17B

Competition Law II

State Interferences

Contents

Introduction

With the rise of 'mixed economies', modern States have become major players within their national markets. States may thereby interfere with market forces in a number of ways.[1] The EU Treaties expressly address two types of such market interferences. In Article 106 we find a first – casual – reference to public undertakings (and undertakings endowed with public functions) in Section 1 of the EU competition rules. By contrast, Section 2 of the competition chapter is entirely dedicated to a second type of market interference: State aid. State aid is financial assistance paid out of State resources that assist specific undertakings to fight the forces of competition.

This chapter discusses both substantive types of market interferences in sections 1–3. Section 4 will explore the 'procedural' involvement of the Member States in the enforcement of EU competition law. We shall see there that national authorities may be asked to positively assist the Union in the enforcement of its rules, but may also find themselves as defendants in actions brought by the Union.

Table 17B.1 Competition Rules – Overview

FEU Treaty – Title VII – Chapter 1	
Section 1: Rules Applying to Undertakings	**Section 2: Aids Granted by States**
Article 101 Anti-competitive Agreements	Article 107 State Aid Prohibition
Article 102 Abuse of a Dominant Position	Article 108 Commission Powers
Article 103 Competition Legislation I	Article 109 Competition Legislation II
Article 104 'Transitional' Provisions	
Article 105 Commission Powers	
Article 106 Public Undertakings (and Public Services)	
Protocol on Services of General Economic Interest	
Competition Secondary Law (Selection) Commission Decision 2012/21 on Public Service Compensation Regulation 651/2014 on a General Block Exemption for State Aid Regulation 1/2003 on the Implementation of Articles 101 and 102 Regulation 659/1999 on the Application of Article 108	

[1] For an excellent general analysis of the various ways in which a State could interfere with the competition rules, see T. Prosser, *The Limits of Competition Law: Markets and Public Services* (Oxford University Press, 2005); E. Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Hart, 2007); as well as W. Sauter and H. Schepel, *State and Market in European Union Law* (Cambridge University Press, 2009).

1. Public Undertakings and Public Services

Capitalist economies are based on *private* enterprise(s). They constitute the foundation of a free market in which free competition is to take place. And yet, the blind reliance on the 'market' as a social institution has been qualified ever since modern States became welfare states. Here, *public* authorities are charged to 'provide' essential services – like electricity or education.[2] To guarantee these 'public goods', States began to intervene in their economies wherever *private* markets could not unconditionally produce *public* goods. Many European States even decided to 'nationalise' these 'public services' and to offer such 'utilities' themselves.[3] The economic role thus assumed by the State created a 'mixed' economic system – composed of capitalist and 'socialist' elements – in which private and public undertakings coexist.

The EU Treaties recognised the coexistence of private and public undertakings, as well as the special role of public services, from the start.[4] Sitting on the fence between Section 1 and Section 2 of the competition chapter, Article 106 TFEU states:

> 1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, *Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109*.
> 2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, *in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them*. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.
> 3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.[5]

The provision represents a constitutional compromise between those Member States that originally wished to completely exclude public undertakings (and public services) from the EU competition rules, and those States favouring their complete assimilation.[6] Recognising the 'legality' of public undertakings, paragraph 1 here clarifies that States must never use these undertakings to violate the

[2] For the origin of the idea of 'public services', see L. Duguit, *Les Transformation du droit public* (Nabu Press, 2010).

[3] One of the most famous cases of European Union law, Case 6/64, *Costa* v. *ENEL* [1964] ECR 614, is a case in which such nationalisation of the electricity market in Italy was challenged.

[4] Art. 345 TFEU states: 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.'

[5] Emphasis added.

[6] For an analysis of the origin of the provision, see F. Löwenberg, *Service Public und öffentliche Dienstleistungen in Europa* (Berliner Wissenschaftsverlag, 2001), 125 *et seq*. For an extensive general analysis of the provision, see J. L. Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law* (Oxford University Press, 2000).

European Treaties, and in particular their competition rules. This clarification continues in paragraph 2 with regard to – public or private – undertakings entrusted with the provision of 'services of general economic interest'.[7] However, these undertakings would *not* be fully subject to the competition rules. For the latter would only apply to the extent that they did 'not obstruct the performance, in law or in fact, of the particular tasks assigned to them'.

Article 106(1) and (2) has been found to be directly effective,[8] despite the fact that Article 106(3) charges the Commission with the enforcement of both provisions. The Commission's regulatory powers are here 'autonomous' regulatory powers, and some of its acts under Article 106(3) have (in)famously pushed for the privatisation of previously public markets.

a. Public Undertakings (and Undertakings with Special Rights)

With the exception of the State aid rules, EU competition law is principally addressed to (private) undertakings. The Union legal order has nonetheless recognised that Member States themselves must not undermine the competition rules by aiding their undertakings through anti-competitive legislation. This obligation is rooted in the general Union duty of sincere cooperation, according to which the Member States must 'refrain from any measure which could jeopardise the attainment of the Union's objectives'.[9] This general duty finds a specific expression in Article 106(1) TFEU. It prohibits Member States, with respect to public undertakings or (private) undertakings endowed with special rights, from 'enact[ing or] maintain[ing] in force any measure contrary to the rules contained in the Treaties'; and in particular, Articles 101 and 102 TFEU.

