



Working Paper

State Aid after Covid-19

Juan Jorge Piernas López



Co-funded by
the European Union

State Aid

Juan Jorge Piernas López

Abstract

This contribution analyses the main changes occurred in the State aid field in European Union Law since the outbreak of the COVID-19 crisis. These changes include the temporary framework adopted to mitigate the economic consequences of the pandemic, the subsequent temporary framework approved following the Russian aggression to Ukraine, and the Temporary Crisis and Transition Framework. The chapter analyses the interplay of State aid Law after the pandemic with the Next Generation EU programme and, more generally, with the new architecture of economic governance in the European Union. The contribution concludes with suggestions for the future such as the provision of more EU funding mechanisms instead of (national) State aid to support key policy initiatives such as the green transition, while mitigating the negative impact of aid on competition and cohesion in the Single Market.

Keywords

State aid; COVID-19; Next Generation EU; Temporary Frameworks, economic governance, trends

I. Introduction

Following the outbreak of the COVID-19 pandemic, the State aid regime had, once again since the 2008 financial crisis, to strike a balance between the need to avoid an economic meltdown and the goal of protecting effective competition in the Single Market of the European Union (EU). This contribution analyses the Commission's reaction to the COVID-19 crisis in the State aid field,¹ and subsequently to the crisis in the Ukraine following the Russian aggression, which took as their starting point the orthodox State aid rules but added unprecedented flexibility in their application, and the interplay of the State aid rules with the new architecture of economic governance in the European Union after the setting up of the Next Generation EU Recovery Fund.² Indeed, the deployment of the Next Generation EU Funds has coexisted with the granting of State aid under the COVID-19 Temporary Framework and the subsequent Temporary Framework adopted to cope with the crisis brought about by the war in Ukraine, which makes the analysis in context of this theme

¹* Senior Lecturer at the Faculty of Law of the University of Murcia and holder of the Jean Monnet Chair on the Transformative European Union Law Power (TEULP).

See for the Commission's reaction more generally Chapter 14 in this book, by Maria Patrin.

This paper is forthcoming in Federico Fabbrini & Christy Petit (eds), *Research Handbook on Post-Pandemic EU Economic Governance and NGEU Law* (Elgar 2024).

² To understand the profound constitutional consequences of NGEU for the EU architecture of economic governance see Federico Fabbrini, 'Next Generation EU: Legal Structure and Constitutional Consequences' [2022]. REBUILD Centre Working Paper No. 3. More generally see Federico Fabbrini (ed.) *Research Handbook on EU Economic Law*, Edward Elgar, 2019.

crucial. In this framework, both the Commission and the Parliament have warned that “[t]here is a serious risk that excessive state aid support by some Member States will jeopardise free and fair competition in the EU single market.”³

The chapter is structured as follows. The second section reviews the main changes occurred in the State aid field since the outbreak of the COVID-19 pandemic. The third section then analyses the interplay of the State aid rules and the Next Generation EU Recovery Fund. The fourth section discusses the relationship between the Treaty State aid rules and the new EU architecture of economic governance in light of two recent trends discernible in the case-law of the Court of Justice of the EU. Finally, the fifth section proposes some conclusions looking ahead such as the provision of more EU funding mechanisms instead of (national) State aid to support key policy initiatives (e.g. the green transition) while mitigating the negative impact of aid on competition and cohesion in the Single Market.

II. The COVID-19 pandemic and the State aid discipline

In addition to the devastating impact on individual lives and public health, the COVID-19 outbreak generated dire economic effects. The European Commission soon acknowledged that the reaction of EU Member States to the crisis through the injection of a significant amount of public resources into the economy, and particularly in some sectors, was liable to bring about considerable competition distortions in the Single Market, which should be managed at Union level.⁴

Few weeks after the outbreak of the pandemic in Europe, in early March 2020, the European Commission adopted its first decision related to the COVID-19 crisis. The decision concerned the granting of compensation for the cancellation of events, and it was adopted under Article 107(2)(b) TFEU, a provision that allows the granting of State aid to make good the damage caused by natural disasters or exceptional occurrences. In this regard, the COVID-19 pandemic was recognised as an “exceptional occurrence”,⁵ a classification that the EU Courts have confirmed.⁶ Indeed, the General Court held that it was “indisputable that the Covid-19 pandemic constitutes an exceptional occurrence within the meaning of Article 107(2)(b) TFEU.”⁷ The Court referred in this regard to the cumulative criteria followed by the European Commission to classify an event as an exceptional occurrence under that

³ European Parliament, ‘Impact of state aid on competition and competitiveness during the COVID-19 pandemic: an early assessment’, PE 658.214, 23, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2020\)658214](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2020)658214) accessed 30 October 2023.

⁴ See generally in relation to this section Juan Jorge Piernas López and Michelle Cini, ‘The Law and Politics of EU State Aid Control: Rule Making and Rule Change in Response to Crises’, in Paul Weismann, Diane Fromage and Adrienne Heritier (eds.), *EU regulatory responses to crises. Adaptation or transformation?* (OUP, 2024). See for a previous account Juan Jorge Piernas López, ‘State Aid in Times of Pandemic Lessons from Recent Crises’, in Dolores Utrilla and Anjum Shabbir, A. (eds), *EU Law in times of pandemic, the EU’s legal response to COVID-19* (EU Law Live Press 2020), pp. 355-361.

⁵ European Commission, ‘State Aids SA. 56685 (2020/N) – DK – Compensation scheme for cancellation of events related to COVID-19, C(2020)1698 final, Brussels, 12.3.2020 https://ec.europa.eu/competition/state_aid/cases1/202011/285054_2139535_70_2.pdf accessed 27 October 2023.

⁶ See, e.g., C-320/21 P, *Ryanair v Commission*, EU:C:2023:712.

⁷ T-259/20, *Ryanair v Commission*, EU:T:2021:92, at para 26

provision, namely: (i) the event must be unforeseeable or difficult to predict; (ii) it must have a large scale/significant economic impact, and (iii) it must have an extraordinary nature.⁸

However, while Article 107(2)(b) TFEU was a suitable legal basis to compensate for the immediate damages brought about by the pandemic, such as the cancellation of events, it was clearly insufficient to deal with the severe economic consequences of the pandemic in the medium and long-run, which led to the adoption by the Commission of a specific Temporary Framework for State aid on 20 March 2020.⁹ Notwithstanding, over one hundred COVID-19-related decisions were taken by the Commission between early 2020 and November 2023 on the basis of this treaty provision, circa three times more Commission decisions than those adopted under Article 107(3)(b) and 107(3)(c) TFEU.

