

The Confluence of the Janus-Faced EU and Hungarian Domestic State Aid Law through Crises

Abstract

The permacrisis, including the COVID-19 pandemic, Russia's war on Ukraine and the urge for the green transition, has put the European Union in a situation whereby it has had to act without delay in many fields, of which one was and still is, the EU's State Aid Law. The European Commission adopted a set of soft law instruments, thereby effectuating the greatest shift in state aid the internal market has ever seen. This shift, however, has had impacts on the competences of the Commission, the power of the Commission, and the undistorted nature of the internal market itself. We are now marking Hungary's 20th year as a Member of the EU, and this anniversary hallmarks great changes in the division of competences within and between the Commission, other institutions, and the Member States. In this paper, I intend to elaborate on this shift in the field of State Aid Law in the light of the permacrisis.

Keywords: EU State Aid Law, Temporary Framework, crisis, internal market, competition law, soft law, competence

I Background

EU state aid law has been loosened since 19 March 2020 by three consecutive regimes. Immediately upon the COVID-19 pandemic-related crisis, the European Commission (Commission) adopted its Temporary Framework¹ as the guardian of EU competition law,² whereby they announced a series of legal bases functioning as derogations from the then-known state aid framework, granting massive 'easing' for Member States regarding how and

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¹ Commission, 'Temporary Framework' (2020) C/2020/1863 and its amendments.

² Katalin Gombos, *Az Európai Unió joga* (2nd edn, Patrocinium 2021, Budapest) 363.

under what conditions they are entitled to grant state aid to the entities of their national economies. Since the effect of most legal bases of the Temporary Framework (TF) lasted until 30 June 2022, it even seemed like, for a short period, that the main state aid regime would be put back in place as if it had never been altered, not even remotely. However, when the Russo-Ukrainian war broke out, the Commission decided to adopt a new, revised framework tailor-made for the ongoing crisis, the Temporary Crisis Framework (TCF),³ on 23 March 2022, still heavily based on the specifications of the then-outgoing TF regime. The enumeration of this has not ended yet, as the Commission, on 9 March 2023, adopted the Temporary Crisis and Transition Framework (TCTF),⁴ further introducing targeted legal bases for granting state aid in a simplified way under uniform conditions *en masse*.

In peace and boom times, Articles 107–109 of the Treaty on the Functioning of the European Union (TFEU) constitute the base of the state aid law of the European Union, where Article 107(1) stipulates a general ban on granting state aid, immediately prior to laying down exceptions from this general prohibition in Paragraphs 2 and 3 of the said Article. These rules are crucial, as they play a key role in establishing the internal market of the European Union (EU) entrusted by Article 2 of the Treaty on the European Union (TEU) alongside the four freedoms and antitrust provisions. Article 107(2) declares certain categories *ab ovo* compatible with the internal market, and within the framework of this Article, the Commission cannot exercise any discretion, as regarding Paragraphs 1 and 2, to declare what measure falls within the category of state aid. Further, which of these measures are deemed automatically compatible with the internal market is a matter of pure EU law, based solely on an objective basis. On the other hand, Article 107(3) grants the Commission the right to declare particular measures to be compatible with the internal market.⁵ Under Article 107(3), even though the Commission is entitled to individually decide about the compatibility of each measure, and may avail itself of discretion,⁶ it cannot be foreseen from the wording of the TFEU that the Commission could broaden the scope, which consists the following: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349 TFEU, in view of their structural, economic and social situation; (b) 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; (c) 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; and (d) aid to promote culture and heritage conservation where such aid does not

³ Commission, 'Temporary Crisis Framework' (2022) 2022/C 426/01 and its amendments.

⁴ Commission, 'Temporary Crisis and Transition Framework' (2023) 2023/C 101/03 and its amendments.

⁵ Conor Quigley, *European State Aid Law and Policy* (3rd edn, Hart Publishing 2015, Oxford-Portland) 3, DOI: <https://doi.org/10.5040/9781782259329>

⁶ Paul Craig, Gráinne de Búrca, *EU Law, Text, Cases and Materials* (7th edn, Oxford University Press 2020, Oxford) 1171, DOI: <https://doi.org/10.1093/he/9780198856641.001.0001>

affect trading conditions and competition in the EU to an extent that is contrary to the common interest. I find it important to pay attention to the fact that the text of Article 107(3) makes certain differentiations regarding the balance test needed when deciding whether an aid measure may be deemed compatible, as the said Article only prescribes taking into account the ‘common interest’ of the EU in the cases of Points (c) and (d) of the aforementioned Article, from which I infer, regarding Items (a) and (b), that the Commission may not articulate further requirements to be complied with, and it may not even analyse the potential of the harm to the internal market when it comes to, for instance, remedying a serious disturbance in the economy of a Member State. This statement of mine is further elaborated in this paper in light of the *actio radius* of the Commission in the field of state aid control, which is, in practical terms, nothing less but a limitation on the competences of the Member States, upon which the Member States have only agreed to the extent imposed by the Treaties – that is to say, concerning how the wordings of the Treaties are formulated and not beyond this, by any arbitral broadening.

Previously, I mentioned ‘peace and boom times’, although the factual legal situation is that peacetimes and turbulent times do not differ regarding the legal bases of granting state aid. Normatively, the Treaty framework is used to authorise crisis measures, as well. On the other hand, the Commission, by limiting its wide discretion to apply Article 107(3), has adopted soft law instruments. The function of soft law, primarily, is to fine-tune and fill the Treaty provisions with actual and precise substance and a set of clarifications. The Commission adopted the abovementioned frameworks (TF, TCF, TCTF); nonetheless, they do not play the primary legal role in labelling a state aid measure compatible, even though they may seem like they do.

In the following chapters, I intend to briefly introduce some of the Hungarian legislative measures taken during the times of the still ongoing state aid ‘great loosening’ while examining whether the Commission has or has not stretched beyond its rightful *actio radius* at all when seemingly dealing with TFEU-based matters within the frameworks of soft law, supposedly defining criteria additional to the TFEU. When elaborating on these issues, I seek to introduce the domestic implementation of approving Commission decisions, mostly in the form of Government Decrees, which sometimes form a triangle-shaped problem, ie, involving the tensions between the tertiary and primary laws of the EU and between EU and domestic law. In order to draw conclusions, I mainly apply desk research while also relying on my work experience.

II The Legal Nature of the TF, TCF and TCTF

We may declare that state aid rules are monitored by the Commission in the first place. Therefore, the Commission is active when it comes to forming them. This is also why we are faced with several soft law instruments published by the Commission that suggest its

own way of thinking about competition. All in all, I find these kinds of ‘*pseudo* legislation’ instruments legitimate, as they do not create extraordinary or new burdens; they are always formulated to either make existing obligations and rights clear by delineating their boundaries or to fill existing obligations with actual and practical content. This means the Commission does not override the TFEU, any secondary laws of the EU, nor the judgments or interpretations of the Court of Justice of the European Union (Court); it only supplements, construes, highlights or paves the way for them, and these soft law instruments perfectly blend into the ‘immune system’ of the net of – inter alia – the Treaties, regulations, directives, Court judgments and the binding decisions of the Commission. Many soft law measures, during the years of the State Aid Law expansion, have become hard law,⁷ however, and have been turned into regulations (eg the De minimis Regulation⁸ in 2001), which shows that a soft law, in itself, possesses a variable range of power.