When is an undertaking a *public* undertaking? The Union has traditionally identified the concept of public undertaking by reference to the 'dominant influence' of the State within the undertaking. A public undertaking – like the BBC – is thus an undertaking that is either owned or governed by the State.[10]

[7] The following section will not deal with undertakings 'having the character of a revenue-producing monopoly'. For an analysis of this category, see Buenda Sierra, *Exclusive Rights* (n. 6 above), 286–8.

[8] See Case 66/86, *Saeed Flugreisen and Silver Line Reisebüro GmbH* v. *Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V* [1989] ECR 803; as well as Case C-260/89, *Elliniki Radiophonia Tiléorassi (ERT) and others* v. *Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ERC 2925.

[9] Art. 4(3) TEU. For an analysis of this provision in the context of EU competition law, see e.g. K. W. Lange, 'Die Anwendung des europäischen Kartellverbots auf staatliche Eingriffe in das Marktgeschehen' (2008) *Europarecht* 3.

[10] See Commission Directive 2006/111 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings [2006] OJ L 318/17; Art. 2(b) states: '"public undertakings" means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the public authorities shall be presumed when these authorities, directly or indirectly in relation to an undertaking:

Article 106(1) however also captures private undertakings that are granted special or even exclusive rights. An exclusive right grants an economic monopoly to one specific undertaking within a geographic area.[11] Special rights, by contrast, are 'oligopolistic' forms of market divisions. Here a State limits the number of market participants in a discretionary and discriminatory way.[12]

What State measures are outlawed by Article 106(1)? Many States have traditionally subscribed to the idea that the designation of 'public markets' was a sovereign choice. In the past, the Court also seemed to suggest that Article 106(1) could not touch upon the very existence of public undertakings or the conferral of special and exclusive rights.[13]

This 'national choice' theory was however severely qualified in *France* v. *Commission*.[14] The case concerned a challenge to the EU Directive on Telecommunications Equipment that required Member States to withdraw (!) any special or exclusive rights falling within its sphere.[15] France passionately

(i) hold the major part of the undertaking's subscribed capital; or (ii) control the majority of the votes attaching to shares issued by the undertakings; or (iii) can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.'

The Court has, however, felt the need to point out that this legislative definition is not a constitutional definition, see Joined Cases 188–90/80, *French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland* v. *Commission* [1982] ECR 2545, para. 24: 'In relation to the provisions of Article 2, which defines the concept of public undertaking "for the purpose of this directive", it should be emphasized that the object of those provisions is not to define that concept as it appears in Article [106] of the Treaty, but to establish the necessary criteria to delimit the group of undertakings whose financial relations with the public authorities are to be subject to the duty laid down by the directive to supply information. In order to assess that delimitation, which is moreover indispensable in order to make known to the Member States the extent of their obligations under the directive, it is therefore necessary to compare the criteria laid down with the considerations on which the duty of surveillance imposed on the Commission by Article [106] is based.'

[11] For a legislative definition, see Directive 2006/111 (n. 10 above), Art. 2(f).

[12] *Ibid*., Art. 2(g). Special rights will thus only be granted, where the State 'arbitrarily' acts; they will not be present, when the State simply conditions market access by means of abstract and objective criteria. See e.g. Case C-387/93, *Banchero* [1995] ECR I-4663, esp. para 54: 'So far as retailers are concerned, these traders do not themselves have any exclusive or special distribution right at their place of establishment. The contested legislation merely governs their access to the market in the retail distribution of tobacco products. Authorized retail traders thus satisfy at the same time consumer needs for tobacco products and cigarettes and no outlet enjoys a particular advantage over its competitors. They cannot therefore be regarded as undertakings having the kind of rights referred to in Article [106(1)] of the Treaty.'

[13] See Case 155/73, *Sacchi* [1974] ECR 409, para. 14: 'Nothing in the Treaty prevents Member States, for considerations of public interest, of a non-economic nature, from removing radio and television transmissions, including cable transmissions, from the field of competition by conferring on one or more establishments an exclusive right to conduct them.'

[14] Case 202/88, *France* v. *Commission* [1991] ECR 1223.

[15] Directive 88/301 on competition in the markets in telecommunications terminal equipment, [1988] OJ L 131/73. The aim of the directive was to liberalise the market for 'terminal equipment', that is: 'equipment directly or indirectly connected to the termination of a public telecommunications network to send, process or receive information' (*ibid*., Art. 1). The central provision here was Art. 2, which stated: 'Member States which

objected to the use of Article 106 to liberalise 'public' monopolies; yet the Court tersely found that 'even though [Article 106(1)] presupposes the existence of undertakings which have certain special or exclusive rights, *it does not follow that all the special or exclusive rights are necessarily compatible with the Treaty*'.[16] That dramatic judgment would nonetheless be softened in subsequent jurisprudence, when the Court admitted that 'the simple fact' of 'granting an exclusive right within the meaning of Article [106(1)] is not as such incompatible with [the Treaties]'.[17]

What, then, is the scope and function of Article 106(1)? In *Höfner & Elser*, the Court had to deal with the exclusive right to provide job-seeking services granted to the Federal Office of Employment within Germany. Rejecting the idea that the granting of such an exclusive right automatically violated Article 102, the Court here insisted on an actual violation of the competition rules by the public undertaking. The role of Article 106 was complementary to that of Article 102, and Article 106 would come into play '*only if the undertaking in question, merely by exercising the exclusive right granted to it, cannot avoid abusing its dominant position*'.[18] In the present case, the Court – ingeniously – found such an abuse to exist. The very inability of the legal monopolist to satisfy demand was seen as a refusal to supply that fell under Article 102[2][b].[19] In the view of the Court, Article 106(1) was thus breached, wherever