Indeed, while Article 107(3)(c) TFEU, the main State aid compatibility provision in terms of the number of soft law instruments adopted on the basis of this provision, could also be used by the Commission to incentivize the granting of public support to the health sector “as well as enhancing preparedness to respond to any further threats stemming from the virus”.¹⁰ Yet, only four pandemic-related decisions were taken under this provision over the period from January 2020 to November 2023.¹¹ (albeit amounting to just under €3.6 billion in approved aid)

Indeed, despite the initial use of Article 107(2)(b) TFEU, and in light of the deeper economic consequences of the pandemic, which were soon visible, the Commission resorted to Article 107(3)(b) TFEU, an exceptional legal basis that had barely been used in the past except during the 2008 financial crisis, when it was heavily used.¹² The Commission underlined in a press release in early March 2020 that Member States could grant support to remedy a serious disturbance to their economy under Article 107(3)(b) TFEU in case of particularly severe economic situations “such as the one currently faced by Italy”.¹³

In relation to this, some authors suggested that the relaxation of State aid rules should have been applied only to companies in the countries most affected by COVID-19, such as Italy initially, in order to reduce competition distortions in the internal market.¹⁴ These authors proposed to assess the intensity of the impact under the following criteria: the number of infections, number of deaths, relative impact on macroeconomic variables (employment, Gross Domestic Product) or the need to close down activities in order to cope with the pandemic.

⁸ The General Court referred to the criteria followed by the Commission in Commission Decision C(2020) 2097 final of 31 March 2020 on State Aid SA.56765 (2020/N) – France – Covid-19 – Deferral of the payment of airline taxes in favour of public air transport undertakings, at para 29.

⁹ European Commission, ‘Communication of 19 March 2020 - Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak’, C2020:0911; TOC Official Journal Of the European Union C 0911 20 March 2020

¹⁰ European Commission, ‘State aid: Commission approves €12 million Danish scheme’ (n 19).

¹¹ European Commission, ‘Coronavirus – list of Member State measures approved’ (n 20).

¹² See in this regard, *e.g.*, Delia Ferri and Juan Jorge Piernas Lopez ‘The Social Dimension of EU State Aid Law and Policy’ [2020] Cambridge Yearbook of European Legal Studies. pp. 1-26, at footnote 91.

¹³ European Commission, ‘State aid: Commission approves €12 million Danish scheme to compensate damages caused by cancellations of large public events due to COVID-19 outbreak’, Press Release 12 March 2020 https://ec.europa.eu/commission/presscorner/detail/en/ip_20_454 accessed 27 October 2023 (hereafter European Commission, ‘State aid: Commission approves €12 million Danish scheme’).

¹⁴ Marisa Álvarez Suárez, Javier Domínguez Viera, and Pedro Garrosa Fernández, ‘Ayudas de estado y COVID-19 Nuevos desafíos para el mercado interior’ [2020], *Economía industrial*, N° 417, 2020, 163, at p. 167.

However, the same authors also recognized that this proposal, while desirable for the **cohesion** in the Single Market, was very difficult to implement in practice.¹⁵ Indeed, it would have been difficult to sustain for the EU institutions that the economy of a certain EU Member State was not severely affected after the Commission and the Council had recognized, in the context of the activation of the general escape clause under the Stability and Growth Pact (discussed below)¹⁶ the existence of a ‘severe economic downturn in the euro area or in the Union as a whole.’¹⁷ In our view, as developed further below, the relaxation of the State aid rules have brought about serious competition and cohesion concerns that have not been sufficiently addressed by the EU institutions.

Finally, the Commission also clarified in the early days of the pandemic that Member States had several options to grant State aid to businesses affected by COVID-19 within the ordinary legal framework. They could resort to *de minimis* aid,¹⁸ to the General Block Exemption Regulation (GBER),¹⁹ and to no-aid measures such as non-selective tax deductions, compensation for public service obligations under Article 106(2) TFEU that comply with the *Altmark* criteria,²⁰ or public measures fulfilling the Market Economy Operator test, as interpreted by the Court of Justice of the EU.²¹ However, all these ordinary measures soon proved insufficient to cope with the COVID-19 crisis.

In this context, the European Commission received, as it also happened during the previous financial crisis, requests from Member States ‘to suspend State aid rules for the duration of the fight against the coronavirus pandemic’.²² These requests were rejected, although, again, the compromise seems to have been to adopt a very flexible interpretation of the existing rules.

On 20 March 2020 the European Commission adopted a temporary framework to deal with the effects of the COVID-19 pandemic from the State aid perspective.²³ The Temporary Framework had a dual legal basis. First, it was mainly based on Article 107(2)(b) TFEU, which requires *de jure* the European Commission to declare aid ‘to make good the damage caused by natural disasters or exceptional occurrences’ as compatible with EU Law. Second, it was based on Article 107(3)(b) TFEU which allows (not requires) the Commission to authorize aid to remedy a serious disturbance in the economy of a Member State.

The initial version of the Temporary Framework allowed the granting of national aid to ensure the liquidity of undertakings in order to keep them afloat during and shortly after the

¹⁵ Ibid.

¹⁶ See on the relationship between NGEU & the new Stability & Growth Pact Chapter 20 of this book, by Lucio Pench.

¹⁷ Communication from the Commission to the Council on the activation of the general escape clause of the Stability and Growth Pact COM/2020/123 final, at p. 1.

¹⁸ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1–8.

¹⁹ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1–78.

²⁰ C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg*, EU:C:2003:415.