TF, TCF, and TCTF belong to the category of soft law instruments, nonetheless, as they are published in the form of communications. That being said, it is visible that they shall not modify or expand any obligations assumed by the Treaties, namely the TFEU in our case. Soft laws play an important role in the modernisation of State Aid Law,⁹ and they give guidance to the legal subjects – unilaterally or in a cooperative way¹⁰ – concerning what the Commission requires from them. The rules of state aid set out by communication and accepted by the Member States practically have binding effects and constitute a measure of general application.¹¹ The Court, in the *Kotnik* case,¹² confirmed that the Treaty confers wide discretion on the Commission to assess the compatibility of aid measures with the internal market, including the possibility of adopting guidelines spelling out the criteria of compatible aid,¹³ and from the legality point of view, it still remains within the remit of the TFEU to serve as the basis concerning whether a measure constitutes compatible state aid.¹⁴ However, any effect of the communication on the Member States ‘can at most be incidental

⁷ Eugene Stuart, Iana Roginska-Green, *Sixty Years of EU State Aid Law and Policy* (International Competition Law Series, Wolters Kluwer 2018, Alphen aan den Rijn) 11.

⁸ Regulation (EU) 2023/2831 of the Commission [2023] OJ L2023/2831 currently, formerly Regulation (EU)1407/2013/EU of the Commission [2013] OJ L352/1; Regulation (EC) 1998/2006 of the Commission [2006] OJ L379/5; Regulation (EC) 69/2001 of the Commission [2001] OJ L10/30; and in the beginning Commission, ‘Notice on the de minimis rule for State aid’ 96/C 68/06 (1996).

⁹ Oana Stefan, *EU Competition and State Aid Soft Law in the Member States: Finland, France, Germany, Italy, the Netherlands, Slovenia and the UK* (King’s College London Law School Research Paper Forthcoming, King’s College 2020, London) 10.

¹⁰ Francesco de Cecco, *State Aid and the European Economic Constitution* (Hart Publishing 2013, Oxford-Portland) 48.

¹¹ Lea Petra Láncoš, ‘A Hard Core Under the Soft Shell: How Binding Is Union Soft Law for Member States?’ (2018) 24 (4) *European Public Law* 771, DOI: <https://doi.org/10.54648/EURO2018042>

¹² Case C-526/14 *Kotnik and Others v Državni zbor Republike Slovenije*, ECLI:EU:C:2016:570.

¹³ Láncoš (n 11) 779.

¹⁴ Láncoš (n 11) 780.

or indirect',¹⁵ as opposed to other unofficial views considering these communications 'factually binding', as the principle of loyalty would and may deter national courts and authorities from departing from such measures fearing an infringement procedure.¹⁶ It is a general accord that the Commission, in practice, forces the Member States to accept its soft law instruments, for instance, because if a Member State opposes a guideline of the Commission, the Commission then is inclined to launch a formal investigation into all relevant existing State aid schemes,¹⁷ as is mentioned later, as well. Formally, soft law binds only the Commission itself as a self-imposed limitation on the power of its discretion;¹⁸ in practice, however, it defines positive criteria for national state aid policies compatible with the common market and leaves little room for Member State aid policies, which seek to deviate from these criteria, and this is a part of the Commission's task concerning the 'negative integration' of the EU.¹⁹ However, its depth is questionable.²⁰ Regarding the TF, it set out the criteria which, if complied with, paved the way for Member States to grant state aid in order to tackle the effects of the COVID-19 pandemic. Point 11 of the TF explicitly states that 'in the overall effort of Member States to tackle the effects of the COVID-19 outbreak on their economy, this Communication sets out the possibilities Member States have under EU rules to ensure liquidity and access to finance for undertakings, especially SMEs that face a sudden shortage in this period in order to allow them to recover from the current situation'. Thereby, the TF unapologetically suggests, in my opinion, that the criteria defined by the Communication ought to be the sole option of the Member States for granting state aid. Point 19 of the TF reinforces this when stating, 'the Commission sets out in this Communication the compatibility conditions it will apply in principle to the aid granted by Member States under Article 107(3)(b) TFEU.²¹ Member States must, therefore, show that the State aid measures notified to the Commission under this Communication are necessary, appropriate and proportionate to remedy a serious disturbance in the economy of the Member State concerned and that all the conditions of this Communication are fully respected'. To emphasise the severeness of this statement, we shall juxtapose the aforementioned wordings with the wording of the TFEU, which merely says that aid to remedy a serious disturbance in the economy of a Member State may be considered to be compatible with the internal market.

¹⁵ Ibid.

¹⁶ Láncoš (n 11) 781.

¹⁷ Stuart, Roginska-Green (n 7) 14.

¹⁸ de Cecco (n 10) 49.

¹⁹ Michael Blauberger, 'From Negative to Positive Integration? European State Aid Control: Through Soft and Hard Law' (2008) Max-Planck-Institut für Gesellschaftsforschung Discussion Paper 2008/4 Max-Planck-Institut, Köln 6, DOI: <https://doi.org/10.2139/ssrn.1660981>

²⁰ Blauberger (n 19) 8.

²¹ In other cases, the TF also mentions the TFEU itself as a direct legal base; however, in a quite inconsistent way, see Point 1.3. of the TF, and the Commission also approved measures directly under the TFEU, see Case T-657/20 *Ryanair v European Commission* ECLI:EU:T:2022:390.

This is not to argue that the Commission has the competence to decide on the compatibility of state aid. However, setting absolute criteria that effectively narrow the scope for granting aid – beyond which an aid measure would seemingly be deemed incompatible – raises doubts. In practice, this has not been the case, as Member States have been, and still are, allowed to notify state aid measures that derogate from the provisions of the TF, TCT and TCTF. However, when doing so, the approval process has taken significantly longer,²² recently ranging from 1 to 2,319 days (almost six and a half years), as the Commission is no longer able to assess notified aid measures in a simple checklist-based manner.

This creates a factual situation in which the Member States are, in fact, obliged to follow every detail of the Communications without any derogations. Legally, this is not the case, but the factual possibilities are different, and they narrow down the room for manoeuvre of Member States, so to say, contrary to what is granted by the TFEU itself. I clearly understand and sympathise with the contemplations of the Commission concerning the desire to respond quickly by setting uniform rules, although these uniform rules do not take into consideration the different environmental and economic differences – for instance, the interest rates in different Member States. Even though the communications afforded a large scale and a wide range of variety of aid schemes and may seem like ‘loosenings’, the legal reality shows that they delineated and limited the Member States’ *actio radiuses* in a way that cannot be foreseen or inferred from the TFEU, as the status of a ‘serious disturbance in the economy of a Member State’ is a *sui generis* legal base on which to address such anomalies by state aid measures. Legal scholars regularly mention that these ‘derogations’ ‘created a generalised sense that a set of exceptional rules allowed aid and cooperation that would normally be prohibited’.²³ I would like to draw attention to the fact that setting frameworks and delineating the room for manoeuvre of Member States may not constitute loosening; on the contrary, such measures may constitute tightening, even in the case that the Commission is more inclined to approve measures based on its own setup agenda than TFEU-based measures, especially if the decisions take longer (eg when it comes to scrutinising a measure that relies on the TFEU directly compared to those relying directly on TF, TCF or TCTF). Nonetheless, while it still remains important to justify the existence of a serious disturbance and its genuine existence affecting the entirety or nearly the entirety of a national economy, I consider that imposing concrete and strict rules on how state aid should be granted in such situations exceeds what is necessary for the Commission to ensure the unity of the internal market. According to the wording of

²² Kai Struckmann, Kate Kelliher, ‘European Union: Practitioners’ Perspective on State Aid and Covid-19’ (2022) White and Case LLP, 24/6 <<https://globalcompetitionreview.com/review/the-european-middle-east-and-african-antitrust-review/2023/article/european-union-practitioners-perspective-state-aid-and-covid-19>> accessed 1 April 2025.