> [a] Member State creates a situation in which the provision of a service is limited when the undertaking to which it grants an exclusive right extending to executive recruitment activities is *manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind*.[20]

This Solomonic judgment insisted on an 'abuse' of a dominant position, yet located the abuse not in a particular behaviour of the undertaking but in the general nature of the national legislation. For a violation of Article 106(1), the Court thus simply required that national legislation create a situation in which an undertaking is 'led' or 'induced' to commit a breach of the competition rules.[21]

have granted special or exclusive rights within the meaning of Article 1 to undertakings shall ensure that those rights are withdrawn. They shall, not later than three months following the notification of this Directive, inform the Commission of the measures taken or draft legislation introduced to that end.'

16 Case 202/88, *France* v. *Commission* (n. 14 above), para. 22 (emphasis added).

17 Case C-41/90, *Höfner and Fritz Elser* v. *Macrotron GmbH* [1991] ECR I-1979, para. 29.

18 *Ibid*. (emphasis added).

19 On this specific form of abuse under Art. 102, see Chapter 17, section 3(c/bb) above.

20 Case C-41/90, *Höfner and Fritz Elser* (n. 17 above), para. 31 (emphasis added).

21 Case C-260/89 *ERT* (n. 8 above), para. 37: 'In that respect it should be observed that Article [106(1)] of the Treaty prohibits the granting of an exclusive right to retransmit television broadcasts to an undertaking which has an exclusive right to transmit broadcasts, where those rights are liable to create a situation in which that undertaking is led to infringe Article [102] of the Treaty by virtue of a discriminatory broadcasting policy which favours its own programmes.' See also Case C-179/90, *Merci convenzionali porto di Genova SpA* v. *Siderurgica Gabrielli SpA* [1991] ECR I-5889, para. 17; as well as Joined Cases C-147–8/97,

Under this test, the very grant of a public status or of special rights will not – as such – be caught by Article 106(1),[22] unless that grant automatically engenders a violation of the substantive competition rules.

This restrictive scope of Article 106(1) is nonetheless complemented by the broader scope given to Article 106(3). For the Commission has – backed by the Court – been allowed to use its competence to 'dissolve' monopolistic or oligopolistic market structures. The Commission Directive on telecommunications services could therefore oblige Member States in the 1990s to 'withdraw' all those measures that granted exclusive or special rights in the provision of telecommunication services.[23] And when judicially challenged, the European Court had no qualms in confirming the legality of the Union's liberalisation effort.[24] While seen by many very critically, this effort is not necessarily a neo-liberal 'attack' on the public elements within the Union market. It is directed against inefficient *national* 'champions',[25] and should therefore not be seen as an ideological assault on the European tradition of services of general (economic) interest.

b. Services of General Economic Interest

The Union recognises the importance of public services and their special role within the Union and its Member States. Article 14 TFEU expressly requires:

> [T]he Union and the Member States, each within their respective powers and within the scope of application of the Treaties, *shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions*.[26]

Deutsche Post AG v. *Gesellschaft für Zahlungssysteme mbH GZS) and Citicorp Kartenservice GmbH* [2000] ECR I-825, para. 48.

[22] The exception here might be Case C-320/91, *Corbeau* [1993] ECR I-2533. For an extensive analysis of the case see also L. Hancher, 'Casenote on Corbeau' (1994) 31 *CML Rev* 105.

[23] (Commission) Directive 90/388 on competition in the markets for telecommunications services [1990] OJ L 192/10, esp. Art. 2.

[24] For an unsuccessful challenge to Directive 90/388, see Case C-289/90, *Spain and others* v. *Commission* [1992] ECR I-5833, where the Court built on the interpretation given to Art. 106(3) in Case C-202/88, *France* v. *Commission* (n. 14 above). The Union has however increasingly based its market liberalisation measures on, *inter alia*, Art. 114 TFEU (see Directive 97/67 on common rules for the development of the internal market of [Union] postal services and the improvement of quality of service [1998] OJ L 15/14).

[25] K. Van Miert, 'Liberalization of the Economy of the European Union: The Game Is Not (Yet) Over' in D. Geradin (ed.), *The Liberalization of State Monopolies in the European Union and Beyond* (Kluwer, 2000), 1: 'In fact, it can be said that liberalization in the European Union has mainly been an unavoidable consequence of the internal market. It is obvious that a market based on competition and free circulation of goods, services, people and capital is at odds with systems based on national monopolies. Our liberalization policy was therefore conceived as an indispensable instrument for the establishment of the internal market.'

[26] Emphasis added. For a general analysis of Art. 14, see M. Ross, 'Article [14] and Services of General Interest: From Derogation to Obligation?' (2000) 25 *EL Rev* 22. The second sentence of the provision allows the Union to adopt legislation to 'establish the principles

This provision is further developed in a special Treaty Protocol dedicated to 'Services of General Interest'.[27] The brief Protocol reads as follows:

> *Article 1*
>
> The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:
> – the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;
> – the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;
> – a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

> *Article 2*
>
> The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.