²¹ See, e.g., C-124/10 P, *Commission v EDF*, EU:C:2012:318

²² See in this regard the request reportedly made by Austria:

<https://www.reuters.com/article/health-coronavirus-eu-austria/austria-wants-suspension-of-eu-rules-on-state-aid-for-coronavirus-crisis-idUSV9N28601Q/>

²³ European Commission, ‘Communication of 19 March 2020 - Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak’, C2020:0911; TOC Official Journal Of the European Union C 0911 20 March 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2020:0911:TOC> accessed 30 October 2023 (henceforth European Commission, ‘Temporary Framework – COVID-19’).

pandemic, which at the time was uncertain, leading to several prolongations of the Framework. These measures could take the form of direct grants, tax advantages, advance payments, state guarantees, loans or short-term export credit insurance. However, the Temporary Framework was amended six times over the course of the pandemic, particularly four times in 2020 (April, May, June, October) and twice in 2021 (January and November).²⁴ Each time, the rules were further clarified and broadened. Notably, new exemptions were included, making the application of the State aid rules more flexible by allowing more types of acceptable aid and higher aid ceilings. The increased flexibility, both in terms of the change in the nature as well as in the scale of the exemptions, should be underlined, as it also brought about increasingly higher competition and cohesion concerns linked to the granting of more national aid.

As it has been noted, the Temporary Framework did not modify the existing legal framework or introduce directly applicable rules; it “only” stated the criteria under which the Commission considers acceptable the adoption of State aid measures by Member States to counter the effects of the pandemic.²⁵ Indeed, the Temporary Framework takes as its starting point the orthodox or regular State aid rules. Formally, the Commission did not adopt *new* rules in the State aid field. It just applied the *existing* rules, and particularly Article 107(3)(b) TFEU, in a flexible and temporary manner.²⁶

The Temporary Framework notably favoured the granting of State aid linked to R&D projects on COVID-19 and other antiviral research.²⁷ Although the decision to grant State aid is a national one, and the Commission may not force Member States to grant a particular type of State aid, the efforts of the European Commission to signal investments that could increase the health and social resilience against the current crisis and help prepare the Member States for future crises should be commended, as it contributes to combat major cross-border health threats and stimulates cross-border cooperation in line with the Union’s powers under Article 168(5) TFEU.

The Covid-19 Temporary Framework recognised the exceptional character of Article 107(3)(b) TFEU, noting that this provision only applied where the whole economy of a Member State, or ‘an important part’, was in jeopardy.²⁸ However, the judicial formula - to which the Temporary Framework points to support this statement - does not include a reference to an ‘important part’ of the economy, only to the economy as a whole. Indeed, the formula originally coined by the General Court in the *Freistaat Sachsen* case in 1999,²⁹ and subsequently quoted by both the General Court and the Court of Justice in this context,³⁰ highlights in our view that the whole of the economy of a certain Member State must be affected in order to apply this provision, and not a part thereof, even if an important one. The

²⁴ In 3 April 2020, OJ C 112, 4.4.2020, pp. 1-9, 8 May 2020, OJ C 164, 13.5.2020, p. 3-15, 29 June 2020, OJ C 218, 2.7.2020, pp. 3-8, 13 October 2020, OJ C 340, 13.10.2020, pp. 1-10, 1 February 2021 OJ C 34, 1.2.2021, pp. 6-15; and 24 November 2021 OJ C 473, 24.11.2021, pp. 1-15.

²⁵ See European Commission, ‘Temporary Framework – COVID-19’, cit. para. 10.

²⁶ See in this regard Juan Jorge Piernas López and Michelle Cini, ‘The Law and Politics of EU State Aid Control: Rule Making and Rule Change in Response to Crises’, cit.

²⁷ Andrea Biondi, ‘State aid control and COVID-19: a map to the temporary framework’, in Dolores Utrilla and Anjum Shabbir (eds), *EU Law in times of pandemic, the EU’s legal response to COVID-19* (EU Law Live Press 2020), pp. 316-324, at p. 318.

²⁸ See European Commission, ‘Temporary Framework – COVID-19’, cit. para. 17.

²⁹ Joined Cases T-132/96 and T-143/96, *Freistaat Sachsen*, ECLI:EU:T:1999:326, para 167. [...] See also in this regard, Phedon Nicolaides, ‘The Evolving Interpretation of Article 107(3)(b)’ [2022] EStAL 21, at p. 34: “However, it appears that no judgment has referred to ‘important part’ of the economy.”

³⁰ See in this regard, e.g., opinion of AG Whal in C-526/14, *Kotnik and Others*, EU:C:2016:102, para 56.

Commission might have therefore pushed the existing legal boundaries through exceptional soft law measures adopted to cope with recent crises.

The COVID-19 Temporary Framework includes some safeguards to limit the negative consequences of the State aid granted under its provisions to prevent relocations of businesses between Member States due to the public support, or the granting of aid to companies that were already in difficulties prior to the COVID-19 pandemic outbreak. Another option to reduce the emergence of disparities between Member States as a result of the granting of significant amounts of State aid under the Temporary Framework would have been to allow a relaxation of State aid rules, but setting a maximum level of aid per Member State. This maximum ceiling of aid could have been set by reference to a percentage of the GDP.³¹ However this was not done, regrettably in my view, and, as discussed below, the foreseen safeguards have not sufficed to neutralise the concerns related to the distortions of competition and cohesion resulting from the public interventions.³²

In relation to the foregoing, for the European Commission, based on the 2022 State aid scoreboard published in April 2023: ‘The picture that emerges shows that the temporary State aid measures adopted in the COVID-19 crisis were proportionate and necessary, matching the economic damage suffered during the crisis. Moreover, there is no evidence of Member States that would have granted an excessively larger amount compared to the others.’³³

Other recent accounts are more critical, notably in relation to the impact of the unprecedented level of public support by some Member States for competition and cohesion in the Single Market.³⁴ In addition, another author has criticised some instances of misuse of the Temporary Framework, noting that “sometimes the Temporary Framework has offered a ‘smokescreen’ for aid which purported to relate to tackling the COVID-19 pandemic, but which actually did not”.³⁵

In any event, as discussed in this section, the European Commission reacted quickly and with flexibility to the pandemic by swiftly adopting a Temporary Framework that, at the very least, provided clarity as to what could be done with State aid in this context and transparency about the measures taken. The Commission thus emerged again as a *de facto* crisis-management authority at EU level, as it did in relation to the financial crisis, in such a sensitive domain as public health, where EU conferred powers are so limited, which should be recognised and praised, notably as the alternative was – as requested – the complete suspension of the discipline for an undefined period and it should not be ignored that under Article 108(2) TFEU the Council may, by unanimity, declare State aid compatible “in exceptional circumstances”. In addition, some positive steps were taken under the Temporary Framework to foster public investment in the health sector (including COVID-19 and other antiviral relevant research).