²³ Francisco Costa-Cabral, ‘From Crisis Cartels to COVID-19 State Aid and Cooperation: The Non-Exceptionality of Crisis Management by EU Competition Law’ (2023) (6), Tilburg University Tilec Discussion Paper, 2, DOI: <https://doi.org/10.2139/ssrn.4411326>

the TFEU, decisions on granting aid should objectively be left to the Member States, within a reasonable margin, as long as the measures taken are adequate and not merely aimed at improving public sentiment or boosting government trust.²⁴ In practice, however, the Commission's Communications have created a situation in which Member States have no real margin of appreciation to address serious disturbances in their own economies

The vagueness of the Treaty rules creates many conflicts between state aid control and state aid policy. At the same time, the need for interpretation of the Treaty rules and the heterogeneity of Member States' interests have become the major sources of the Commission's power,²⁵ as we shall see in Chapter VI. In reaction to the Council's unwillingness to agree upon secondary legislation, the Commission changed its approach in favour of a flexible strategy of enforcement aiming at utilising the absence of a Council Regulation in the direction of gradually forming a practice founded on the Commission's political sense of possible impact. Along with and besides individual state aid decisions, soft law became the main instrument of this strategy.²⁶ And the Commission does not only restrict the possibilities of Member States to act state-aid-wise; it also, from time to time, expands the wording of the Treaty by introducing, for instance, the Energy and Climate Change Package or the promotion of SMEs, as these moves rather indicate the evolution of the Commission's own state aid policy priorities and they do not follow from the wording of the Treaty provisions.²⁷ Thereby, we may say the soft law of the Commission 'reflect[s] the Commission's desire to publish directions on the approach it intends to follow [...]',²⁸ and in practice, this desire turns into the actual behaviour of Member States in most cases.

III The Formulation of Communication-Based Decisions

If we take a look at the wording of the Commission's decisions approving state aid measures notified by Member States, it formulates its stance as 'the measure is expressly based on Article 107(3)(b) of the TFEU, as interpreted by Sections 2 and 3.1 of the Temporary Framework'.²⁹ The Commission, thereby, communicates that it considers the TF and its content as an interpretation, remaining within the provisions of the TFEU. However, the dilemma remains intact as to whether a row of strict criteria could mean a simple interpretation or, rather, the setting of additional requirements that must be complied with,

²⁴ Penelope Giosa, 'Assessing the Use of the State Aid Covid Temporary Framework with Regard to the Healthcare and Media Sector' (2023) 14 (5) *Journal of European Competition Law & Practice* 274–269, 274, DOI: <https://doi.org/10.1093/jeclap/lpad030>

²⁵ Blauburger (n 19) 12.

²⁶ Blauburger (n 19) 13.

²⁷ Blauburger (n 19) 15.

²⁸ Case T-187/99 *Agrana Zucker und Stärke v Commission*, ECLI:EU:T:2001:149, para 56.

²⁹ The first Hungarian TF-based decision approved on 8 April 2020, State Aid, Hungary (TF scheme) SA.56926 (2020/N) OJEU C/214/2021.

going beyond the provisions of the TFEU. The case law of the EU has also corroborated that soft law (and explicitly the communication of the Commission) ‘must be regarded as being interpretative in nature and not in itself a legislative provision and the criteria applied by the Commission are those which can be inferred from the Treaty and the case law’.³⁰ When assessing the nature of communications, we shall see they cannot alter, limit,³¹ restrict, or expand the Treaties or the decisions of the Court, but when ‘adopting rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion. A limit, whereby it cannot depart from those rules under pain of being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations, unless it gives reasons justifying, in the light of those principles, its departure from its own rules’. This soft law approach dates back almost 60 years and emerged out of necessity after the refusal of Member State governments to adopt Council legislation (namely, regulations in the field of regional aid block exemptions³²) in 1966 and 1972, which were officially refused by the Council (comprising the heads of state or government).³³

In its decisions, the Commission – in a uniform way – consistently ran tests, declaring that the measures constituted state aid, then also declaring them to be compatible by stating, for instance, in the first Hungarian TF-based decision³⁴ that:

‘By adopting the Temporary Framework on 19 March 2020, the Commission acknowledged [...] that “the COVID-19 outbreak affects all Member States and that the containment measures taken by Member States impact undertakings”. The Commission concluded that “State aid is justified and can be declared compatible with the internal market on the basis of Article 107(3)(b) TFEU”.’

‘[...] The importance of the measure to provide non-refundable direct grants to enterprises during the COVID-19 outbreak is widely accepted by economic commentators³⁵ and the measure is of a scale which can be reasonably anticipated to produce effects across the entire Hungarian economy.’

‘[...] Furthermore, the measure has been designed to meet the requirements of a specific category of aid [...] described in Section 3.1 of the Temporary Framework.’

³⁰ Case T-189/03 *ASM Brescia v Commission* ECLI:EU:T:2009:193.

³¹ Corinne Ruechardt, *EU State Aid Control of Infrastructure Funding* (International Competition Law Series, Wolters Kluwer 2018, Alphen aan den Rijn) 374.

³² Blauburger (n 19) 13.

³³ Michael Blauburger, ‘State Aid Control from a Political Science Perspective’ in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edwar Elgar Publishing 2011, Cheltenham) 31, DOI: <https://doi.org/10.4337/9780857936424.00011>

³⁴ State Aid, Hungary (TF scheme) SA.56926 OJEU C/144/2020.

³⁵ Not well-funded by the Commission; however, see, for instance, Giosa (n 24).

‘The Commission considers that the measure is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State since it meets all the conditions of Section 3.1 of the Temporary Framework. In particular:

- The maximum amount of aid granted under the measure will not exceed EUR 800 000 per undertaking. The measure therefore complies with point 22(a) of the Temporary Framework;
- Aid is granted under the measure on the basis of a scheme with an estimated budget of EUR 140 million. The measure therefore complies with point 22(b) of the Temporary Framework;
- Aid will not be granted under the measure to undertakings that were in difficulty [...]. The measure therefore complies with point 22(c) of the Temporary Framework;
- Aid will be granted under the measure no later than 31 December 2020. The measure therefore complies with point 22(d) of the Temporary Framework;
- Aid granted to undertakings active in the processing and marketing of agricultural products is conditional [...]. The measure therefore complies with point 22(e) of the Temporary Framework.’

‘[...] The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(b) of the Treaty on the Functioning of the European Union.’