The Protocol distinguishes between economic and non-economic services of general interest.[28] Services of general *economic* interest (SGEI) fall within the Treaties; but Article 1 of the Protocol clarifies that they are predominantly a matter for the Member States. By contrast, general interest services that lack an 'economic' character are totally excluded from the scope of Union law.

The general protection of SGEI in Article 14 TFEU and the Protocol finds a specific expression in Article 106(2) TFEU.[29] The provision states that

and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services'. This competence thus competes with Art. 106(3) TFEU and will thus 'provide a counterpoise to the Commission's competence under Article 106(3) TFEU' (see H. Schweitzer, 'Services of General Economic Interest: European Law's Impact on the Role of the Markets and of the Member States' in M. Cremona (ed.), *Market Integration and Public Services in the European Union* (Oxford University Press, 2011), 11 at 54.

[27] Protocol No. 26 'On Services of General Interest'.

[28] For an extensive discussion of these two categories, and their relation to each other, see U. Neergaard, 'Services of General Economic Interest: The Nature of the Beast' in M. Krajewski et al. (eds.), *The Changing Legal Framework for Services of General Interest in Europe* (Asser, 2009), 17. Typical non-economic services of general interest are general 'State services', such as the police and the judicial system, as well as social services and the general education system.

[29] On SGEI in general and Art. 106(2) in particular, see A. Gardner, 'The Velvet Revolution: Article 90 and the Triumph of the Free Market in Europe's Regulated Sectors' (1995) 16 *ECLR* 78; E. Szyszczak, 'Public Service Provision in Competitive Markets' (2001) 20 *YEL* 35; J. B. Cruz, 'Beyond Competition: Services of General Economic Interest and

undertakings entrusted with the operation of services of general economic interest will only be subject to the full force of the substantive competition rules 'in so far as the application of such rules *does not obstruct the performance, in law or in fact, of the particular tasks assigned to them*'.[30] The Union here recognises an additional 'justification' for – public or private (!) – undertakings that breach the competition rules.

aa. Public Service Definition(s): BUPA

The key question behind Article 106(2) is to what extent this SGEI justification can be used. Having started with a – very – restrictive interpretation of the provision,[31] the Union Courts have come to settle on a (relatively) generous reading of Article 106(2).

In *BUPA*,[32] the Union deferred to the principal prerogative of the Member States to define their services of general economic interest. The case concerned an Irish law that established a risk equalisation scheme for private medical insurance. Private insurers whose clients were below the average risk profile – like BUPA – would have to pay a fee, while insurance companies that provided insurance coverage for clients above the average risk profile were entitled to receive a payment. Claiming that the equalisation scheme constituted a breach of Union competition law regarding State aid,[33] BUPA brought proceedings before the General Court in the course of which the question arose whether private medical insurance was a public service that could fall under Article 106(2).

The Court here humbly pointed out that since there was 'no clear and precise regulatory definition' in Union law, '*Member States have a wide discretion to define what they regard as SGEIs* and that the definition of such services by a Member State can be questioned by the Commission only in the event of manifest error'.[34] The Union could indeed only lay down 'minimum criteria common to every SGEI mission within the meaning of the [Treaties]'.[35]

European Community Law' in G. de Burca (ed.), *EU Law and the Welfare State: In Search of Solidarity* (Oxford University Press, 2006), 169; as well as W. Sauter, 'Services of General Economic Interest and Universal Service in EU Law' (2008) 33 *EL Rev* 167; Schweitzer, 'Services of General Economic Interest' (n. 26 above); as well as N. Fiedziuk, 'Services of General Economic Interest and the Treaty of Lisbon: Opening Doors to a Whole New Approach or Maintaining the "Status Quo"' (2011) 36 *EL Rev* 226.

30 Emphasis added.

31 See Case C-41/90, *Höfner and Fritz Elser* (n. 17 above), as well as Case C-179/90, *Merci Convenzionali Porto di Genova* (n. 21 above).

32 Case T-289/03, *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd* v. *Commission* [2008] ECR II-81. For an extensive discussion of the case, see M. Ross, 'A Healthy Approach to Services of General Economic Interest? The BUPA Judgment of the Court of First Instance' (2009) 34 *EL Rev* 127.

33 On the State aid provisions, see section 2 below. For a specific analysis of the State aid provision in this context, see T. von Danwitz, 'The Concept of State Aid in Liberalized Sectors' in M. Cremona (ed.), *Market Integration and Public Services in the European Union* (Oxford University Press, 2011), 103.

34 Case T-289/03, *BUPA* (n. 32 above), paras. 165–6 (emphasis added).

35 *Ibid.*, para. 172.

What were these Union criteria? The Court identified two. First, there had to be 'an act of the public authority entrusting the operators in question with an SGEI mission' and, secondly, that mission had to be 'universal and compulsory'.[36] How specific would an SGEI mission have to be? In the view of the Court, the existence of a *positive* and *specific* public function distinguished SGEI from services in the private interest.[37] However, the requirement of a specific public service mission did 'not necessarily presume that the operator entrusted with that mission will be given an exclusive or special right to carry it out'. An SGEI could thus be entrusted to 'a large number of, or indeed [to] all, the operators active on the same market'.[38] This was the case here.