³¹ Marisa Álvarez Suárez et al, cit., Ayudas de estado y COVID-19 Nuevos desafíos para el mercado interior, cit., at p. 167.

³² See for an early forecast in this regard Carole Maczkovics, ‘How Flexible Should State Aid Control Be in Times of Crisis?’, [2020] EStAL 3, 271.

³³ State aid Scoreboard 2022, European Commission, DG Competition, Policy and Strategy, State aid case support and policy, 24 April 2023 44, available at https://competition-policy.ec.europa.eu/system/files/2023-06/state_aid_scoreboard_note_2022.pdf

³⁴ See, e.g., Irene Agnolucci, ‘Will COVID-19 Make or Break EU State Aid Control? An Analysis of Commission Decisions Authorising Pandemic State Aid Measures’, [2022] 13 JECLP 3.

³⁵ Penelope Giosa, ‘Assessing the use of the State Aid Covid Temporary Framework with regard to the healthcare and media sector’ (2023) 14 JECLP 289.

This proactive and flexible application of the State aid rules contributed to the realisation that the coronavirus was a common threat that required a truly European answer, which was best represented by the Next Generation EU programme, the crown jewel of the EU-led Recovery plan.

III. The interplay between the EU State aid rules and the Next Generation EU framework

The adoption of a very flexible approach to State aid to help Member States mitigate the effects of the COVID-19 pandemic was indeed only a part, although a significant one, of the EU's reaction to this crisis. Pursuing a similar outcome, that is, increasing the possibilities for Member States to use their budget to alleviate the effects of the pandemic in their territory, the EU institutions activated the abovementioned general escape clause of the Stability and Growth Pact in the same days that the Temporary Framework for State aid was adopted.

In particular, following a Commission's proposal,³⁶ the Council of the EU found in March 2020 that the pandemic represented a severe economic downturn in the euro area or the Union as a whole, and consequently that the conditions for the application of this clause were fulfilled.³⁷ The general escape clause has continued to apply but was expected to be deactivated at the end of 2023.³⁸ Thirdly, the creation of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE),³⁹ was also a significant first-response measure adopted by the Union institutions in the months following the outbreak of the pandemic in Europe.⁴⁰

Beyond these short-term measures, the most visible and significant Union's reaction to the COVID-19 outbreak was the adoption of the 'Next Generation EU' (NGEU) Recovery Fund by the European Council in July 2020,⁴¹ following a previous Commission's proposal.⁴² As it has been held, NGEU constitutes 'a turning point in the European integration process [...] by enabling the EU to run a sizable budget, funded through resources raised on the financial markets, and to be repaid in years to come through new, truly European, taxes, NGEU endows the EU with a fiscal capacity independent from the transfers of its member states, and suitable both to favour the economic recovery after the pandemic and to promote the EU resilience according to long-term EU strategic priorities.'⁴³

The State aid rules and NGEU are formally linked. In particular, recital 8 of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility,⁴⁴ stipulates that the State aid rules apply to the funds

³⁶ Communication from the Commission to the Council on the activation of the general escape clause of the Stability and Growth Pact COM/2020/123 final.

³⁷ See the Council's press release:

<https://www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministers-of-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis/>

³⁸ See to this extent <https://www.consilium.europa.eu/en/policies/economic-governance-framework/>

³⁹ For an analysis of SURE see Chapter 6 of this book, by Ian Cooper.

⁴⁰ Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, OJ L 159, 20.5.2020, p. 1–7

⁴¹ European Council Conclusions, 17-18-19-20-21 July 2020, EUCO 10/20.

⁴² European Commission Communication "Europe's Moment: Repair and Prepare for the Next Generation", 27 May 2020, COM(2020) 456 final.

⁴³ Federico Fabbrini, 'Next Generation EU: Legal Structure and Constitutional Consequences' [2022]. REBUILD Centre Working Paper No. 3, at p. 2.

⁴⁴ For an analysis of the Recovery and Resilience Facility see Chapter 8 of this book, by Stefania Baroncelli.

granted under this Regulation ‘[...] Private investment could also be incentivised through public investment schemes, including financial instruments, subsidies and other instruments, provided State aid rules are complied with.’⁴⁵ Unsurprisingly, considering that the Treaty State aid rules cannot be set aside by EU secondary law, the European Commission clarified that ‘State aid rules apply in the framework of the Facility. Member States should therefore ensure that all investments comply with EU State aid rules and follow all regular procedures and rules.’⁴⁶

In this regard, as explained by the 2016 Commission Notice on the notion of State aid,⁴⁷ resources coming from the Union, such as the resources from the NGEU Recovery Fund, are considered as “State resources”, one of the constitutive elements of the notion of aid, under Article 107(1) TFEU, that is, as if they were national funds provided that “national authorities have discretion as to the use of these resources (in particular the selection of beneficiaries)”,⁴⁸ as it is the case with the Next Generation funds. Indeed, the Commission found in numerous State aid decisions adopted after the approval of the NGEU that “RRF funds assigned to a Member State constitute State resources as they are subject to the Member State’s control”.⁴⁹

On this basis, the Commission published several State aid guiding templates to help Member States design their recovery and resilience programs in accordance with EU State aid rules and procedures.⁵⁰ The templates provide specific guidance to the granting of State aid to support investment and reforms in the flagship areas identified by the European Commission, which are linked to the six pillars in which the RRF is structured, namely (i) green transition; (ii) digital transformation; (iii) smart, sustainable and inclusive growth; (iv) social and territorial cohesion; (v) health, and economic, social and institutional resilience; (vi) policies for the next generation i.e. children and youth:

The guiding templates remind that some reforms and investments will not constitute State aid in the sense of Article 107(1) TFEU (e.g. support to a hospital that may not be defined as undertaking under the case-law of the EU Courts). In addition, the templates note that some investments and reforms may be supported with State aid on the basis of an existing State aid scheme falling under a block exemption regulation, in particular the abovementioned GBER, or approved by a Commission State aid decision. Furthermore, where the investments or reforms foreseen constitute new State aid under Article 107(1) TFEU, they can still comply with the conditions of a block exemption regulation such as the GBER and therefore do not

⁴⁵ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, p. 17–75, recital 8.