As we may conclude, the Commission acknowledges that the base of its decisions is the TFEU itself, however, it then concludes the measure abides by all the criteria set by the TF by even mentioning the particular section of the TF on which the measure was based: thus, the Commission does no less than practically state that the measure is necessary, appropriate and proportionate, since it meets all the conditions of the said section of the TF. The Commission thereby says necessity, appropriateness and proportionality are only met if the Member State meets its specific criteria. A proportionality check is certainly a more lenient test than the balancing of economic effects³⁶ under the TFEU. However, it is another question whether the Commission does not, thereby, unduly limit the possibility of granting compatible state aid, exaggerating the conditions set by the TFEU, even though its basis is undeniably created by the Court. The Commission, as seen above, does not simply refer to the applicable section but also reiterates the provisions of the said section, word by word, emphasising the importance of following its prescriptions to the letter. Then, the Commission concludes that because of the compliance with the TF, it cannot decide other than to declare the measure’s compatibility with the internal market under Article 107(3) (b) TFEU. As is visible, the Commission aims at filling the content of the TFEU with actual and tangible meaning; however, when it does, it does so in a strongly limiting way, forcing Member States to conform to dozens of parameters that they normally probably would not

³⁶ Costa-Cabral (n 23) 3.

comply with as there may be other suitable, Member-State-fit measures that may be taken to address the onerous impacts of a crisis. As mentioned before, the Commission does not and cannot enunciate that a Member State may only notify measures compliant with the TF; however, as a result of the time-consuming manner of the non-expedited procedure, the Member State potentially wishing to have a TF-outsider measure adopted shall be forced to wait several months before receiving a decision, the outcome of which may also entail the Commission's raising of objections as well. This makes the outcome of the decision quite imponderable, thereby increasing the risk of not having an approved measure, consequently leaving the Member States in doubt and frozen in action, thereby pushing the Member States towards availing themselves of the 'boxed and pre-packed solution', which is to follow the criteria of the Commission laid down in advance. This practically results in the actual effect that the Commission does not merely interpret TFEU but extends it and creates additional criteria on top of those the TFEU requires, which raises the issue of whether the Commission, by this, arbitrarily requires certain conditions potentially running counter to the TFEU.

IV Implementing the Commission's Decision in the Hungarian Legal System

The decisions of the Commission, regardless of being based on TFEU, do not equal the Treaties, nor do they equal regulations, therefore, they have to be duly implemented in the domestic legal systems. In the previous chapter, I took the first TF-based decision concerning Hungary as a basis for my inquiry and taking this further, we may see that the abovementioned decision reserves a designated section for the 'National legal basis' in its Section 2.2., where it displays 'the Decree of the Ministry of Foreign Affairs and Trade on aid measures for increasing competitiveness of undertakings in relation with the COVID-19 outbreak'. This leads to the Decree of the Minister of Foreign Affairs and Trade,³⁷ which implements the notified and approved measure in the Hungarian domestic legal system. Section 2(1) of the Decree stipulates that:

'The aid, according to this regulation, is considered state aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union, and state aid may be granted only in accordance with

- a) the European Commission's Communication regarding the transitional framework for state temporary support measures that can be introduced to boost the economy during

³⁷ 7/2020. (IV. 16.) KKM rendelet a koronavírus-járvány következtében szükségessé vált versenyképesség-növelő támogatásról [7/2020 (IV. 16.) Decree of the Minister of Foreign Affairs and Trade on aid measures for increasing competitiveness of undertakings in relation with the COVID-19 outbreak]. Translated by the author.

- the Covid-19 pandemic, under Section 3.1. of the Communication, according to the European Commission's Decisions No. C(2020) 2332 [...] and C(2020)3426 [...] or
- b) the European Commission's Decision No. SA.57375 (2020/N) C(2020)4286 final [...] adopted on the basis of Article 107(2)(b) of the Treaty on the Functioning of the European Union [...] or
- c) Section 3.1. of the Communication adopted in accordance with the conditions of Decision SA.62526 (2021/N) C(2021) 3360 [...] by the European Commission.'

The Decree listed above, according to the Decree itself, encompasses four Commission Decisions that approved state aid measures notified by the State of Hungary. As they are interconnected, domestic legislation pulls them under the same legal source. These measures were notified at different points in time as circumstances evolved swiftly during the onset of the pandemic. Furthermore, the Member States had been monitoring each other's state aid schemes, and consequently, they frequently copied them by notifying brand new measures or amending already existing ones.

The earliest one in time³⁸ introduced the first Hungarian measures for tackling the effects of the pandemic, referring to the *TF*, in which case Hungary obtained the approving decision within six days. It also contributed to the swift approval that the Member States, when notifying, exceptionally agreed to waive their rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation 1/1958, ie to have the decisions adopted in their official language, therefore, to have the decisions adopted and notified in English.

This scheme granted aid to medium- and large-sized enterprises with a total budget of EUR 140 million. The scheme was modified several times, and finally, for the fifth time,³⁹ followed by due transposition by the Decree of the Minister of Foreign Affairs and Trade. Every single time this decision or the connecting decisions were amended or new connection decisions adopted, the Minister of Foreign Affairs and Trade duly amended its Decree, just like the latter would have regulated a solely internal matter. In this sense, transposing a Commission Decision does not practically differ from regulating a purely internal issue which does not arise from EU law. The only difference is that in the Decree, the general provisions point to EU law instruments (the *TF*, for instance) and not solely domestic affairs. Whether the right and obligation arise from a domestic act or an EU law instrument, its execution by decrees follows the same patterns, which is in correlation with the fact that EU law is a *sui generis* legal system and *ab initio* functions as an immanent legal system of each and every Member State upon accession without further ado. When Hungary notified a new or an amending scheme to the Commission, and the Commission approved it, the competent Minister or the Government adopted an amending decree, amending the original decree and implementing the original approving decision of the

³⁸ State Aid, Hungary (TF scheme) SA.56926 OJEU C/144/2020.

³⁹ State Aid, Hungary (TF scheme) SA.62526 OJEU C/260/2021.

Commission. When the fifth amendment was approved, as mentioned before, it took effect immediately. As a result, the amendments to the original Decree also became effective. The amending decree explicitly justified its necessity based on the Commission's decision to approve the amendment of the original scheme. Thereby, we can state that the Hungarian legal system makes no significant difference between EU law-based and national law-based measures to be regulated and promulgated. This is inherently corroborated by the Act on Law-making, which does not introduce different rules for law-making based on whether a decree implements an EU law instrument or a domestic one.

The 7/2020. (IV. 16.) Decree of the Minister of Foreign Affairs and Trade was also amended upon Decision SA.57375, the speciality of which was that the measure was not based on TF in many ways; it was based, however, solely on 107(2)(b) TFEU, which covers aid to make good damage caused by natural disasters or exceptional occurrences and which grants an automatic *de iure*⁴⁰ exception under the general state aid ban constituted by 107(1) TFEU, unlike in the case of 107(3)(b) TFEU, which only acknowledges the compatibility of the measure with the internal market upon the scrutiny of the Commission and its decision thereof. Regarding this distinction, the Commission seems to handle cases under 107(2) and 107(3) TFEU alike, as it runs a very similar test in both cases regarding the compatibility of each state measure, regardless of whether it falls under an automatic exception or not. Articles 4 and 5 TFEU create an overriding principle⁴¹ under which the EU shall only act within the limits of the competences conferred by the Member States. However, Articles 107(2) and 107(3) TFEU are different in nature, as regarding the former, the Commission has no real discretion as to whether it can actually deny the compatibility of state aid, noting that the 'shall' does not imply totally automatic approval at all – it reserves the right for the Commission to scrutinise whether the measure is in line with the applicable Treaty provision.⁴² If the Commission duly finds that the aid meets these provisions, it decides (ie has to decide) that the derogation laid down in 107(2) TFEU applies, which was reaffirmed in the *Philip Morris* case⁴³ by a *contrario* line of reasoning when the Court stated that 107(2) TFEU is the opposite of Article 107(3), as regarding 107(3) TFEU there is discretion because there is a 'may' in the wording.⁴⁴ Since Member States also notified measures under 107(2) TFEU, the Commission should not have a wider margin of appreciation than when it comes to scrutinising the existence of its checklist correlating with TF, TCF or

⁴⁰ Stuart, Roginska-Green (n 7) 11.

