State Aid in the Times of COVID-19 Pandemic

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Abstract

COVID-19 caused serious turbulence in the economy worldwide, severely damaging certain industries, while generating extra revenues for others. In order to be able to continue business as usual following the current crises there is a need to provide state aid to sectors and companies which could not have been imaginable previously. The EU has reacted extremely speedily. Under the Temporary Framework issued by the European Commission at the beginning of the pandemic a significant number of state aids has been approved. Although the Temporary Framework was adapted very quickly, the transitional rules ensure that state aids do not interfere with the functioning of the internal market except to the extent a necessary and proportionate. The present article highlights the various legal bases which can be invoked in the present COVID-19 pandemic situation for providing state aid, includes a comprehensive summary of every single state aid notified to the European Commission with respect to the effects of COVID-19 pandemic and presents numerous examples from the practice.

Keywords: temporary framework, competition law, state aid, COVID-19, European Commission.

1. Introduction

On 31 December 2019, the Wuhan Municipal Health Commission (China) reported to the WHO China Country Office cases of pneumonia of unknown cause detected in Wuhan.[1] Late January the Emergency Committee of the WHO discussed the matter and could not reach a decision on whether a "public health emergency of international concern" should be called; it took until 11 March 2020 for the WHO to state that "COVID-19 can be characterized as a pandemic."[2] A little more than a year later, in April 2021 more than 3 million people were confirmed to have died as the result of COVID-19 infection worldwide, while there are more than 140 million confirmed coronavirus cases.[3] Thus, we can

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1 See at www.who.int/csr/don/05-january-2020-pneumonia-of-unkown-cause-china/en/.

2 See at www.who.int/news/item/27-04-2020-who-timeline---covid-19.

3 See at www.worldometers.info/coronavirus/.

doi: 10.5553/HYIEL/266627012021009001005

safely say that COVID-19 is the gravest health-issue to have been dealt with by the EU from its inception.

The economic impact of the pandemic is extremely significant as well. Various research, analyses and data are available to substantiate this finding, but probably one of the most shocking indicators is the never-before-seen decrease of the economic sentiment indicator (ESI) by more than 30 points in April 2020,[4] which is a negative record since the ESI was introduced in 1985. The ESI is administered by the Directorate General for Economic and Financial Affairs of the European Commission, and it covers the following sectors: industry (40%), services (30%), consumers (20%), retail (5%) and construction (5%).[5] This data tells us that the COVID-19 pandemic has effects for both the overall economy,[6] as well as for specific sectors, these sectors mainly being those most dependent on personal contacts. The study prepared by the Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies in March 2021 specifies these as "cultural and creative industries and the aerospace industry (due to the decrease in mobility and tourism activities)", also stating that "they are likely to suffer for extended periods from these unprecedented shocks."[7]

Thus, we may conclude that the need for unprecedented forms of state aid and aid provided to sectors earlier almost unimaginable to be eligible for such aid has become imminent. The European Commission was actually not really far behind the WHO: on 19 March 2020 (just 8 days after the WHO declared the COVID-19 situation to be a pandemic) the Commission issued the communication on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (Temporary Framework).[8]

The state aid measures as laid down in the Temporary Framework do not only include possible ways forward through providing aid to those affected by the COVID-19 outbreak. Namely, the TFEU ab ovo contains provisions which can be invoked to this end: Article 107 (2) and (3).[9] In the following, the authors describe the bricks of this legal framework citing various examples from the practice of the Member States, including an overview of the economic context where the beneficiaries operate.

2. The Economic Context of the Current Situation

The general aim of EU state aid rules is to keep the economic balance between the various EU Member States on one hand, and to ensure fair competition on the

4 See at www.destatis.de/Europa/EN/Topic/COVID-19/COVID-19-article.html.
5 See at https://ec.europa.eu/eurostat/web/products-datasets/-/teibs010.
6 See e.g. Tej Gonza et al., 'Marcora for Europe: How Worker-Buyouts Might Help Save Jobs and Build Resilient Businesses', European State Aid Law Quarterly, Vol. 20, Issue 1, 2021, pp. 61-73.
7 See at www.europarl.europa.eu/RegData/etudes/STUD/2021/662903/IPOL_STU(2021)662903_EN.pdf.
8 See at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOC_2020_091_I_0001.
9 Philipp Werner & Vincent Verouden, EU State Aid Control Law and Economics, Wolters Kluwer, Bedfordshire, 2017, p. 7.

doi: 10.5553/HYIEL/266627012021009001005

market and more generally, the existence of the internal market itself on the other.[10] Since this balance and fair trade can be disrupted not only by intentional actions of a Member State but also by events outside the control of the Governments, it should also be the task of those setting forth state aid rules to make sure that appropriate rules are laid down for exceptional cases where the balance between demand and supply is disturbed.

The COVID-19 pandemic caused exactly such a disturbance: various market sectors are affected through declining demand for fear of becoming infected, while other sectors are faced with the same issue owing to government ordered lockdowns and other restrictions. According to Santander, an international financial services company, wholesale and retail trade, accommodation and food services and transport industries "will face an acute risk of bankruptcy", while 25-35% of companies "would experience a financing shortfall"; losses for EU companies in 2020 are estimated to be "between EUR 720 billion and EUR 1.2 trillion".[11] COVID-19 thus affects multiple layers of the economy: the economic downfall is triggered partially by less people being interested in purchasing a service, the ban on rendering or using certain services, the gradual decline in demand for certain products, and finally, a general economic recession.