⁴⁶ See, inter alia, European Commission, Recovery and Resilience Facility – State Aid, Guiding template:

Energy and hydrogen infrastructure, available at

https://competition-policy.ec.europa.eu/system/files/2023-04/template_RRF_energy_and_hydrogen_infrastructure_04042023.pdf, at page 2. See also Commission staff working document - Guidance to Member States

Recovery and Resilience Plans - Part 1, SWD(2021) 12 final, published 22.1.2021

(https://commission.europa.eu/document/7c55aadf-6b8d4d9c-a930-bc7ef8656de1_en) and Commission Notice-Guidance on Recovery and Resilience Plans in the context of REPowerEU, 2023/C 80/01 published 3.3.2023

([https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52023XC0303\(01\)&from=EN](https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52023XC0303(01)&from=EN)).

⁴⁷ 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, OJ C 262, 19.7.2016, p. 1–50.

⁴⁸ Id., at paragraph 60.

⁴⁹ See, e.g., State Aid SA.103451 (2022/N) – Spain RRF – Deployment of backhaul networks for mobile connectivity, at paragraph 116.

⁵⁰ The guiding templates are available at

https://competition-policy.ec.europa.eu/state-aid/legislation/rrf-guiding-templates_en

have to be notified to the European Commission for clearance before their implementation in accordance with Article 108(3) TFEU.

Furthermore, for the measures that constitute State aid, and which must be notified to the European Commission, the templates provided guidance on the possible justifications available under the existing compatibility guidelines adopted by the European Commission, for instance for regional aid or for environmental protection. The Commission also committed to give administrative priority to the assessment of notified measures pertaining to a national recovery and resilience program.⁵¹ Importantly, the European Commission also adopted a communication on the criteria for the analysis of the compatibility of State aid with the internal market to promote the execution of important projects of common European interest (IPCEI), which refers to the NGEU as one of the policies that these projects can underpin. In particular, the communication underlines that these projects “must represent a concrete, clear and identifiable important contribution to the Union’s objectives or strategies and must have a significant impact on sustainable growth, for example by being of major importance for the [...] Next Generation EU, among others”.⁵² In relation to these projects, that were backed by France and Germany,⁵³ some authors have noted that they “seem to systematically favour the richer and larger states with greater organisational and financial capacity to launch IPCEIs”.⁵⁴

Finally, the deployment of the Next Generation Funds has coexisted with the granting of State aid under the COVID-19 Temporary Framework and the subsequent Temporary Framework adopted to cope with the crisis brought about by the war in Ukraine.⁵⁵ The Temporary Framework was revised on two occasions, on 20 July 2022 and on 28 October 2023, with the latter in place until the end of 2023. This Temporary Framework was replaced by the Temporary Crisis and Transition Framework (TCTF), published in March 2023.⁵⁶ The TCTF amended and prolonged in part the previous Temporary Crisis Framework until 31 December 2025, and introduced new measures to accelerate investments in key sectors for the transition towards a net-zero economy. On 20 November 2023, the Commission amended for the first time the Temporary Crisis and Transition Framework.⁵⁷ In particular, through this amendment the Commission extended the application of some sections of the TCTF until 30 June 2024 and increased the aid ceilings to cover the winter heating period and for aid to compensate for high energy prices. The other sections of the TCTF remain unchanged.

⁵¹ See to this extent, in particular the Practical guidance to Member States for a swift treatment of State aid notifications in the framework of the Recovery and Resilience Facility, available at https://competition-policy.ec.europa.eu/system/files/2022-02/practical_guidance_to_MS_for_notifications_under_RRF.pdf, p. 2.

⁵² Communication from the Commission Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest 2021/C 528/02, C/2021/8481, OJ C 528, 30.12.2021, p. 10–18, at paragraph and 14. See also paragraph 4.

⁵³ A Franco-German Manifesto for a European industrial policy fit for the 21st Century [2019], 19 February 2019, at p. 4.

⁵⁴ Donato Di Carlo & Luuk Schmitz (2023): ‘Europe first? The rise of EU industrial policy promoting and protecting the single market’, *Journal of European Public Policy*, pp. 1-34, at p. 24. The authors refer for this finding to Andreas Eisl (2022) ‘EU industrial policy in the making’. Jacques Delors Institute Policy Paper No286/December.

⁵⁵ Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, OJ C 1311, 24.3.2022, p. 1–17.

⁵⁶ European Commission, ‘Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia’ 2023/C 101/03, OJ C 101, 17.3.2023, p. 3–46, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2023:101:TOC> accessed 30 October 2023.

⁵⁷ Official Journal C, C/2023/1188.

Consequently, some aid measures were phased out on 31 December 2023, while other measures, notably those linked to the transition to a net-zero economy, will remain in force until the end of 2025.⁵⁸ After that, the State aid discipline should “go back to normal”, although since the first exceptional State aid measures linked to the financial crisis in 2008, the European Commission has adopted three different Temporary Frameworks, making the complete disappearance of exceptional measures rather unlikely, which is linked to the discussion in the next section concerning existing trends.

IV. The State aid rules and the new EU architecture of economic governance after the COVID-19 crisis: a Tale of Two Trends

Trend 1: towards a more literal (and restrictive) interpretation of the Commission’s powers in the State aid field.

The Treaty system of State aid control is based on a general rule of incompatibility of aids, contained in today’s Article 107(1) TFEU, coupled with a number of exemptions, enshrined mainly in Articles 107(2) and 107(3) TFEU, and an *ex ante* control by the European Commission, which must be notified by the Member States of any planned aid. The rationale of the system, originally foreseen in the Spaak Report,⁵⁹ has been confirmed by the case-law of the Court of Justice of the EU.⁶⁰

However, although the core State aid rules have remained virtually unchanged since the Treaty of Rome, ‘the goals and the patterns of enforcement of this EU policy have changed radically over the past 60 years’.⁶¹ Indeed, together with the original goal of preventing Member States from granting aids having as their *object* and *effect* the distortion of competition,⁶² the application of the State aid rules has recently also pursued other goals,⁶³ such as strengthening budgetary discipline and improving “the quality of public finances – resulting in a better use of taxpayers’ money”.⁶⁴

A number of policy initiatives have contributed to these changes, particularly the publication of the 2005 State Aid Action Plan (SAAP),⁶⁵ and, more notably, the adoption of the State Aid Modernization (SAM) reform in 2012.⁶⁶ One of the most discernible elements of these reforms is the reorientation of the granting of State aid to some policy goals set by the European institutions, the so-called “horizontal goals” or “good aid”.