⁴¹ Koen Lenaerts, José Gutiérrez-Fons, 'A Constitutional Perspective' in Robert Schutze, Takis Tridimas (eds), *Oxford Principles of European Union Law* (The European Union Legal Order, I, OUP 2018, Oxford) 112, DOI: <https://doi.org/10.1093/oso/9780199533770.003.0005>

⁴² Ramona Ianus, Tim Maxian Rusche, Massimo Francesco Orzan, 'De Jure Compatible Aid under Article 107(2) TFEU' in Herwig C. H. Hofmann, Claire Micheau (eds), *State Aid Law of the European Union* (Oxford University Press 2016, Oxford) 234, DOI: <https://doi.org/10.1093/law-ocl/9780198727460.003.0013>

⁴³ Case 730/79 *Philip Morris Holland BV v Commission of the European Communities*, ECLI:EU:C:1980:209, para 17.

⁴⁴ Ianus, Rusche, Orzan (n 42) 235.

TCTF. In the *Olympiaki* case,⁴⁵ the Court unapologetically stated that the Commission does not have a right of discretion to impose further restrictions by soft law instruments on top of the wording of 107(2) TFEU. Accordingly, solely based on the non-correlating nature of a measure with the communication of the Commission, the Commission cannot pronounce a measure incompatible with the internal market. Especially because the TF was based on Article 107(3)(b) TFEU and not on 107(2)(b) TFEU, the Commission should certainly not cause a tougher situation for a measure based on 107(2)(b) TFEU to be decided than one based on the TF itself, as at least TF is rooted in 107(3)(b) where the Commission has real margin of appreciation. Therefore, it is even questionable whether the Commission could actually require proportionality when it comes to a measure relying on Article 107(2) TFEU and simultaneously raises the question of whether the Court rightfully accepts and even fortifies it.⁴⁶

V The Significance of the COVID-19 Measures

The TF triggered more than 1,300 decisions, facilitating and opening the doors to a budget of EUR 3.2 trillion, which is equal to about HUF 1,300 trillion or HUF 1.3 quadrillion. Besides this, as mentioned before, as the Commission also approved measures solely under the provisions of the TFEU without their being linked to the TF, the number was even larger.

Here, however, great disparities may be found as to the proportion of the approved budget associated with TF-based measures compared to the GDP of each Member State, as Germany's state aid support budget amounted to 45% of its GDP, while in the case of the Republic of Ireland, this figure remained well below 1%. The EU average was 22%, while only two Member States surpassed this: Germany and Italy, thereby extremely distorting this value upwards. Therefore, relevant scholars state that a relaxation of State aid rules will deepen the economic inequalities between Member States, even though Member State economies have benefitted from that advantageous scheme.⁴⁷ Only eight more Member States reached or exceeded the 10% threshold, so if we cumulate the two extreme outlier Member States and the eight significantly subsidising ones, they still make up only 10 Member States out of 27, one of these being Hungary, with a rate of almost 11%, thereby reaching ninth place in this per-GDP state aid race as of 30 July 2021. There were Member States that channelled more state aid measures to their beneficiaries based on the TFEU than on TF, namely Denmark, the Netherlands, and Belgium, and this value was also high for Germany, Portugal, and Spain. In contrast, there were Member States that did not avail themselves of TFEU-based aid measures, only TF-based ones: Bulgaria, Cyprus, Ireland,

⁴⁵ Joined cases T-415/05, T-416/05, T-423/05 *Greece v Commission* ECLI:EU:T:2010:386.

⁴⁶ See, for instance, Case C-320/21P *Ryanair v Commission* ECLI:EU:C:2023:712.

⁴⁷ Jonatan Echebarria Fernández, 'A Critical Analysis on the European Union's Measures to Overcome the Economic Impact of the COVID-19 Pandemic' (2021) 5 (3) *European Papers* 1399–1423, 1420.

Latvia, Lithuania, Malta and Slovakia. Hungary, as mentioned before, availed itself of both, with TF-based measures being dominant.

If we look at the figures representing how much aid was actually granted from the approved budgets, the global picture changes significantly, with Italy at the top and Germany an also-ran, simultaneously leaving Hungary in fourth imaginary place, amounting to 6.5% of its GDP. The disparity is still huge; if we look at the actually granted aid, this still ranges from over 9% of the GDP to less than 0.5% in Ireland, which shows a great difference, albeit not unequivocally and necessarily in favour of the more developed Member States, as Greece, Poland and Portugal also scored above-average values.

What gives a clearer picture on an internal market level, however, in my opinion, is how much aid was granted per capita as it filters the distortion caused by the differences in development and per capita GDPs across the Member States. This type of measurement makes France and Italy frontrunners and ranks Hungary well below average. Spain, Germany and Denmark also scored above average. I believe the actual interference in the internal market can be depicted by the actual amount of money that was spent, as this is the suitable figure for reflecting the size of the distortion that took place and was put into effect by each Member State. Hungary seems to be a pioneer when it comes to actual spending per nominal GDP. However, this may be explained by its comparative GDP disadvantage, which makes the state aid measures granted by Hungary quite insignificant on a whole internal market level. This compares with the fact that even a relatively small proportion of GDP spent by wealthy Member States may play a significant role in potentially distorting the internal market by placing its own undertakings in an advantageous position compared to how they would have been without such grants of state aid.

I believe it is also important to talk about the nature of the measures introduced, as it is not sufficient to address how much money per capita has been burnt in order to subsidise undertakings, but thoughts have to be articulated on what type of interference occurred, as one euro spent on a guarantee hits the economy differently than one euro spent on direct grants. Undeniably, public guarantees also facilitate economic growth, stability and liquidity since they increase the credibility of undertakings when seeking financing. However, this concerns indirect financing, mostly aiming at enabling the targeted undertakings to take out a loan or to have their bonds subscribed, obtaining capital injections, etc. A stronger measure is when this step is skipped, and the Member States directly support the forms of financing mentioned in the previous sentence, as these are primarily aimed at serving the objectives of providing guarantees, as well. When a Member State does not simply provide the key to the goal in the form of guarantees but immediately provides the goal itself, the advantage it confers upon the undertaking is even more significant, more direct and puts the beneficiary in a more advantageous situation than one that only obtains the 'key' to the target financing, let alone those which do not obtain any kind of state aid measures at all. Therefore, when taking into account Section 3.1. of the TF, which covers the limited amounts of aid providable to recipients, a different sketch seems to emerge, even though this legal

basis may also include guarantees, although not the typical loan guarantees as stipulated by Section 3.2. of the TF. Regarding Article 3.1., Greece leads all Member States by far, followed by Poland, Slovenia, Czechia, Latvia, Cyprus and Germany, where this type of aid amounted to more than half of the TF-based subsidising. The amount for Hungary almost reached 40% in this regard, which ranks the country above the average of 30%. Along with this, if we juxtapose the data regarding the per capita spending and the prevalence of Section 3.1. of the TF, it becomes clear that it is Germany that spent the most euros per capita on measures based on Section 3.1. of the TF, which may suggest that it was Germany that interfered with the internal market the most and the strongest among all the Member States of the European Union. Following the same logic, juxtaposing these two sets of data, Hungary may be ranked in 18th place out of 27, which situates the country in the middle of the field. Here, it is worth noting that compared to the nominal significance of Hungary in the EU, Hungary represented itself in TF-based subsidising equal to its nominal significance, as its share of the EU's nominal GDP leaves the country in 17th place.⁴⁸ Therefore, regarding the most massive intrusion into the internal market in the sense of subsidies, Section 3.1., we may infer that Hungary was not an outlier. If we look at, however, the per capita GDP data of Hungary, of which Hungary is in 22nd place,⁴⁹ Hungary is overrepresented in terms of subsidising compared to its general per capita power and significance.