As mentioned above, the TFEU already contained various legal bases which could be relied on to provide state aid in the current situation. However given the exceptional nature of the COVID-19 pandemic (resulting in unprecedented and unimaginable restrictions and market turbulence) called for more specific action: the acceptance of the *Temporary Framework*, which is a clear example of how the Commission shaped and amended the aid framework depending on how the economic situation in the EU and the pandemic evolved.

As of 19 March 2020, the Temporary Framework provided for only five types of temporary state aid measures: *(i)* aid in form of direct grants, repayable advances or tax advantages; *(ii)* aid in the form of guarantees on loans; *(iii)* aid in the form of subsidized interest rates for loans; *(iv)* aid in the form of guarantees and loans channeled through credit institutions or other financial institutions; and *(v)* short-term export credit insurance. With amendments adopted on 3 April (aid for COVID-19 relevant research and development; investment aid for testing and upscaling infrastructures; investment aid for the production of COVID-19 relevant products; aid in the form of deferrals of tax and/or of social security contributions; aid in the form of wage subsidies for employees to avoid lay-offs during the COVID-19 outbreak) and on 8 May (recapitalization measures) the current scope of measures was reached, and further amendments shaped the regulatory framework on 29 June and 13 October 2020 and 28 January 2021 that is modified from time to time the detailed rules of relying on the above

10 *See* Michael Flickenschild *et al*., *Impacts of the COVID-19 Pandemic on EU Industries*, Publications Office of the European Union, 2021, at https://op.europa.eu/en/publication-detail/-/publication/145218e0-a314-11eb-9585-01aa75ed71a1/language-en.

11 *See* at www.santander.com/en/press-room/insights/recovery-plan-and-economic-sectors-most-affected-by-the-covid-crisis.

doi: 10.5553/HYIEL/266627012021009001005

mentioned various measures. Below, the authors discuss the provisions of the Temporary Framework effective from 25 April 2021.[12]

3. Types of State Aid Under the Temporary Framework

3.1. Limited Amounts of Aid

Direct financial aid is considered to be one of *the most intrusive form of aid* which can have a significant effect on the fair market balance of the internal market, and it is thus no wonder that such types of aids are, even where allowed, generally restricted by numerous conditions which must be met additionally. In this case, the preconditions are as follows (all conditions below are to be met):[13] *(i)* the overall aid may not exceed EUR 1.8 million per undertaking; *(ii)* the aid shall be granted based on a scheme with an estimated budget; *(iii)* aid may not be granted to undertakings that were already in difficulty on 31 December 2019; *(iv)* the aid may be granted no later than 31 December 2021; and *(v)* the aid granted to undertakings active in the processing and marketing of agricultural products is conditional upon parameters laid down in the Temporary Framework.

Of course, there are certain exceptions, such as the micro and small enterprises (they must meet less strict preconditions[14]) and aid granted to undertakings in the agricultural, fishery and aquaculture sectors (in which case additional conditions must be met[15]).

Spain introduced an umbrella scheme under the Temporary Framework already in early April 2020 and has had it amended multiple times since then.[16] Among others, the scheme provides for a limited amount of aid for uncovered fixed costs to companies and the self-employed affected by the coronavirus outbreak. The budget for this limited aid was eventually set at EUR 13.65 billion with a maximum aid amount of EUR 225,000 per company active in the primary production of agricultural products, EUR 270,000 per company active in the fishery and aquaculture sector and EUR 1.8 million per company active in all other sectors.

3.2. Aid in the Form of Guarantees on Loans

In order to ensure that there is no undue intervention in the market, several specific preconditions are laid down by the Temporary Framework in its para. 25, among others, those related to guarantee premiums, the overall amount of the loans, the duration of the guarantee, *etc*. The guarantee shall be granted by 31 December 2021 at the latest and (with certain exceptions) may not be granted to undertakings that were already in a difficulty on 31 December 2019. Such

12 *See* at https://ec.europa.eu/competition/state_aid/what_is_new/TF_informal_consolidated_version_as_amended_28_january_2021_en.pdf.

13 Temporary Framework, para. 22.

14 Id. para. 22.c.bis.

15 Id. para. 23.

16 SA.61875.

doi: 10.5553/HYIEL/266627012021009001005

guarantees were provided among others, by Denmark,[17] Finland,[18] France,[19] Germany,[20] Italy,[21] Latvia,[22] Luxembourg[23] and Portugal.[24]

3.3. Aid in the Form of Subsidized Interest Rates for Loans

Very similar preconditions are set forth by para. 27 of the Temporary Framework as in the case of the above-mentioned guarantees, except that instead of guaranteed premiums the credit risk margins are one of the decisive factors. Among others, Germany[25] and Latvia[26] introduced subsidized loan schemes.

The *Latvian* scheme includes an overall budget of EUR 200 million, of which EUR 50 million must be given in the form of a capital injection from the state budget into the state-owned joint stock company and Latvian public development bank Altum, while an additional EUR 150 million will be raised by Altum in the form of loans from an international financial institution (*e.g.* the European Investment Bank) or from the state treasury. The loans are limited to a maximum of three years.