To this extent, according to the SAM reform, “Modernized State aid control should facilitate the treatment of aid which is well-designed, targeted at identified market failures and

⁵⁸ For more information on the main changes introduced by the 20 November amendment, the Commission’s press release is available at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5861

⁵⁹ Report of the Heads of Delegation to the Ministers of Foreign Affairs, of 21 April 1956, Mae 120 fl56 (corrigé) (hereinafter “Spaak Report”), pp. 57 and 59.

⁶⁰ Case C-75/18, *Vodafone Magyarország*, EU:C:2020:139, para 19.

⁶¹ Pier-luigi Parcu, Giorgio Monti and Marco Botta (Eds.), *EU State Aid Law Emerging Trends at the National and EU Level* (EE 2020), at p. 5.

⁶² Spaak Report, cited *supra* note 1, at pp. 16–17.

⁶³ See in relation to the transformation of State aid law Juan Jorge Piernas López, “The Transformation of EU State Aid Law . . . And Its Discontents”, *Common Market Law Review* 60: 1–32, 2023.

⁶⁴ COM(2012)209 final, “EU State Aid Modernisation (SAM)”, at p. 5 (point 14).

⁶⁵ COM(2005)107 final “State aid action plan Less and better targeted state aid: a roadmap for state aid reform 2005–2009 (Consultation document)”. See also in this regard the Draft Communication from the Commission, “Common principles for an economic assessment of the compatibility of State aid under Article 87.3” 2009, at p. 9.

⁶⁶ COM(2012)209 final, “EU State Aid Modernisation (SAM)”, at p. 5.

objectives of common interest, and least distortive ('good aid').⁶⁷ Notably, although the redirection of State aid towards "horizontal objectives" can be observed since 1999,⁶⁸ the SAAP and SAM initiatives markedly reinforced this trend, stimulating national State aid policies to align with the Commission's policy goals, and moving State aid control "beyond purely negative integration", that is, beyond the mere control of national State aid from the perspective of competition. This evolution has contributed to blurring the divide between State aid *control*, which is the Commission's responsibility, and State aid *policy*, which is a competence of the Member States.⁶⁹ As commented above, State aid control has radically changed and "is now a positive control on States' interventions".⁷⁰

The need for State aid to pursue objectives of common interest is linked to the 1980 *Philip Morris* case.⁷¹ In that landmark judgement, the Court held that "as far as concerns Article [today 107(3)(c) TFEU] ... the compatibility with the Treaty of the aid in question must be determined in the context of the Community and not of a single Member State [and that] the need for aid is assessed from the standpoint of the Community rather than of a single Member State".⁷² The European Commission, which had suggested a similar approach in its First Competition Policy Report,⁷³ interpreted the Court's decision as follows: "the [*Philip Morris*] judgement underlined that the Commission in its evaluation of aid proposals cannot accept national objectives are sufficient to justify the use of aids. They can only be considered compatible with the Common Market if they further Community objectives."⁷⁴ The Commission subsequently extended this passage to all State aid under Article 107(3) TFEU, and not only Article 107(3)(c) TFEU, the provision mentioned by the Court in the *Philip Morris* judgement.⁷⁵

However, the Court of Justice, in Grand Chamber formation, has recently reversed this interpretation of the Treaties, correcting the long-standing practice of the Commission, which was supported by judgments of the General Court.⁷⁶ In essence, following the Opinion of Advocate General Hogan, the Court noted in the *Hinkley case* that Article 107(3)(c) TFEU, the main compatibility provision, "does not make the compatibility of aid dependent on its pursuing an objective of common interest".⁷⁷ In other words, the Court adopted a literal interpretation of Article 107(3)(c) TFEU which underlines, on the one hand, that the goals pursued by the granting of State aid under this provision remain national [not Union] ones,

⁶⁷ Id., at p. 5 (point 12).

⁶⁸ Michael Blauberger, 'Of 'good' and 'bad' subsidies: European State aid control through soft and hard law', [2009] 32 *West European Politics*, 719, at 732.

⁶⁹ Id. at 720 and 733. See also, in relation to the incremental positive approach towards State aid, and particular "good aid", among others Michelle Cini, 'The soft law approach: Commission rule-making in the EU's State aid regime', [2001] 8 *Journal of European Public Policy*, 192; or Michelle Cini and Lee McGowan, *Competition Policy in the European Union* (Macmillan 1998), at pp. 123 and 154.

⁷⁰ Massimo Merola and Filippo Caliento, 'Is the notion of aid broadening or shrinking over time, and if so, why? A subjective view on the rationale of the case law' in Pier Luigi Parcu, Giorgio Monti and Marco Botta (eds), *EU State Aid Law Emerging Trends at the National and EU Level* (EE 2020), pp. 18–53, at p. 49.

⁷¹ Case 730/79, *Philip Morris Holland BV v. Commission of the European Communities*, EU:C:1980:209.

⁷² Id., at para 26.

⁷³ See in this regard Stig Eidissen, 'Common interest as a condition for State aid compatibility', [2020] *EStAL* 19, 452, at 454–455.

⁷⁴ *Eleventh Report on Competition Policy* (Office for Official Publications of the European Communities, 1982), at point 178.

⁷⁵ *Twelfth Report on Competition Policy* (Office for Official Publications of the European Communities, 1982), point 160.

⁷⁶ See e.g. Case T-177/07, *Mediaset*, EU:T:2010:233, para 125.

⁷⁷ Case C-594/18 P, *Austria v. Commission*, para 20.

and on the other reminded that the Commission's main task in this context is to ensure that competition is not distorted to an extent contrary to the common interest.