VI The Significance of the TCF-TCTF Measures

On 23 March 2022, the Commission adopted the Temporary Crisis Framework under Article 107(3)(b) TFEU as a continuation of the TF regime, albeit aiming at the resolution of disparate issues stemming from the closure of business routes and energy pipelines upon the outbreak of war in the neighbouring states of the EU, namely in Ukraine and in the Russian Federation, which crucially affected energy supplies, EU-based investments in the states in conflict and basically all undertakings active in this area, Ukraine on one side and Russia along with Belarus on the other. On 9 March (all the measures were adopted in March 2023 – thereby, we may call them the ‘March Frameworks’ in conjunction⁵⁰), eventually, TCF was replaced – fine-tuned and softly altered – by TCTF, which further clarified and simplified the legal bases for supporting renewable energy solution installations while simultaneously speeding up the process of decarbonisation. Furthermore, it also brought to life new legal bases, like investments aimed at achieving net-zero economies, for which support the TCTF prescribed the end of 2025 as a final date of potential provision, as opposed to the general deadline of 30 June 2024. Therefore, at the time of the completion of the current paper,

⁴⁸ Commission, ‘Competition State Aid Brief’ 1/2022, 1–7.

⁴⁹ Gross Domestic Product per capita in the European Union in 2023, by member state, Statista <<https://www.statista.com/statistics/1373462/gdp-per-capita-eu-member-states-2022/>> accessed 1 April 2025.

⁵⁰ Author's creation.

TCTF is still in force, emphasising that ever since 19 March 2020 – for more than four consecutive years – we have been living in a constant state of aid legal derogation.

Until 30 June 2023, an aid budget of more than EUR 730 million was approved, which is considerably less than the measures approved under the TF regime. However, it should be added that this time, Member States more frequently relied on the TFEU solely, ignoring the TCF-TCTF regime and also more frequently channelled financing to entities that did not constitute state aid, either because they were granted on a market basis or because they were not selective, or because they were granted to natural persons on social grounds. If we were to calculate all these, the support under both regimes would seem to be more convergent regarding the amounts.

Regarding this scheme, we may talk about absolute German hegemony, as Germany, until 30 June 2023, accounted for 48.8% of all amounts approved, while France for 23%, the two together being responsible for almost 72% of all approved amounts. This shows that while aid measures were smaller in volume altogether than under TF, they nonetheless appear to be more distorted as to the allocation of the measures among the Member States. If we look at the data regarding the actual spending that had already been effectuated, the overall picture is even more distorted, as Germany is identified as responsible for 52% of all aid actually granted. Germany, Italy and Spain together were responsible for 88% of the spending. It is mentionworthy, however, that Hungary takes fifth place in absolute terms, with EUR 3.6 billion, elevating it much above its economic potential and strength, thereby making it the greatest aid granter of all Member States compared to its nominal GDP. Due to this, Hungary went from an average performance under the TF regime to a top subsidising Member State under the TCF-TCTF regime.

It is also mentionworthy and quite controversial again that Denmark did not avail itself of any TCF-TCTF-based measures, but only those based on the Treaty itself, just like it did under the TF regime. This stems from the fact that Denmark consistently opposes state aid generally and has not supported any of the ‘March Frameworks’; they argue that state aid eventually distorts competition, even in the country where it is granted, and additionally, the way the Commission opened the gates through the TF, TCF and TCTF does not align with the goals of the internal market, as the Commission should focus on keeping subsidised products and investments – especially from China – out of the internal market, instead of engaging in a never-ending subsidy tug of war, while the EU would be able to compete on a level playing field without state aid.⁵¹ Also, when Denmark exceptionally decided to grant state aid, it consistently effectuated it under Treaty provisions to emphasise that they consider this to be the only and exceptional last resort of Member States wishing to provide state aid. Therefore, Denmark focuses on generally providing a safe environment for business and aims at providing financing, usually by omitting the ‘selective’ element of

⁵¹ Jonathan Packroff, ‘State aid should be “stopped”, Danish industry minister warns’ (2024) Euractiv <<https://www.euractiv.com/section/economy-jobs/news/state-aid-should-be-stopped-danish-industry-minister-said/>> accessed 1 April 2025.

the measures rather than granting state aid. As Denmark's Finance Minister formulated it in February 2024: 'Subsidies can't be the answer to foster long-term competitiveness and growth in the European Union. If you have to compete based on the size of state coffers, Denmark will quickly lose out, and Europe will probably too, given the debt situation in large parts of the region. We'll have to focus on real competitiveness, and that requires a greater willingness in some countries for reforms that support growth and development and is not just a question of investing in new things. It's not conducive to Europe as a whole, if the way we spend the money is just a competition between whether the factory should be located in Poland or Germany or France.'⁵² Denmark remains true to its commitment as the only Member State in the EU in this regard, also at the time of the completion of this paper. On the other hand, exceptionally, Denmark avails itself of state aid granting, as well, mostly in the field of renewable energy, which sector is deemed to be short of market financing on its own, and on the occasion of the latest such state aid (December 2023) the Director of the Confederation of the Danish Industry called this aid a 'necessary evil', and added that Denmark itself does not benefit from state aid and this does not induce a harmful subsidy race among Member States.⁵³

We may say that concerning the TCF-TCTF regime, the two polar opposites are Denmark and Hungary; on the one hand, Denmark spends 0% of its GDP under the regime, and on the other, Hungary spends 1.35% of its GDP under the TCF-TCTF regime as of 30 June 2023,⁵⁴ reminding us that the Member States' approaches to state aid strongly differ, and State Aid Law, as a whole, remains inherently political, both on the policy-objective side and on the enforcement side,⁵⁵ including the legal, economic, and ideological attitude of Member States concerning state aid and its status. Industrial policy traditions greatly differ between EU Member States, ranging from countries with very restrictive state aid policies to other countries in which state aid is not only used to address market failures but also for redistributive purposes, functioning as a social system complementary.⁵⁶

VII The Speed of Approval

Under the 'March Frameworks', by the end of March 2024, there had been 33⁵⁷ approving, amending or correcting decisions concerning state aid measures notified by Hungary. I have

⁵² Sanne Wass, 'Europe Can't Compete with US on State Aid, Danish Minister Says' (2024) Bloomberg <<https://www.bloomberg.com/news/articles/2024-02-23/europe-can-t-compete-with-us-on-state-aid-danish-minister-says?embedded-checkout=true>> accessed 1 April 2025.

⁵³ Af Ritzau, 'Danish government to set aside one billion kroner for green state aid' (2023) Energy Watch <https://energywatch.com/EnergyNews/Policy___Trading/article16705343.ece> accessed 1 April 2025.

⁵⁴ Commission, 'Competition State Aid Brief' 1/2024, 1–9.

⁵⁵ Blauburger (n 33) 29.

⁵⁶ Blauburger (n 19) 11.