The *German* subsidized interest rate loans are provided either directly by the state-owned development bank KfW together with private banks in a consortium to beneficiaries, or indirectly in the form of risk-sub-participations. These measures are open to all financial intermediaries and their aim is to provide financial means either for investment or working capital needs of the beneficiaries. The duration of the loan is limited to a maximum of six years.

3.4. Aid in the Form of Guarantees and Loans Channeled Through Credit Institutions or Other Financial Institutions

Para. 28 of the Temporary Framework sets forth that

> "aid in the form of guarantees and loans pursuant to section 3.1, section 3.2, section 3.3 and section 3.12 of this Communication may be provided to undertakings facing a sudden liquidity shortage directly or through credit institutions and other financial institutions as financial intermediaries."

If the aid is provided through a financial institution, it

> "should, to the largest extent possible, pass on the advantages of the public guarantee or subsidized interest rates on loans to the final beneficiaries. The financial intermediary must be able to demonstrate that it operates a

17 SA.56708.
18 SA.56809.
19 SA.56709.
20 SA.56787.
21 SA.56690.
22 SA.56722.
23 SA.56805.
24 SA.56755.
25 SA.56714.
26 SA.56722.

doi: 10.5553/HYIEL/266627012021009001005

> mechanism that ensures that the advantages are passed on to the largest extent possible to the final beneficiaries in the form of higher volumes of financing, riskier portfolios, lower collateral requirements, lower guarantee premiums or lower interest rates than without such public guarantees or loans."

Among others, the governments of France,[27] Germany,[28] and the UK[29] have employed this type of state aid.

3.5. Short-Term Export Credit Insurance

This type of state aid certainly cannot be called a typical one. The Temporary Framework itself also contains only one single paragraph (para. 32), stating that "there is a lack of sufficient private insurance capacity for short-term export credits in general and that the cover for marketable risks is temporarily unavailable." Thus, *the Commission has temporarily removed all countries from the list of 'marketable risk' countries* under the short-term export-credit communication, enabling Member States to make available public short-term export credit insurances to all countries.[30] That is, all commercial and political risks associated with exports to any country have become eligible for export credit insurance until 31 December 2021.

3.6. Aid for COVID-19 Relevant Research and Development

The COVID-19 pandemic was caused by a novel coronavirus, hence, it is no wonder that related R&D may lawfully be supported by members states (even with a 100% aid intensity in certain cases) provided that the following are obeyed:[31] *(i)* the aid is granted in the form of direct grants, repayable advances or tax advantages by 31 December 2021 at the latest; *(ii)* the aid beneficiary commits to grant non-exclusive licenses under non-discriminatory market conditions to third parties in the EEA; *(iii)* the aid is not granted to undertakings that were already in a difficulty on 31 December 2019.

Many countries have relied on this legal basis. Austria provided a direct grant of *approx*. EUR 840,000 to Apeptico and a direct grant of *approx*. EUR 1.2 million to Panoptes to support R&D projects aiming at assessing the therapeutic potential of two medicinal products developed by these companies for the treatment of coronavirus patients.[32] Belgium has set up an EUR 25 million scheme to support (by means of direct grants and repayable advances) coronavirus related R&D activities in Wallonia[33] and an EUR 4 million direct grant scheme for the Brussels-Capital region.[34] Czechia notified the European

27 SA.56709.
28 SA.56714.
29 SA.5679. and SA.56794.
30 *See* at https://ec.europa.eu/commission/presscorner/detail/en/statement_20_551.
31 Temporary Framework, para. 35.
32 *See* at https://ec.europa.eu/commission/presscorner/detail/en/MEX_20_1276.
33 SA.57173.
34 SA.57057.

doi: 10.5553/HYIEL/266627012021009001005

Commission of an *approx*. EUR 7.3 million scheme to support research and development activities related to the coronavirus outbreak.[35] Estonia set up a EUR 10 million scheme to support research and development by companies affected by the coronavirus outbreak, as well as coronavirus-related research and development.[36] The Hungarian R&D scheme, open to all companies that are capable of engaging in the research and development and/or production of relevant products irrespective of their sector of activity, will take the form of direct grants and has a framework amount of EUR 143 million.[37] The Irish scheme amounting to EUR 200 million also supports the research and development, testing and production of coronavirus-relevant products.[38] Italy has provided EUR 40 million in the form of a direct grant to ReiThera S.r.l., a medium-sized biotechnology company located in the Lazio region, to support its coronavirus related R&D activities.[39] The Luxembourg scheme in the amount of EUR 30 million is open to small, medium-sized and large enterprises of all sectors, with aid to be granted in the form of direct grants to enhance and accelerate research and the production of goods directly relevant to coronavirus.[40] The Maltese scheme is similarly open to everyone and will also take place in the form of direct grants, amounting to a total of EUR 5.3 million.[41] The Polish scheme amounts to a significant PLN 2 billion (*approx*. EUR 449 million) and will be co-financed by the European Structural and Investment Funds.[42]