Importantly in our context in post-pandemic economic governance, the impact of this judgement of the Court is not restricted to Commission decisions adopted under Article 107(3)(c) TFEU. Indeed, in November 2023 the Court of Justice concluded, in a case related to State aid in the context of the COVID-19 pandemic, that Article 107(3)(b) TFEU, the main exceptional provision relied on during the COVID-19 outbreak, does not require an assessment of the impact of State aid on trade and competition. Thus, the Commission is not required to carry out any balancing test between the positive and the negative effects of the State aid measure.⁷⁸ The basis for this finding is ultimately the literal and restrictive interpretation followed by the Court in the *Hinkley* case, which the Court cited.⁷⁹

This finding is seemingly at odds with the role of the compatibility analysis of State aid under the Treaties as confirmed by the legislative history of Article 107(3)(b) TFEU. The Court's conclusion appears to contradict also the previous case-law of the Court of Justice,⁸⁰ as recently noted also by Advocate General Pitruzzella.⁸¹ Finally, the Court's finding confirms the restrictive approach towards the control of State aid at Union level, reinforcing the national prerogatives of Member States in this area, the traditional State aid policy. Other judgments of the Court, in Grand Chamber formation, could also be cited as part of this trend, notably the *Commission v Hungary*, *Commission v. Poland* and *Fiat Chrysler Finance Europe v. Commission* judgments, which have reinforced the national competences of Member States in the tax realm,⁸² at the expense of the Commission's powers to investigate certain tax measures as State aid.⁸³

Trend 2: towards the granting of EU federalised aid.

The Commission's reaction to the COVID-19 pandemic in the field of State aid went beyond ensuring the liquidity and stability of companies and markets. It also supported some public health measures as well as the twin digital and green transitions under the EU Recovery Plan. In my opinion, the unprecedented Next Generation EU was a great leap in the right direction towards a European answer, and marked a trend towards raising EU funds to support EU common policy objectives that could also be seen in the immediate SURE program. The use of the EU budget, or of EU-raised funds, can also help mitigate the distortions caused by the use of national funds, which depend ultimately on the very different financial capacity of Member States. Indeed, the new economic architecture developed by NGEU can also help realise the solidarity principle enshrined in the Treaties. As an example, in the field of State aid, some authors have already asked whether "EU federalist Covid-19 aid to EU airlines" could be more advantageous than the existing framework based on (national) *State aid*.⁸⁴

⁷⁸ Case C-209/21 P, *Ryanair v. Commission*, EU:C:2023:905, paras 84-90.

⁷⁹ *Id.*, at para 84.

⁸⁰ Juan Jorge Piernas López 'The COVID-19 State Aid Judgments of the General Court ... Every Man for Himself?' Cases T-238/20 and T-259/20 *Ryanair v Commission* [2021] EStAL 20, 258, at pp. 261-265.

⁸¹ Opinion of A.G. Pitruzzella, Case C-209/21 P, *Ryanair v. Commission*, EU:C:2023:223, paras. 83-88

⁸² See also concerning the tax field Chapter 19 of this book, by Carlo Garbarino.

⁸³ Case C-562/19 P, *Commission v. Poland*, EU:C:2021:201; Case C-596/19 P, *Commission v Hungary*, EU:C:2021:202; and Joined Cases C-885/19 P & C-898/19 P, *Fiat Chrysler Finance Europe v. Commission*, EU:C:2022:859.

⁸⁴ Luis Martín-Domingo and Juan Carlos Martín, 'The Effect of COVID-Related EU State Aid on the level playing field for airlines, [2022] Sustainability 14, 1.

In line with the foregoing, the Court of Justice of the EU, acting in Full Court, held in the judgement on the rule of law conditionality regulation, a significant piece of the new EU funding architecture, that “the Union budget is one of the principal instruments for giving practical effect, in the Union’s policies and activities, to the principle of solidarity”.⁸⁵ The judgement followed on this point the Opinion of Advocate General Campos Sánchez-Bordona,⁸⁶ who had referred in this regard to an article co-authored by the President of the Court of Justice.⁸⁷ This article reminds, *inter alia*, that social solidarity also has had an impact on the definition of an undertaking under EU competition and state aid law, and also plays an important role in this context under Article 106 TFEU.⁸⁸ In particular, the article recalls the *Dôvera* judgement, where the Grand Chamber of the Court found that the presence of for-profit companies in a compulsory health insurance scheme does not necessarily make the system at stake an ‘economic activity’ under EU Competition law, and therefore those private companies are not “undertakings” under Article 107(1) TFEU.⁸⁹

At the start of the pandemic, some academics put forward the idea of a solidarity fund. They suggested to link the granting of State aid under the Temporary Framework to the contribution of national funds into a solidarity fund that would support those Member States with less financial means. In particular, Lamadrid and Buendía suggested the Commission to “amend the [COVID-19 State aid] Temporary Framework in order to make the compatibility of State aid conditional on the provision of compensation for the competitive distortions that they necessarily create.”⁹⁰ Under this proposal, Member States would make mandatory contributions to the solidarity fund determined by a percentage of the State aid that they grant, e.g. 15 per cent of the public resources involved in a particular State aid measure

In this context, it is worth noting that the Commission’s NGEU proposal, published in May 2020, a few months after the proposal for a solidarity fund mentioned above, provided for a fund to compensate the disparities caused by the granting of national State aid, described as the Solvency Support Instrument.⁹¹ Indeed, the proposal acknowledged that the COVID-19 crisis did not impact all the Member States in the same way and, notably, that not all of them enjoyed the same ability and capacity to grant State aid, an element which could widen existing divergences and disparities between Member States.⁹² In addition, the proposal also underlined that the temporary flexibilities concerning State aid should not “cause long-term fragmentation in the Single Market”, and for these purposes stressed the importance of the EU competition rules, noting that it was reviewing the EU competition framework.⁹³

⁸⁵ C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97, para 129; and C-157/21 - Poland v Parliament and Council, para 147.

⁸⁶ Opinion of A.G. Campos Sánchez-Bordona in case C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2021:974, paragraph 96.

⁸⁷ Koen Lenaerts and Stanislas Adam, ‘La solidarité, valeur commune aux États membres et principe fédératif de l’Union européenne’ (2021) CDR 307.

⁸⁸ *Id.*, pp. 354-358.

