEU.

\(^{198}\) Article 222 TFEU.

\(^{199}\) Charter of Fundamental Rights of the European Union [2014] OJ C326/391, Title IV. Much of the material in the Charter appears to relate more closely to solidarity between European citizens rather than between States in the recognition of employment and family rights (Articles 27-33), rights to social security and social
solidarity including a recognition of the ability of Member States to provide services of general economic interest, which is subject to more detailed regulation by the State aid rules.\textsuperscript{200} It has been observed that while Article 125 TFEU might seem to offer a limit on the extent to which the EU and Member States can act in solidarity, it has also been suggested that this legal limit has not prevented practical cooperation and joint action in response to various crises.\textsuperscript{201}

Inter-state solidarity also carries some uncertainty and ambiguity as to its meaning and status.\textsuperscript{202} While its status is not entirely self-evident from the Treaties, there appears to be consensus that is should not be considered to be a general principle of EU law.\textsuperscript{203} However, some commentators regard it as a principle that can in some circumstances be legally enforceable in conjunction with other provisions in some contexts.\textsuperscript{204} Joppe considers assistance (Article 34) and rights of access to healthcare (Article 35) and rights to consumer protection (Article 38). However, elements of these may also engage relationships and interaction between Member States. This is particularly apparent in the recognition of services of general economic interest (Article 36) and the need to integrate environmental protection into the policies of the Union (Article 37).\textsuperscript{205} Charter of Fundamental Rights of the European Union [2014] OJ C326/391, Article 36. This could arguably relate more to national solidarity and allowing this to qualify internal market rules. However, there may also be an element relating to Member State solidarity in that Member States may agree on common rules that permit them to derogate from the stricter rules. See more generally Case C-280/00 Altmark ECLI:EU:C:2003:415, [2003] ECR I-7747; Thomas Jaeger, ‘Services of General Economic Interest’ in Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), EU State Aids (6th edn, Sweet & Maxwell 2021) 255-306. \textsuperscript{206} WT Eijsbouts and David Nederlof, ‘Rethinking Solidarity in the EU, from Fact to Social Contract’ (2011) 7 European Constitutional Law Review 169, 171-172.


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

Nevertheless, it may be instructive to consider Sangiovanni’s account of inter-state solidarity which regards it as an integral part of the European project which he claims is ‘a way for member states to enhance their problem-solving capacities in an era of globalization,

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while indemnifying each other against the risks and losses implicit in integration.\(^{210}\) He argues that while the Union as a whole may benefit from trade integration and the protection of competition goals, different Member States may have to deal with a disproportionate share of the benefits or costs of these processes which may arise from regulatory competition. Solidarity may also seek to preserve the resilience of the Union against the risks inherent in a market economy.\(^{211}\) Inter-state solidarity recognises that measures may sometimes be required to compensate Member States who bear a disproportionate burden in this context\(^{212}\) and that this may come in the form of allowing Member States to take action themselves through more active industrial policy. It has been suggested that solidarity in this context is largely concerned with Member States making sacrifices in pursuit of their own longer-term self-interest,\(^{213}\) which does not appear inconsistent with Sangiovanni’s account which involves burden sharing in pursuit of long-term mutual benefit.\(^{214}\)

This has a clear relevance to EU State aid law. One of the first judicial references to this concept occurred in *Commission v France*, in which the CJEU was called upon to interpret the State aid rules and held that solidarity was the basis of the obligations relating to the State aid rules and of the EU more generally.\(^{215}\) This view was repeated by the CJEU in *Commission v Italy* in which it was held that Member States had to implement EU

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agricultural market regulations even though they were contrary to their national interests.216 While these remarks may appear to describe an integrative force in the form of an obligation for Member States to obey EU rules against their own interests,217 the broader interpretation canvassed by Sangiovanni218 and Schiek219 implies that it might also be used to allow Member States to take compensatory action through market intervention in other contexts. It has been argued that solidarity of this type could help inform the justifications available to Member States when they restrict the exercise of free movement rights.220 Ross links this to broader themes in the case law, such as the role played by solidarity in limiting the effect of the competition and internal market rules, and argues that solidarity plays an important role in disputes on the allocation of competences between Member States and the EU.221 This is clearly a role that is also performed by the State aid rules,222 in determining the scope of the notion of aid and the limits of national economic policy. In the context of State aid law, this principle might similarly be used to clarify the scope of the prohibition in Article 107(1) TFEU and the Commission’s guidelines on the compatibility of aid under Article 107(2)-(3) TFEU.223 Recourse to this concept of solidarity between Member States allows the rationale for State aid law outlined in this chapter to provide a more complete account of

222 This characterisation is particularly appropriate in respect of Article 107(1) TFEU which defines the notion of aid.
223 See Section 8.2.4 for a proposal of how the principle might be used as an interpretive guide to assist in determining whether a measure is aid.
the system, explaining how it regulates a specific process (ie regulatory competition) to achieve or protect an important value or objective (ie inter-state solidarity).

3.7. Conclusion

This chapter has outlined the different rationales that have been used to explain and justify State aid control. The most prominent of these rationales in the literature are focus on market integration and competition policy concerns. Other strands of the literature and elements of the Commission’s rhetoric justify the system as a means of correcting national government failure. While it is accepted that there may be a number of competing objectives served by the State aid control regime, these objectives have considerable deficiencies and are ill-equipped to explain the increasing enforcement of the rules against fiscal measures. Further, ambiguity on precisely what objectives are served by State aid law has also been criticised in the literature.224

This chapter has explained how fiscal measures, together with certain systems of regulation that are treated similarly by these rules, pose new challenges for State aid control. This is because of differences in the form and effect of such measures when compared to many non-fiscal measures that were more directly in contemplation when State aid rules were first drafted. It is also because of the way fiscal measures have changed the dynamics of competition between Member States. Instead of trying to impose trade barriers and support national industries, competition is increasingly about attracting investment from mobile capital. This is a form of regulatory competition enabled by a highly integrated internal market. This chapter has proposed an alternative rationale for the State aid rules based on the management of regulatory competition which has been neglected in the

224 See for example Ruth Mason, 'Ding-Dong! The EU Arm’s Length Standard Is Dead’ (2022) 108 Tax Notes International 1249, 1256.
literature and sometimes conflated with the market integration rationale. It has also proposed orienting the rationale around the concept of solidarity between Member States as a guiding principle. While this rationale need not entirely displace the other objectives discussed here, it is more useful in understanding what the regime seeks to achieve in light of these changing dynamics.

This examination of the objectives of State aid control serves two important purposes. The first is that these objectives can be used as guiding principles to assist the CJEU in determining the breadth of the notion of aid and the prohibition in Article 107(1) TFEU. As the legislative provisions on this point are sparse, significant interpretive choices must be made by the CJEU, in part by drawing on these objectives. The second is that it provides this thesis with a theoretical framework that offers criteria for the evaluation and critique of the case law of the CJEU and the Commission’s decisional practice. It will also provide the foundation for proposals for reform. The following chapter will begin this process by identifying the developments in the doctrine on Article 107(1) TFEU emerging from cases on fiscal measures identifying some areas where the law already fits the account based on regulatory competition canvassed here and other areas where it falls short of this.