The Court however still had to respond to BUPA's second challenge that the service was not an SGEI because it was not universally provided to *all* Irish citizens. With regard to the second criterion, the Court answered as follows:

> [C]ontrary to the theory put forward by the applicants, it does not follow from [Union] law that, in order to be capable of being characterised as an SGEI, the service in question must constitute a universal service in the strict sense, such as the public social security scheme. *In effect, the concept of universal service, within the meaning of [Union] law, does not mean that the service in question must respond to a need common to the whole population or be supplied throughout a territory* ... [T]he compulsory nature of the service in question is an essential condition of the existence of an SGEI mission within the meaning of [Union] law. That compulsory nature must be understood as meaning that the operators entrusted with the SGEI mission by an act of a public authority are, in principle, required to offer the service in question on the market in compliance with the SGEI obligations which govern the supply of that service.[39]

The essential core of the Union definition of SGEI thus lies in their potentially(!) universal nature. Undertakings charged with a public service task cannot refuse clients wishing to benefit from the service – even if the undertaking would 'lose money' on a particular class of clients. Where this minimum definition of SGEI is fulfilled, a violation of the competition rules could potentially be justified under Article 106(2) TFEU.

bb. Public Service Obstruction(s): Corbeau

The application of Article 106(2) requires proof that the full application of the EU competition rules to SGEI undertakings will '*obstruct the performance, in law or in fact, of the particular tasks assigned to them*'.[40]

[36] *Ibid.*

[37] *Ibid.*, para. 178. The Court has found in a number of cases that there was no specific mission but only general public regulation, see e.g. Case 7/82, *GVL* v. *Commission* [1983] ECR 483; Case C-18/88, *GB-Inno-BM* [1991] ECR I-5941.

[38] Case T-289/03, *BUPA* (n. 32 above), para. 179.

[39] *Ibid.*, paras.186–8.

[40] Art. 106(2) TFEU (emphasis added).

How have the Courts interpreted this final element in Article 106(2)? Would they allow undertakings 'burdened' with general interest obligations to compensate their losses by, say, charging higher prices than unburdened competitors? After a period of tight proportionality control,[41] the Courts have indeed found that compensatory actions can be justified under Article 106(2).

In *Corbeau*,[42] Belgian law had granted the exclusive right to postal services to the Belgian Post Office. This legal monopoly had been breached by Mr Corbeau, who had set up a private postal service around his home town. Criminal proceedings were thus brought in the course of which the defendant claimed that the exclusive right granted to the Post Office violated Articles 102 and 106(1) TFEU. The case provided the Court with an opportunity to define the relationship between both provisions. It held:

> The question which falls to be considered is therefore the extent to which a restriction on competition or even the exclusion of all competition from other economic operators is necessary in order to allow the holder of the exclusive right to perform its task of general interest *and in particular to have the benefit of economically acceptable conditions*.
>
> The starting point of such an examination must be the premise that the obligation on the part of the undertaking entrusted with that task to perform its services *in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings where the economically profitable sectors are concerned*. Indeed, to authorize individual undertakings to compete with the holder of the exclusive rights in the sectors of their choice corresponding to those rights would make it possible for them to concentrate on the economically profitable operations and to offer more advantageous tariffs than those adopted by the holders of the exclusive rights since, unlike the latter, they are not bound for economic reasons to offset losses in the unprofitable sectors against profits in the more profitable sectors. *However, the exclusion of competition is not justified as regards specific services dissociable from the service of general interest* ... [43]

The Court here accepted that undertakings offering SGEI would need to be able to perform their tasks in 'economically acceptable conditions'. They were entitled to establish 'conditions of economic equilibrium' in which losses incurred in one service sector could be offset by 'exploiting' its monopoly position in another. A private competitor could here not force its way into the market by 'creaming off' the lucrative business away from a public service provider. Article 106(2) may thus justify restrictions of

[41] See e.g. Case C-41/90, *Höfner and Fritz Elser* (n. 17 above); as well as Case C-179/90, *Merci Convenzionali Porto di Genova* (n. 21 above).

[42] Case C-320/91, *Corbeau* (n. 22 above).

[43] *Ibid*., paras. 16–19 (emphasis added).

competition in order to prevent the 'cherry picking' of the profitable parts of the overall business. Potential private market entrants can only force their way into the 'reserved' market where they can show that a particular service is 'dissociable' from the SGEI in that it will 'not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right'.[44] Put the other way around: the grant of an exclusive or special right will only be justified under Article 106(2), where it is necessary for the fulfilment of an SGEI mission.[45]

2. State Aid I: Jurisdictional Aspects

Public undertakings are the most direct form of State involvement in the market. A less direct form is State aid, that is: financial aid given by the State to private undertakings.[46] States might decide to aid a private undertaking so as to rescue jobs or to stabilise an economic sector. There are however social costs in such a choice:

> [S]tate aid does not come for free. Nor is state aid a miracle solution that can instantly cure all problems. Taxpayers in the end have to finance state aid and there are opportunity costs to it. Giving aid to undertakings means taking funding away from other policy areas.[47]

Moreover, and importantly, the costs of keeping an ailing firm artificially alive in the market are not solely paid by the taxpayer. Competing firms might be

[44] *Ibid.*, para. 19. This has been confirmed in Case C-475/99, *Ambulanz Glöckner* v. *Landkreis Südwestpfalz* [2001] ECR I-8089.