⁵⁷ State Aid Register, Commission <<https://competition-cases.ec.europa.eu/search>> accessed 1 April 2025.

scrutinised – using desk research – each one in terms of the duration of the approving decision being made from the time of notification and found that a decision, on average, took 21.66 days to be made regarding the measures notified by Hungary. However, this should be considered from more perspectives, as the modes of the lengths are found to be 6 and 12, respectively, meaning the most frequent durations of a decision being made were 6 and 12 days, thus much shorter than average. The same may be said about the median of these lengths, as the median was calculated to be 12 days. This suggests some extremes that distorted the average, explicitly to the lengthier end, as the longest decision⁵⁸ took 200 days to be made, which is a strong outlier, thereby distorting the value in the row. Only six of the 33 decisions surpassed the calculated average. At the other extreme, I have not identified such an outlier, as the speediest decision⁵⁹ took five days to be made, nesting the mode of 6. The reason for the existence of such outliers is that in those cases, there were debates between Hungary and the Commission ‘behind the walls’, and Hungary had to lodge and submit a revised notification upon additional questions from the Commission. The Commission spent altogether 715 days, ie almost two years, examining the Hungarian measures if we cumulate all days between the notifications and the decisions; this data, however, serves solely for informative reasons as the Commission did not spend all this time exclusively scrutinising the Hungarian notifications. I have scrutinised 250 randomised decisions of the Commission under the ‘March Frameworks’, at least five from each Member State (if there were five), and I have identified that the average length of a decision was 36.28 days, while the modes were 9 and 16 days, respectively, and the median value was 20 days. These data show that the Commission tended to approve the measures notified by Hungary more rapidly than other Member States cumulated. This is corroborated by all values, as the average (21.66 to 36.28), the modes (6 and 12 to 9 and 16), and the median (12 to 20) of the latter all surpassed the data concerning the approvals of the decisions notified by Hungary. The data for the other Member States were also distorted by some outliers at the lengthy end; nevertheless, it took longer to decide about the measures of other Member States.

Under solely the TFEU, I have identified only two state aid measures⁶⁰ notified by Hungary that stemmed from the ever-ongoing crises, and both were based on 107(2)(b) TFEU concerning compensation for damage caused by exceptional occurrences. Other TFEU-based decisions had no causal – or even indirect – link with the crises necessitating the ‘March Frameworks’. These two decisions were made in under 42 and 37 days, respectively, making an average of 39.5 days. Thus, regardless of the lower volume of values, this indicates that it took almost double the time the Commission needed to approve measures fitting into the TF, TCF or TCTE, and it is even more striking when we juxtapose this with the modes and medians of the latter. Nevertheless, it is still mentionworthy that even this length

⁵⁸ State Aid, Hungary (TCTF scheme) SA.104385 OJEU C/276/2023.

⁵⁹ State Aid, Hungary (TF scheme budget increase) SA.57350 OJEU C/187/2020.

⁶⁰ State Aid, Hungary (Amendment to the agricultural risk management system) SA.61783 OJEU C/195/2021 and State Aid, Hungary (TF scheme) SA.57375 OJEU C/302/2020.

cannot be considered long compared to the general duration of such Commission decisions. Therefore, it may be seen that the Commission proceeded with significant haste in the case of TFEU-based measures, as well. I have also examined the speed of the decisions regarding other Member States in order to evaluate whether there was a disadvantage on Hungary's side concerning the length of approvals. I scrutinised all the applicable decisions under TFEU from all Member States (except for Hungary), and my finding is that their average was 45.16 days, with a modus of 56 and a median of 41 days, which shows that the decisions for other Member States took longer than for Hungary, albeit, I did not identify an extreme disparity (comparing 39.5 to 45.16 days). The most rapid decision⁶¹ took one day, which was also the very first decision under 107(2)(b) TFEU, even before the adoption of the TF on 12 March 2020, in relation to event cancellation compensations in Denmark.

VIII The Assessment Problem

The TF, for instance, was an easing in the sense that the Commission generally concluded that the COVID-19 pandemic was worthy of being categorised as a serious disturbance to the economy. However, once the Commission acknowledged this under the TF, it could and does not deviate from it just because a Member State notifies its measure directly based on the provisions of the TFEU. Therefore, I believe that stating and making it an axiom that the pandemic equals a serious disturbance in the national economy is an easing certainly; the doubt that still exists, nevertheless, is whether the Commission is entitled to judge each measure differently solely because one was notified under the TFEU and the other under the TF. Once it was cleared that the serious disturbance is a living reality for the time being, it is questionable whether its handling could be restricted by discriminating based on the basis of the measures and whether handling different from the framework of the Commission could fairly be subject to lengthier scrutiny – just the threat of prolonging its control procedure and ordering the possible recovery of illegal aid creates significant legal uncertainty for firms, and this uncertainty may and could be sufficient to discourage the latter from demanding potentially inadmissible aid in the first place. The actually low rate of negative Commission decisions on state aid thus does not prove the ineffectiveness of European state aid control. Rather, Member States often anticipate Commission control and try to frame their state aid measures in a way that presumably fits the criteria positively defined in state aid soft laws.⁶² The Commission has also developed a second mechanism to force Member States to explicitly approve its soft law and even to adapt existing state aid measures that were declared compatible with the revised rules in the past. If a Member State refuses to accept the revised soft law, the Commission threatens to open formal

⁶¹ State Aid, Denmark (TFEU-based scheme of event cancellation) SA.56685 OJEU C/125/2020.

⁶² Blauburger (n 19) 17.

investigations into all existing state aid measures that fall under the new rules: this will normally have the effect of forcing the Member State concerned to accept the Commission's policy.⁶³

Although the Commission enjoys a wide margin of discretion in this balancing, it must not improperly reduce the scope of Article 107(3)(c), as stated by the Court in *Hinkley Point*.⁶⁴ However, I find this statement problematic, as TFEU does not prescribe this balancing test when applying the abovementioned Article. However, the TFEU suggests some restrictions by using the word 'may', which hands wide discretion to the Commission. While it certainly should not improperly reduce the scope of the TFEU, it also should not balance the positive and negative effects; rather, it should only scrutinise whether proportionality is met and whether the measure necessarily targets and promises a realistic solution for the objective set out by the TFEU. This is why it is also questionable whether the Commission's IPCEI Communication⁶⁵ is in line with the TFEU when requiring the balancing of the positive and negative effects in its communication, thereby stuffing the provision of the TFEU according to a soft law instrument, which may mean it brimming over rather than filling in or simply interpreting it.

The situation is even more questionable in my opinion, when it comes to measures relying on 107(2) TFEU, which states: 'The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; and (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division'. What we may infer from these provisions is that, first, these cases fall under the automatically compatible category of state aids, which means the Commission should not have a margin of appreciation besides the margin conferred upon them by the exact wording of the TFEU. Case (a) makes it clear what is needed to be exempted from the prohibition stipulated by 107(1) TFEU: the aid has to be of social character, has to be granted to individuals and cannot be discriminative in relation to the origin of the product. The question instantly arises: if a government decides to provide fully covering direct grants for natural persons living under the poverty line and living in rural areas in dwellings that are at least 1 km away from the nearest public transport station which offers direct services at least five times a day per direction to a city of at least 100,000 inhabitants, up to the gross purchase price of EUR 30,000, to be able to purchase one of any brand of electric cars, could the Commission scrutinise whether

⁶³ Blauburger (n 19) 18.

⁶⁴ Case T-356/15 *Austria v Commission*, ECLI:EU:T:2018:439, paras 21 and 24.