3.7. Investment Aid for Testing and Upscaling Infrastructures

Infrastructure-related aid under this legal title shall be related to infrastructure necessary for the development, testing and upscaling of COVID-19 relevant products (among others medicinal products, medical devices, hospital and medical equipment, disinfectants, *etc*.). An example is the EUR 80 million Slovak scheme, though it must be mentioned that this amount is not entirely provided based on the currently discussed legal title (investment aid for testing and upscaling infrastructures), but also based on the legal title of COVID-19 relevant research and development. The aid is provided as a direct grant and every company (except for financial institutions) may be eligible. (This scheme is to be co-founded by the European Structural and Investment Funds.[43])

The *most important preconditions* allowing for the use of this type of aid are as follows:[44] *(i)* the aid may be granted in the form of direct grants, tax advantages or repayable advances by 31 December 2021; *(ii)* the investment project shall be

35 SA.57071.
36 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_2316.
37 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1471.
38 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_995.
39 SA.61774.
40 SA.56954.
41 SA.57075.
42 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1132.
43 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1338.
44 Temporary Framework, para. 37.

doi: 10.5553/HYIEL/266627012021009001005

completed within six months after the date of granting the aid; *(iii)* aid intensity shall not exceed 75% of the eligible costs (with certain exceptions); *(iv)* the aid under this measure shall not be combined with other investment aid for the same eligible costs (with certain exceptions); *(v)* the price charged for the services provided by the testing and upscaling infrastructure shall correspond to the market price; *(vi)* the testing and upscaling infrastructures shall be open to several users and access shall be granted on a transparent and non-discriminatory basis; *(vii)* aid may not be granted to undertakings that were already in a difficulty on 31 December 2019.

3.8. Investment Aid for the Production of COVID-19 Relevant Products

This type of aid shall be granted under very similar conditions as aid for testing and upscaling infrastructure, with the difference that aid intensity shall (instead of 75%) not exceed 80% of eligible costs as a general rule. Also, a loss cover guarantee may be granted in addition to the direct grant, tax advantage or repayable advance but as an independent aid measure as well.[45]

Similarly, to the R&D related aid type, investment aid for the production of COVID-19 relevant products was used by many Member States, including Austria,[46] Belgium,[47] Czechia,[48] France,[49] Germany,[50] Hungary,[51] Ireland,[52] Lithuania,[53] Luxembourg,[54] Malta,[55] Poland,[56] Portugal,[57] and Slovenia.[58] It may be observed that in almost all cases, R&D and production-related aid was provided hand in hand. This is not a unique setup: schemes of various Member States usually combine various aid types under the Temporary Framework.

3.9. Aid in the Form of Deferrals of Tax and/or of Social Security Contributions

Denmark introduced a tax deferral scheme to support small and medium-sized enterprises (SMEs) affected by the coronavirus outbreak in January 2021 in the amount of *approx*. EUR 4 million[59] and increased this amount already in March 2021 with *approx*. EUR 34 million.[60] These schemes provide interest-free credit facilities in relation to wage taxes and VAT.

45 Id. para. 39.
46 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_917.
47 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_21_102 and https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1139.
48 SA.56961.
49 SA.57367.
50 SA.57100.
51 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1471.
52 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_995.
53 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1831.
54 SA.56954.
55 SA.57204.
56 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1132.
57 SA.57035.
58 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1483.
59 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_21_227.
60 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1042.

doi: 10.5553/HYIEL/266627012021009001005

The Lithuanian tax deferral scheme includes tax deferrals and tax-related liquidity measures (payment in instalments of tax arrears, interest free periods, as well as the suspension of tax debt recovery) and is open to businesses affected by the containment measures imposed by the Lithuanian government to limit the spread of the coronavirus. The volume of these measures reaches the amount of *approx*. EUR 156 million.[61]

3.10. Aid in the Form of Wage Subsidies for Employees to Avoid Lay-Offs During the COVID-19 Outbreak

The Temporary Framework sets forth the following *general preconditions for providing aid in the form of wage subsidies*:[62] *(i)* the aid shall be granted only in the form of schemes to undertakings in specific sectors, regions or of a certain size of companies that are particularly affected by the COVID-19 outbreak; *(ii)* the individual aid awards of the wage subsidy scheme are granted no later than 31 December 2021; and *(iii)* the monthly wage subsidy shall not exceed 80% of the monthly gross salary.

Some examples of wage subsidy are those introduced by Hungary, Denmark and Bulgaria. Hungary has introduced an *approx*. EUR 23.5 million wage subsidy scheme in the form of exemptions (amounting to up to 23% of the monthly gross salary paid to the employees) from the employers' obligation to pay social security, vocational training and rehabilitation contributions.[63] The Danish scheme is to support companies that are subject to an operation ban implemented to limit the spread of the coronavirus, that is the scheme is open to companies in all sectors (except financial institutions) and the support is given in the form of direct grants.[64]

Bulgaria has two wage subsidy schemes in place. *(i)* The first scheme is known in Bulgaria as the "60/40" aid scheme: the government covers 60% of an employee's salary (and mandatory social security and healthcare contributions; but this falls under the above-mentioned aid in form of deferrals of tax and/or of social security contributions). *(ii)* The second scheme provides aid in the form of direct grants of *approx*. EUR 150 per beneficiary per month and is open to companies of all sizes and self-employed persons active in the sectors most affected by the coronavirus outbreak: transport, hotels, restaurants and travel agencies. (This scheme will also be co-financed by the European Social Fund.[65])