[45] *Ibid.*, para. 57: 'The question to be determined, therefore, is whether the restriction of competition is necessary to enable the holder of an exclusive right to perform its task of general interest in economically acceptable conditions. The Court has held that the starting point in making that determination must be the premiss that the obligation, on the part of the undertaking entrusted with such a task, to perform its services in conditions of economic equilibrium presupposes that it will be possible to offset less profitable sectors against the profitable sectors and hence justifies a restriction of competition from individual undertakings in economically profitable sectors.' See also Case C-340/99, *TNT Traco SpA* v. *Poste Italiane SpA and others* [2001] ECR I-4109, para. 52: 'In that regard, it must be noted, first, that the combined effect of paragraphs (1) and (2) of Article [106] of the Treaty is that paragraph (2) may be relied upon to justify the grant by a Member State to an undertaking entrusted with the operation of services of general economic interest of special or exclusive rights which are contrary to, *inter alia*, Article [102] of the Treaty, to the extent to which performance of the particular task assigned to that undertaking can be assured only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the [Union].'

[46] State aid may also be given to public undertakings, but this phenomenon does not interest us specifically here.

[47] Commission, 'State Aid Action Plan – Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005–2009', COM (2005) 0107 final, para. 8.

disadvantaged if the State aid a national 'champion'. And since some Member States are better off than others, there is also the danger of an unequal playing field in which a 'rich' State inadvertently causes unemployment in a 'poorer' State of the Union.

In view of these potential dangers for free competition and the internal market, the EU Treaties contain a second section within the competition chapter. It specifically deals with '[a]ids granted by States', and comprises three articles. Article 107 TFEU sets out the jurisdictional and substantive criteria as to when a public intervention constitutes a State aid that is incompatible with the internal market. Article 108 provides the procedural frame for the control of State aid within the Union.[48] Finally, Article 109 TFEU grants a regulatory competence to the Council to 'make any appropriate regulations for the application of Articles 107 and 108'. The competence to establish secondary law has been extensively used to supplement the bare textual bones offered by the Treaties.

The central provision within the State aid regime is however Article 107. It contains a general prohibition in paragraph 1 that is followed by two sets of justifications in paragraphs 2 and 3. This section will analyse the jurisdictional scope of Article 107(1), while the next section explores the substantive aspects in relation to the compatibility of State aid with the internal market.

a. The Concept of 'State Aid'

The general prohibition on State aid can be found in Article 107(1) TFEU. It states:

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

Leaving the reference to specific provisions within the Treaties aside,[49] Article 107(1) prohibits State aid that distorts competition and affects trade within the internal market.[50] Like all EU competition law, the provision insists on a

[48] Art. 108(3) TFEU establishes a centralised authorisation and control regime that obliges Member States to notify all potential aid to the Commission. For a general discussion of this regime, see section 4(b) below.

[49] A specific provision governing State aid can be found in the transport title, see Art. 93 TFEU: 'Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.'

[50] This prohibition is however not directly effective, as the Court has held that Art. 107(1) is intrinsically linked to the – discretionary – exemptions granted by the Commission in Art. 107(3) TFEU.