⁶⁵ Commission, '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] OJ C528/10.

these people living under the poverty line actually need electric cars? Or would there be a more efficient way to address the matter of immobility for rural, poor citizens and their indirect access to public services in cities? Could, in this case, the Commission argue that the Member State should deploy more buses and more stops instead of basically providing cars for the poorest and least well-connected citizens? The answer has to be negative in my mind, as the Commission could only scrutinise whether the recipients are really natural persons, whether there is a determinative social element in the measure and whether it does not discriminate on the basis of the origin of the product. The Commission, thereby, may analyse the market of electric cars and may investigate whether it is not just one brand that falls within this price range or whether the measure was not simply tailor-made to exclude the car manufacturers of a certain nation. However, if the Commission concludes that there are six brands from five different Member States that produce types of cars falling within this price range, the Commission's room for manoeuvre is fulfilled, and the Commission cannot go much deeper. This is, however, still not an empty competence, as the Commission has to investigate at least three key issues (natural person, social character, no discrimination) before granting the compatible category. When we move forward to case (c), we also find that the Commission also has a certain list to check whether state aid could be compatible. It has to assess whether the aid is really allocated to an area affected by the German division: for instance, the Commission may conclude that even though the aid is channelled to a company headquartered in Dresden because the real beneficiary is a factory to be expanded is located in Hamburg, the Commission may conclude that the aid has got no connection with the disadvantages of former East Germany and it also shall scrutinise whether the aid is required at all to compensate the disadvantages, which inherently projects some kind of special test of necessity and suitability. However, when it comes to the wording of case (b), TFEU only states that the aid shall make good the damage caused by a natural disaster or other exceptional occurrence. Following the previous argumentation, the Commission, then, shall and may analyse only if there is actually a natural disaster or an exceptional occurrence and whether this aid could potentially remedy this disaster or other exceptional occurrence. This, in itself, does not entail anything in connection with proportionality or necessity. In my opinion, the wording only prescribes the scrutiny of whether the disaster is real and could be considered to be a disaster and whether the measure could, at least *prima facie*, remedy it, which may be inferred from the wording 'aid to make good the damage', therefore it has to be able to make good that damage. This paragraph does not confer any right upon the Commission to require proportionality, necessity, or suitability, in my opinion. Therefore, I believe it should be called into question whether to accept that the Commission recurrently requires this in its decisions and whether to accept that the Commission scrutinises whether the aid may lead to overcompensation⁶⁶

⁶⁶ Antonios Bouchagiar, 'State aid in the context of the Covid-19 outbreak, including the Temporary Framework 2020' (2021) (47) Robert Schumann Centre for Advanced Studies, RSC 21/3, Florence School of Regulation, EUI Working Papers, DOI: <https://doi.org/10.2139/ssrn.3796216>

or not, as this also may be an excess of competence, even though it is supported by case law. This highlights the problematics of this: the Commission shall not confuse its discretion under 107(3) TFEU with its only ‘checklist style’ competence under 107(2); it can only check whether the requirements set out in the Treaty are met.⁶⁷

TF is based upon its discretion [107(3) TFEU (107)(3)(b) and then 107(3)(c), as well]; therefore, it may investigate proportionality and necessity with its wide discretionary power in appraising complex economic facts,⁶⁸ and may even communicate it, and the European Courts may avail themselves of a narrow and marginal review of these decisions,⁶⁹ if we look at Article 263 of the TFEU. What causes discrepancy is that the Commission made decisions about the measures notified under the TF more rapidly, even when the measure was notified under Article 107(3)(b) TFEU. However, the discrepancy is even more striking when we juxtapose it with measures notified under Article 107(2)(b) TFEU, where the Commission does not even possess this kind of competence stemming from the TFEU at all. Therefore, we may argue that the TF, TCF and TCTF may rather be construed as ‘accelerations’ than ‘easings’, thereby inherently discriminatory measures notified under the TFEU itself, especially if notified under Article 107(2)(b) TFEU.

IX Conclusions

In the title of the paper, I have indicated the adjective ‘Janus-faced’, which, I believe, clearly illustrates the situation created by the permacrisis: the Commission was forced by economic events to adapt as rapidly as possible, while the Member States simultaneously had to avail of themselves of state interventions no less rapidly in order to avoid the crashes of their own budgets and national economies. For this reason, no space was left for debating whether the Commission’s way of handling the crises is adequate regarding its competence in the field of regulating state aid law by subtly influencing and expanding the application of Treaty rules through soft law.

The Commission, in my opinion, acted on time and rightfully, and because of the squeeze of time, there was perhaps no more suitable solution to the matter but swift soft law-making in the form of the TF. However, as the COVID-19 pandemic has now subsided, there could have been several chances to alter this way of addressing issues, especially since the

⁶⁷ Alessandro Rosanò, ‘Adapting to Change: COVID-19 as a Factor Shaping EU State Aid Law’ (2020) 5 (1) *European Papers* 627.

⁶⁸ Massimo Merola, 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, Marco Botta (ed), *EU State Aid Law, Emerging Trends at the National and EU Level* (Edward Elgar Publishing 2020, Cheltenham) 24, DOI: <https://doi.org/10.4337/9781788975254.00008>

⁶⁹ Stuart, Roginska-Green (n 7) 60.

EU already had the consequences of the 2008/2009 state aid loosening in mind.⁷⁰ Therefore, there would have been sufficient time and experience to build and fine-tune a better working framework under the provisions of the TFEU that reflects the different needs of the different Member States without maintaining unilateral soft law communications. At the least, by the time of the adoption of the TCF, the Commission should have been set and ready to opt for a system like that if it wished so.

As seen, Hungary availed itself of state aid granting, both based on the soft law instruments and on the TFEU, risking the approvals based on the latter. The measures reshaped the internal market by robust subsidising, which measures have not been independently evaluated even until now, and the potential economic distortion not only has not been analysed, but there are no plans to *ex-post* mitigate these potential consequences in the – hopefully – forthcoming ‘peace and boom times’. The lack of the latter indicates that the Commission is slightly exploiting the justifiable haste with which it acted in March 2020, and because of the squeeze of time on the shoulders of the Member States, which could not reasonably oppose it, the Commission does not wish to complete the accounting of whether it acted optimally and does not wish to balance the results. What is of more concern is that the EU is standing unshielded before a potential new crisis without having significantly revised its policy.

I believe the crises have made the European Commission stronger in its position, and it does not intend to give back any of that power, to the detriment of the European Parliament, the European Council, and eventually, the Member States, and the shift has become undeniably visible, from my personal standpoint. Regardless of any debates about competence,⁷¹ Hungary has acknowledged this shift and transposed all Commission decisions and even all soft law instruments adopted by the Commission, word by word, without delay, which tacitly maintains this said shift.

The Commission, as I envisage, seems to be widening its scope and discretion in every field of competition law by drawing up more and more detailed soft law instruments, interfering with more and more fields of the economy and with the room for manoeuvre of the Member States. This may not necessarily be a negative process, albeit it is a mentionworthy one, but it must be noticed and articulated. One field of this expansion is State Aid Law and crisis management, which constitutes only one part of the evolution in the ‘constitutional system’ (allocation of competences) within and between the institutions and the members of the European Union. I believe we are currently witnessing the accumulation of the power of the Commission, which has never been this influential in the field of competition law in Hungary’s 20 years as a Member State.

⁷⁰ Commission Communication, ‘Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis’ (2009) 2009/C 83/01 OJ C 83, 7.4.2009.

⁷¹ See for instance Juan Diego Arregui Acosta, ‘European Union Backsliding in the Rule of Law: The Hungarian Case’ (2023) 40 *Foro Revista de Derecho* 143–159, DOI: <https://doi.org/10.32719/26312484.2023.40.8>