3.11. Recapitalization Measures

Recapitalization measures[66] were the last to be introduced by the Temporary Framework and thus available only from 8 May 2020. It may be observed, that

61 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_21_155.
62 Temporary Framework, para. 43.
63 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1299.
64 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1882.
65 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1359.
66 *See* Antonios Bouchagiar, 'State Aid in the Context of the COVID-19 Outbreak, Including the Temporary Framework 2020', *EUI Working Papers*, RSC 2021/03, Robert Schuman Centre for Advanced Studies Florence School of Regulation, pp. 33-44.

doi: 10.5553/HYIEL/266627012021009001005

this measure is mainly used by governments to aid airlines and generally the air transport sector, which has basically been brought to a halt due to the travel bans and restrictions imposed: *(i)* Germany has contributed to the recapitalization of Deutsche Lufthansa AG (the parent company of Lufthansa Group);[67] *(ii)* SAS (Scandinavian Airlines) was recapitalized by the Danish and Swedish government;[68] *(iii)* Finland has introduced measures to recapitalize Finnair;[69] *(iv)* France has recapitalized Air France;[70] and Latvia has provided recapitalization to Riga International Airport[71] and airBaltic.[72]

Of course, it would not be correct to say that airlines were the only ones receiving recapitalization: *e.g*. Poland has introduced a recapitalization scheme to enable up to EUR 1.65 billion of capital support to SMEs and large enterprises affected by the coronavirus outbreak.[73]

The Temporary Framework sets forth very strict eligibility and entry conditions, defines the possible types of recapitalization measures (which must be either equity instruments or instruments with an equity component), and sets forth rules as to the remuneration and exit of the state. Due to the very high risk of undue distortions of competition, this type of state aid is the one regulated in the most detail in the Temporary Framework.

3.12. Case Study on Hungary

Hungary has notified the Commission on state aid provided within the scope of the Temporary Framework in 22 cases to date, out of which on 14 instances of new schemes were notified, while 8 times the Hungarian government's notification was about increasing already existing schemes.[74] Thus, it is clear that national governments were continuously monitoring the effects of the pandemic on the real economy and the labor market and making necessary adjustments when necessary.

The aggregate amount of the state aid provided by Hungary under the Temporary Framework equals EUR 13.2 billion. By comparison, the country's estimated nominal GDP in 2020 was *approx*. EUR 125 billion.[75] It is clear that the unprecedented crisis triggered an unprecedented amount of state aid as well. Hungary mainly relied on direct grants (Section 3.1 above), but made use of schemes including loans, equity intervention, guarantees, wage subsidies, tax advantages and tax allowances as well.

The aid provided was *generally industry-neutral, with certain exceptions, e.g*. the scheme to support Hungarian agri-food, fisheries and aquaculture, forestry and

67 SA.57153.
68 SA.57543.
69 SA.57410.
70 SA.59913.
71 SA.57756.
72 SA.56943.
73 SA.57055.
74 *See* at https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/jobs-and-economy-during-coronavirus-pandemic/state-aid-cases/hungary_en.
75 *See* at https://tradingeconomics.com/hungary/gdp.

doi: 10.5553/HYIEL/266627012021009001005

game management (hunting) sectors in the amount of EUR 99 million,[76] the wage subsidy scheme to support the aviation sector in the amount of EUR 23.5 million,[77] and the tax advantage/allowance and direct grant combined scheme targeting the accommodation and food service industry, restaurants and the entertainment and recreation sector (aid amount of EUR 195 million).[78] As mentioned in the Introduction above, these are the sectors which are most dependent on personal contacts: the food, cultural and aerospace industry. Thus, it seems reasonable to introduce schemes specifically for their support, although it may be concluded that these three schemes amount to only less than 3% of the notified state aid provided by Hungary.

4. Aid to Make Good the Damage Caused by Natural Disasters or Exceptional Occurrences [Article 107(2)(b) TFEU]

Given that the Temporary Framework specifically designated the COVID-19 pandemic as exceptional occurrence, under Article 107(2)(b) TFEU Member States may compensate both companies from industrial and commercial sectors severely affected by the consequences of the COVID-19 pandemic and organizers of events cancelled for the same reason, for the damage suffered as a direct result of the pandemic and provided that such compensation is notified to the Commission.[79] Thanks to this provision Member States do not have to verify that the conditions of derogation are fulfilled,[80] making the notification process more simple. Member States must ensure the free, non-discriminatory movement of goods, services, persons and capital when providing state aid.[81] This provision however provides a legal basis only with for compensation provided strictly up to the amount of direct damages, that is, up to the amount of the prospective profit that would be realized through the beneficiary's precisely defined scope of activities if no detrimental effect of the pandemic were present.[82] That is, measures aiming to remedy the general economic downturn caused by COVID-19 events (damage not directly and case-by-case specifically and verifiably related to COVID-19) are not admissible under these grounds.[83]*Member States have invoked this legal basis in numerous cases: (i)* Austria when compensating Austrian

76 SA.57329.

77 SA.57767.

78 SA.59477.

79 Peter Roth QC & Vivien Rose, *European Community Law of Competition*, Oxford University Press, Oxford, 2008, p. 1535.

80 Kelyn Bacon, *European Union Law of State Aid*, Oxford University Press, Oxford, 2013, p. 94.

81 Lennart Ritter & W. David Braun, *European Competition Law: A Practitioner's Guide*, Kluwer Law International, Bedfordshire, 2004, p. 971.