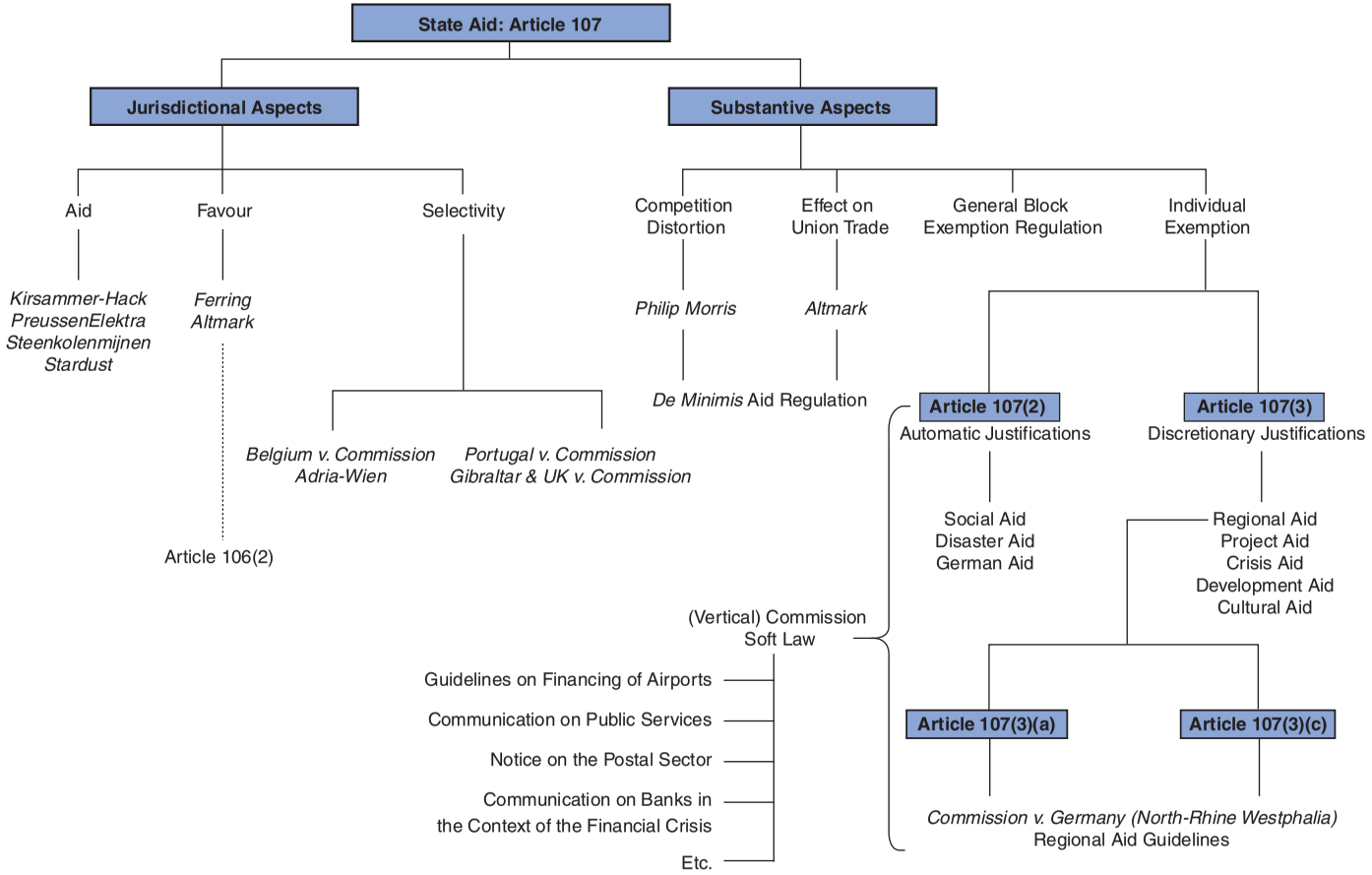

Figure 17B.1 Elements of Article 107 Summary (Flowchart)

distortion of competition, yet the Courts have here adopted a very formalistic approach that treats (almost) all State aid as *per se* competitive distortion.[51] A very light touch has also been applied to the effect-on-trade criterion. The Court has consequently found that even aid to 'an undertaking which provides *only local or regional . . . service and does not provide any . . . services outside its State or origin may none the less have an effect on trade between Member States*'.[52]

This leaves the concept of 'State aid' as the determining jurisdictional criterion for the application of Article 107(1). The Treaties do not define it, and it was therefore left to the Courts to fashion a Union interpretation. The Courts thereby had to answer four essential questions arising from the text of Article 107(1). First, what was the relationship between the concept of 'aid granted by a Member State' and 'State resources'? Secondly, what would actually count as State resources? Thirdly, would these State resources have to be gratuitous? And finally, what did the requirement of favouring '*certain* undertakings or the production of *certain* goods' mean?

Let us look at each aspect of Article 107(1) TFEU in turn.

aa. 'State Aid' and 'State Resources' – Alternative or Cumulative Conditions?

The wording of Article 107 refers to 'any aid granted by a Member State *or* through State resources'.[53] This formulation suggests that the prohibition outlaws two distinct forms of State interference. Indeed, by distinguishing between aids granted 'by the State' and aids granted 'through State resources', Article 107(1) textually implies that the concept of State aid would *not* formally require the use of public resources. In the past, this view indeed received some sporadic backing

[51] See e.g. Case 730/79, *Philip Morris Holland BV* v. *Commission* [1980] ECR 313, esp. para. 11: 'When State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-[Union] trade the latter must be regarded as affected by that aid.' For an analysis of the meaning of competition in the State aid context, see F. de Cecco, 'The Many Meanings of "Competition" in EC State Aid Law' (2006–7) 9 *CYELS* 111. In a similar vein, the Court has never clearly recognised a *de minimis* rule limiting the scope of Art. 107(1) to appreciable distortions of competition; see Case 57/86, *Greece* v. *Commission* [1988] ECR 2855; as well as Case C-172/03, *Heiser* v. *Finanzamt Innsbruck* [2005] ECR I-1627, para. 32: 'According to the Court's case-law, there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected.' The Court's clear statements have however not prevented the Commission from adopting a *de minimis* regulation for administrative purposes, see (Commission) Regulation 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid [2013] OJ L 352/1.

[52] Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v. *Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747, para. 77 (emphasis added).

[53] Art. 107(1) TFEU (emphasis added).

from the Union Courts;[54] yet it has come to be unconditionally rejected by the European Court of Justice. In a number of cases, the Court has thus come to clarify that the concept of State aid requires the – direct or indirect – implication of State resources.[55] The two conditions mentioned in Article 107(1) are thus cumulative conditions: the 'or' must be read as if it were an 'and'!