⁸⁹ Joined Cases C-626/18 P and C-271/18 P, *European Commission and Slovak Republic v. Dôvera zdravotná poisťovňa, a.s.*, See also the annotation by Juan Jorge Piernas López ‘When is a company not an undertaking under EU competition law? The contribution of the *Dôvera* judgment’, [2021] CMLR 58, pp. 529–548.

⁹⁰ Alfonso Lamadrid de Pablo and José Luis Buendía, ‘A Moment of Truth for the EU: A Proposal for a State Aid Solidarity Fund’, JECLP 11, 1.

⁹¹ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Europe's moment: Repair and Prepare for the Next Generation*, COM/2020/456 final, at p. 5.

⁹² *Id.*, at p. 3.

⁹³ *Id.*, at p. 12.

Similar concerns had been expressed by the European Parliament, notably referring to the asymmetrical budgetary capacity of EU Member States to grant State aid “the amounts of State aid disbursed by the Member States [to cope with the COVID-19 crisis] can vary to a significant degree, creating asymmetric risks to the unity and the coherence of the single market. [...]. This lack of capacity to help viable companies can also lead to systemic distortions, creating new or cementing existing disparities.”⁹⁴

To mitigate the divergences between Member States, the Commission’s proposal for the NGEU included the creation of a new Solvency Support Instrument with a budget of €31 billion and aiming to unlock more than €300 billion for companies. Importantly, investment under this instrument would be channelled to companies in the sectors, regions and countries most affected in order to “help to level-up the playing field for those Member States who are less able to support through State aid.”⁹⁵ The Commission also recognised in this context that “Member States have vastly different capacities to support their businesses with State aid [what justified the focus of the new instrument on] Member States where national solvency support is more limited.”⁹⁶

Regrettably in my view, the European Council did not support the new Solvency Support Instrument, which was dropped from the NGEU framework in July 2020. As explained by one commentator, “Most likely, countries with a wider fiscal space, which were solidary enough to support the issuing of European debt, did not want any restriction to save their national companies. This was a big mistake in terms of cohesion of the Single Market.”⁹⁷

This author also linked the abandonment of the Solvency Support Instrument with the increasingly permanent character of the Temporary State aid Framework: “That day, the State Aid Temporary Framework (approved in March 2020) became dangerously anchored in the EU regulatory landscape. In fact, it has been extended a few times even after the COVID crisis, when Russia invaded Ukraine. Like many temporary things in life, the State Aid Temporary Framework seems today more permanent than ever.”⁹⁸

In relation to the foregoing, it should be noted that some Member States, and notably France and Germany through their 2019 Manifesto,⁹⁹ have been particularly emphatic as to the need to preserve the competitiveness of EU companies worldwide, insofar as other trading partners grant significant subsidies that may not be addressed under the State aid rules. This is a position that probably fostered the adoption of the foreign subsidies regulation at the end of 2022.¹⁰⁰

V. Conclusions

This Chapter has shown that the European Commission reacted quickly and with flexibility to the pandemic by swiftly adopting exceptional and temporary soft law measures, based on the

⁹⁴ Briefing, EU Legislation in Progress 2021-2027 MFF, Solvency Support Instrument, available at [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2020\)659264](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2020)659264), p. 3.

⁹⁵ Communication from the Commission, Europe's moment: Repair and Prepare for the Next Generation, cit., at p. 5.

⁹⁶ European Commission, Questions and Answers: Solvency Support Instrument Brussels, 29 May 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_946, p. 1.

⁹⁷ Enrique Féas, ‘EU-level funding to solve state aid dilemmas’, in European Council Experts’ Debrief, Trans European Policy Studies Association, Sixth Issue - March 23, at pp. 17-18.

⁹⁸ Ibid.

⁹⁹ A Franco-German Manifesto for a European industrial policy fit for the 21st Century [2019], 19 February 2019.

¹⁰⁰ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ L 330, 23.12.2022, p. 1–45.

existing legal framework, and approach validated by the EU Courts. The Chapter also shows that the increased flexibility, exacerbated by the co-existence of the State aid Temporary Framework with the NGEU funding, has brought about competition and cohesion concerns in the Single Market as the foreseen safeguards have not sufficed to neutralise the concerns related to the distortions of competition and cohesion resulting from the public interventions.

The foregoing has unfolded in parallel to the development of two discernible trends in the State aid field, one supporting a more restrictive view of the Commission's powers in this field and another advocating for a more federalised granting of aid at EU level. In this regard, the chapter advances, in line with the latter trend, that the use of the EU budget, or of EU-raised funds, can help mitigate the distortions caused by the use of national funds, which depend ultimately on the very different financial capacity of Member States.

In this context, the European Council has recently asked for State aid to be allowed “speedily, including via tax credits, in those sectors that are strategic for the green transition and are adversely impacted by foreign subsidies or high energy prices.”¹⁰¹ However, implicitly acknowledging the risks associated with the granting of even more State aid, the European Council has also stressed that “The integrity of and the level playing field in the Single Market must be maintained.”¹⁰²

There is a tension between the granting of more State aid, which by definition entails a distortion of competition and an effect on trade (being two constitutive requirements of Article 107(1) TFEU) and preserving the integrity and the level playing field in the Single Market, especially in light of the asymmetric financial capacity of Member States. This chapter suggests, in line with the ill-fated Solvency Support instrument, that the new architecture of EU economic governance should provide for more EU funding mechanisms to mitigate the impact of national State aid on competition and cohesion in the Single Market, also in line with the goals of Article 3 TEU and Article 174 TFEU.

The granting of State aid through Union instruments could reconcile the goals of supporting the green/digital transitions¹⁰³ and enhancing the EU's global competitiveness, on the one hand, with the preservation of the integrity of the Single Market, on the other. This proposal, it is submitted, would also allow the European Commission to clarify and reinforce its role as an enforcer of the EU competition rules, including the State aid rules. As the *Hinkley* case underlines, the European Commission can do so through the rigorous application of State aid rules in a more ordinary fashion, while reinforcing the principle of solidarity through the Union's budget, as the Court has also stressed in the financial conditionality regulation judgement.

¹⁰¹ Conclusions of the special meeting of the European Council (9 February 2023), EUCO 1/23, Brussels, 9 February 2023, at p. 6.

¹⁰² Ibid.

¹⁰³ See Chapter 11 in this volume.