82 Tihamér Tóth, 'Állami támogatások versenyjoga a vírusválság idején', *Európai Tükör*, Vol. 23, Issue 3, 2020, pp. 55-73.

83 Judit Barta, 'Az állami támogatás szerepe és átmeneti szabályozása, valamint a magyar intézkedések a koronavírus-járvány okozta válsághelyzetben', *OPUSCULA CIVILIA* 2020, at https://antk.uni-nke.hu/document/akk-copy-uni-nke-hu/Opuscula_Civilia_2020_Barta_Judit.pdf.

doi: 10.5553/HYIEL/266627012021009001005

Airlines;[84] *(ii)* Croatia when compensating Croatia Airlines;[85] *(iii)* Czechia to compensate non-profit sport organizations;[86] *(iv)* Denmark with respect to its compensation provided to mink famers;[87] *(v)* Estonia in its scheme established to compensate international ferry operators;[88] *(vi)* Finland when compensating companies in the restaurant industry;[89] *(vii)* France when compensating ski lifts operators;[90] *(viii)* Germany when compensating of companies active in trade fairs and the congress sector;[91] *(ix)* Greece when introducing a scheme to the protect primary residence of vulnerable borrowers;[92] *(x)* Hungary when compensating specifically large companies;[93] *(xi)* Ireland when compensating airport operators;[94] *(xii)* Italy when compensating commercial rail passenger operators;[95] *(xiii)* Lithuania when compensating companies active in the processing of agricultural products in the poultry and eggs sectors;[96] *(xiv)* the Netherlands when compensating zoos;[97] *(xv)* Poland when setting up an aid scheme to compensate airports;[98] *(xvi)* Romania when compensating its regional airport operators;[99] *(xvii)* Slovakia when compensating airport operators;[100] *(xviii)* Slovenia when compensating specifically large companies;[101] *(xix)* Spain when setting up a guarantee scheme to compensate certain self-employed and companies;[102] *(xx)* Sweden when compensating damages caused by cancelled or postponed cultural events;[103] *(xxi)* the UK when compensating companies active in Scotland in the processing of agricultural products in poultry sector.[104]

84 SA.57539.
85 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_2277.
86 SA.57614.
87 SA.61945.
88 *See* at https://ec.europa.eu/commission/presscorner/detail/en/MEX_20_1331.
89 *See* at https://ec.europa.eu/commission/presscorner/detail/en/MEX_20_970.
90 SA.60949.
91 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_21_204.
92 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_2130.
93 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1176.
94 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_21_804.
95 SA.59346.
96 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1432.
97 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_21_581.
98 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1771.
99 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_2191.
100 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_2529.
101 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1230.
102 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_2191.
103 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1831.
104 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_2507.

doi: 10.5553/HYIEL/266627012021009001005

5. Aid to Promote the Execution of an Important Project of Common European Interest or to Remedy a Serious Disturbance in the Economy of a Member State [Article 107(3)(b) TFEU]

> "This derogation has been used as a basis for a series of decisions and guidelines to deal with state aid to the financial sector and to the "real economy" following the global financial crisis of 2008."[105]

Though measures aiming to remedy the general economic downturn caused by COVID-19 effects are not admissible under Article 107(2)(b) TFEU, such aid may be legitimate under Article 107(3)(b) of the TFEU. Namely, the Temporary Framework specifically refers to this Article and sets forth that

> "state aid is justified and can be declared compatible with the internal market on the basis of Article 107(3)(b) TFEU, for a limited period, to remedy the liquidity shortage faced by undertakings and ensure that the disruptions caused by the COVID-19 outbreak do not undermine their viability, especially of SMEs."[106]

For state aid to be admissible, it has to be notified to the Commission and it has to be proven by the Member State that the measure in question is "necessary, appropriate and proportionate to remedy a serious disturbance in the economy of the Member State concerned."[107]

If one takes a look at the state aids notified by the Member States under this legal title, one may conclude that these projects generally concern a significant amount of aid: *(i)* a Belgian guarantee scheme mobilized EUR 50 billion support for companies affected by the coronavirus outbreak;[108] *(ii)* a French guarantee scheme mobilized up to EUR 20 billion support from private investors for companies affected by the coronavirus outbreak;[109] *(iii)* Italy has set up a guarantee scheme in the amount of EUR 2 billion to support the trade credit insurance market;[110] *(iv)* Germany set up a guarantee scheme in the amount of EUR 840 million to protect consumers and support the travel industry;[111] *(v)* Portugal put in place a top-up insurance scheme in the amount of EUR 500 million to support domestic trade credit;[112] *(vi)* Spain introduced a reinsurance scheme in the amount of EUR 500 million to support the trade credit insurance market.[113]

105 Leigh Hancher *et al.*, *EU State Aids*, Thomson Reuters, London, 2016, p. 141.
106 Temporary Framework, para. 18.
107 Id. para. 19.
108 SA.56819.
109 SA.58639.
110 SA.57937.
111 SA.57741.
112 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1542.
113 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_2335.

doi: 10.5553/HYIEL/266627012021009001005

6. Aid to Facilitate the Development of Certain Economic Activities or of Certain Economic Areas, Where Such Aid Does Not Adversely Affect Trading Conditions to an Extent Contrary to the Common Interest [Article 107(3)(c) TFEU]

The categories listed in Article 107(3) TFEU are so called "aid which may be compatible with the internal market".[114] It comes as no surprise that this legal basis is not a tailor-made one for providing state aid related to the COVID-19 pandemic and accordingly, the authors are aware of only four cases where a Member States invoked this Article: *(i)* Greece when providing aid to protect the primary residence of vulnerable borrowers;[115]*(ii)* the UK when aiding the distribution of free medical grade personal protective equipment;[116] and *(iii)* Portugal when supporting SATA airline[117] and TAP.[118]

7. Comprehensive Summary of Cases Notified to the European Commission with Respect to the Effects of the COVID-19 Pandemic

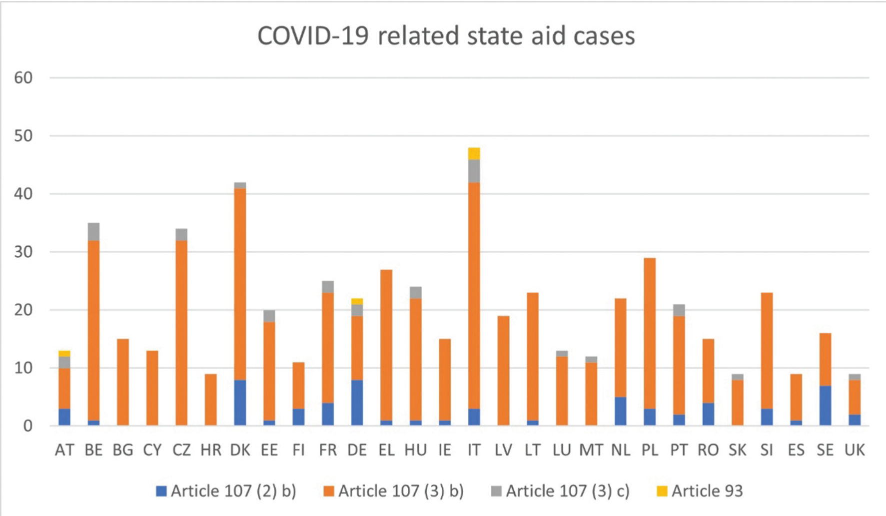
After analyzing all the 577 state aid cases[119] notified to the European Commission with regard to the COVID-19 pandemic (until 13 June 2021), the following main conclusions may be drawn.[120] Since the country is no longer a member of the EU, the UK was obliged to report the provision of state aid to the European Commission only until 31 December 2020. Accordingly, the figures below contain only the data reported by this date.

More than 80% of the examined state aid cases were reported as to be provided under legal basis Article 107(3)(b) TFEU. In line with the above, this figure does not come as a surprise given that the Temporary Framework specifically puts this legal basis into its focus. In addition, we shouldn't forget that during the financial crisis of 2008 this was the legal basis most heavily relied on. As the Temporary Framework specifically designated the COVID-19 pandemic as an exceptional occurrence, it isn't surprising that state aid provided with reference to Article 107(2)(b) TFEU amounts to the second most commonly cited legal basis. Member States' reliance on Articles 107(3)(c) and 93 is insignificant. State aid cases reported to the European Commission with respect to the COVID-19 pandemic under the various legal bases are shown below in the chart prepared by the authors (see Figure 1).

114 Conor Quigley, *European State Aid Law and Policy*, Oxford and Portland, Oregon, 2015, p. 203.
115 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_2130.
116 *See* at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1682.
117 SA.58101.
118 SA.57369.
119 This number includes the amendments made to the already existing state aid schemes. The reason for choosing this methodology is that the notified modifications themselves are to be accounted for as provision of state aid, given that each and every modification resulted in widening the scope of already existing state aid schemes.
120 *See* at https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/jobs-and-economy-during-coronavirus-pandemic/state-aid-cases_en.

doi: 10.5553/HYIEL/266627012021009001005

Figure 1 Covid-19 related state aid cases



Naturally, what is even more important than the absolute number of reported state aid cases, is the aggregate and individual amount of the provided aid. The total aggregate amount of state aid provided by the Member States with respect to the effects of the COVID-19 pandemic is more than EUR 1.9 trillion, amounting to *approx*. 15% of the total nominal GDP of the EU in 2020.[121] More than half of the total amount of the examined cases were notified by Germany and France, as illustrated by the first chart[122] below (see Figure 2, prepared by the authors). The authors have also prepared another chart showing the state aid notified by the Member States excluding Germany and France, to portray the amounts provided by the rest of the Member States. What is clear is that around 95% of the amounts in question were provided under the legal basis Article 107(3)(b) TFEU. Aid under Article 107(2)(b) TFEU amounts to approx. 2.7%, while aid provided under Articles 93 and 107(3)(c) is insignificant. This is in line with the findings set forth above with respect to the absolute number of the cases notified to the European Commission, thus no disproportion is discernable.

The authors conclude from the second chart that state aid provided by Italy and Romania is quite low compared to their population (and in case of Italy also compared to its nominal GDP), while Austria, Belgium, Czechia and Sweden have notified a considerable amount of state aid compared to their population (see Figure 3).[123]

121 *See* at https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=EU.
122 Given the high numbers involve, the amounts are shown in thousand Euros.
123 *See* at https://ec.europa.eu/eurostat/documents/2995521/11081093/3-10072020-AP-EN.pdf/d2f799bf-4412-05cc-a357-7b49b93615f1.

doi: 10.5553/HYIEL/266627012021009001005

Figure 2 Amounts of state aid per country I

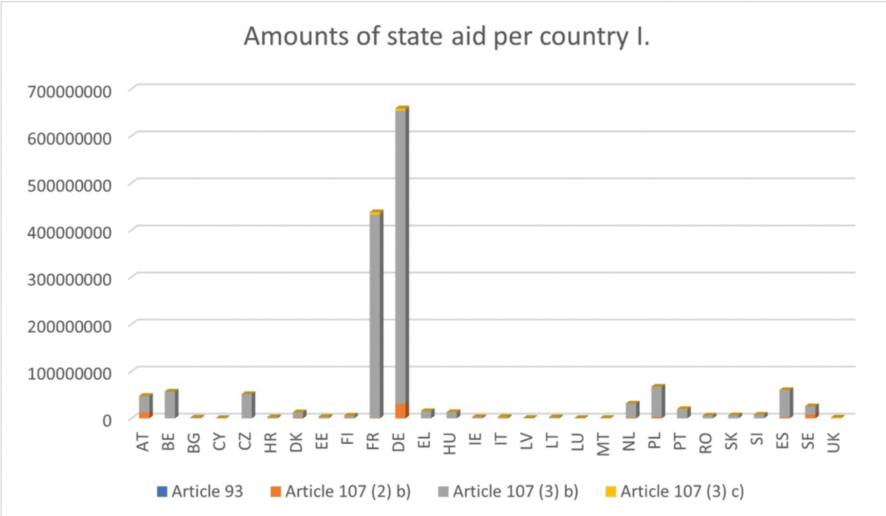
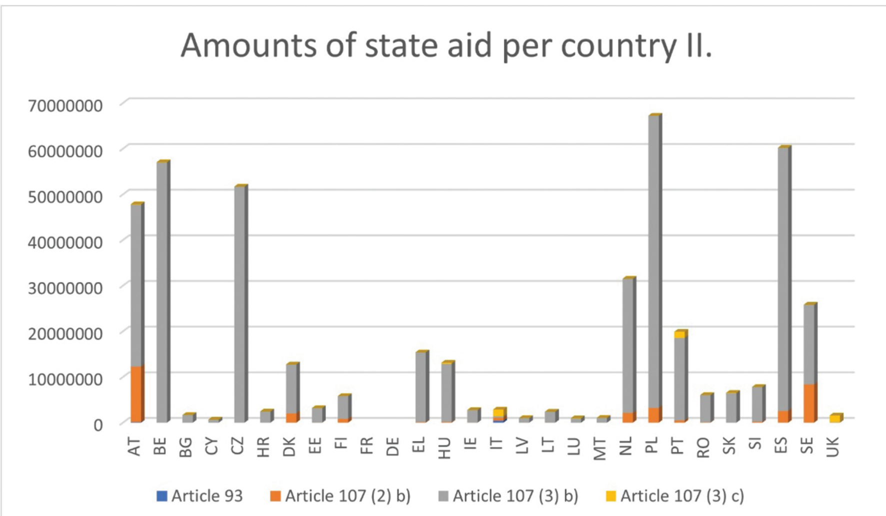


Figure 3 Amounts of state aid per country II



8. Conclusion

Based on the specific cases listed above, the following two conclusions may be drawn. *(i)* The European Commission was quick to issue the Temporary Framework and its amendments in the rapidly changing environment. *(ii)* Given the huge volume of aids provided by the Member States under the legal bases set

doi: 10.5553/HYIEL/266627012021009001005

forth under the Temporary Framework, the rules of the Temporary Framework and the TFEU may be considered flexible enough not to disproportionately restrict the capabilities of the Member States to act speedily and in a flexible manner. The Temporary Framework is the answer to an extraordinary situation. While one cannot predict whether the transitional rules will be used properly in every case, the authors believe that EU state aid rules have proven to be necessary and proportionate in upholding the proper functioning of the internal market. Finally, in case any of the state aid provided is disputed, the CJEU is perfectly placed to rule in such a dispute, just as in the *Ryanair* cases.[124]

124 Judgment of 14 April 2021, *Case T-378/20, Ryanair DAC*, ECLI:EU:T:2021:194; Judgment of 14 April 2021, Case *T-379/20, Ryanair DAC*, ECLI:EU:T:2021:195; and Judgment of 14 April 2021, *Case T-388/20, Ryanair DAC*, ECLI:EU:T:2021:196.

doi: 10.5553/HYIEL/266627012021009001005