We find a clear confirmation of this cumulative relationship in *Kirsammer-Hack*.[56] The case concerned a German law that exempted all undertakings employing fewer than five workers from the general employment laws governing unfair dismissal. This was undoubtedly an economic advantage that the German legislature wished to grant to small businesses; but was it State aid that came within the scope of Article 107(1) TFEU? The Court held that this was not the case and insisted that the notion of State aid required the direct or indirect transfer of State resources:

> [O]nly advantages granted directly or indirectly through State resources are to be considered as State aid within the meaning of Article [107(1)]. The distinction made in that provision between aid granted 'by a Member State' and aid granted 'through State resources' does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State.
>
> In the present case, the exclusion of a category of businesses from the protection system in question *does not entail any direct or indirect transfer of State resources to those businesses but derives solely from the legislature's intention to provide a specific legislative framework for working relationships between employers and employees in small businesses and to avoid imposing on those businesses financial constraints which might hinder their development*. It follows that a measure such as the one in question in the main proceedings does not constitute a means of granting directly or indirectly an advantage through State resources. *Accordingly, the reply to the first question should be that the exclusion of small businesses from a national system of protection of workers against unfair dismissal does not constitute aid within the meaning of Article [107(1)] of the Treaty*.[57]

[54] For some unfortunate wording, see e.g. Case 290/83, *Commission* v. *France* [1985] ECR 439, para. 14: 'As is clear from the actual wording of Article [107(1)], aid need not necessarily be financed from State resources to be classified as State aid.'

[55] For an early judicial view, see Case 82/77, *Openbaar Ministerie (Public Prosecutor) of the Netherlands* v. *van Tiggele* [1978] ECR 25. For the view that the aid granted through State resources is even wider than the term aid, see Joined Cases 213–15/81, *Norddeutsches Vieh- und Fleischkontor Herbert Will and others* v. *Bundesanstalt für landwirtschaftliche Marktordnung* [1982] ECR 583, para. 22: 'Although the term "aid granted through State resources" is wider than the term "State aid", the first term still presupposes that the resources from which the aid is granted come from the Member State.'

[56] Case C-189/91, *Kirsammer-Hack* v. *Nurhan Sidal* [1993] ECR I-6185. See Joined Cases C-72–3/91, *Sloman Neptun Schiffahrts AG* v. *Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts* [1993] ECR I-887.

[57] Case C-189/91, *Kirsammer-Hack* v. *Nurhan Sidal* (n. 56 above), paras. 16–19 (emphasis added).

This ruling on the cumulative relationship between State aid and State resources was confirmed in *PreussenElektra*.[58] German environmental legislation obliged electricity supply undertakings to purchase renewable energy from green producers at a price above the market value. The legislative system was designed to *aid* green energy producers. Was this State measure 'aid' falling within Article 107(1) TFEU? The Court – again – rejected this view by denying the existence of aid because '*the allocation of the financial burden arising from that obligation for those private electricity supply undertakings as between them and other private undertakings cannot constitute a direct or indirect transfer of State resources*'.[59]

This instance on the independent use of State resources has been criticised as 'formalistic':

> A state measure which confers a specific advantage on certain undertakings does not become less anti-competitive when it is financed through private, rather than public resources. On the contrary, the distortion may even be greater where the cost of the measure is born by competitors of the aided undertakings and not the general public.[60]

The Court has however not embraced this – material – approach to State aid, and for good reasons. The extension of the notion of State aid beyond measures that transfer State resources indeed entails the significant danger of questioning 'the entire social and economic life of a Member State'.[61] The insistence on the use of State resources, by contrast, limits the scope of Article 107(1) to situations where the State specifically acts within the market.

bb. The (Wide) Concept of State Resources

The Court has however given an extremely broad interpretation to the concept of 'State resources'. The concept of aid goes far beyond positive subsidies in the form of State grants and equally covers negative exemptions from taxes or charges. This is settled jurisprudence ever since *Gezamenlijke Steenkolenmijnen*.[62] The Court here compared the concept of 'aid' with that of a 'subsidy' and held:

> The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, *but also interventions which, in*

[58] Case C-379/98, *PreussenElektra* v. *Schleswag* [2001] ECR I-2099.

[59] *Ibid.*, para. 60 (emphasis added). But see now also Case C-262/12, *Association Vent de Colère! Fédération Nationale and others* EU: C: 2013: 851.

[60] C. Ahlborn and C. Berg, 'Can State Aid Control Learn from Antitrust? The Need to a Greater Role for Competition Analysis under the State Aid Rules' in A. Biondi and P. Eeckhout (eds.), *The Law of State Aid in the European Union* (Oxford University Press, 2004), 41 at 58.

[61] Advocate General F. Jacobs in Joined Cases C-52–4/97, *Viscido* v. *Ente Poste Italiane* [1998] ECR I-2629, para. 16.

[62] Case 30/59, *De Gezamenlijke Steenkolenmijnen in Limburg* v. *High Authority of the European Coal and Steel Community* [1961] ECR 1.

> *various forms, mitigate the charges which are normally included in the budget of an undertaking* and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect.[63]

Article 107 will consequently cover direct *grants* and direct *exemptions*. However, a much more controversial question has been the inclusion of *indirect* State resources. These are resources that do not officially belong to the State, yet over which the State may exercise control.

Would 'private' resources over which there was 'public' control therefore also count as 'State resources'? The Court has answered this question affirmatively. It has nonetheless insisted that for there to be State aid, the actual decision to grant (private) resources must clearly be a *State* decision.

A good illustration of these points is *Stardust*.[64] The case involved Crédit Lyonnais – a bank that was controlled by the French State – which had granted a financial loan to a private company called Stardust. Would a loan – financed by private deposits – be a State resource, because the bank was a public undertaking? The Court employed a two-stage examination to answer this question. First, it confirmed that even if sums 'are not permanently held by the Treasury, *the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorized as State resources*'.[65] State control over (private) resources thus turned them into an indirect State resource.

However, a second step required that the *individual* decision to grant the loan be 'imputable' to the State. Rejecting an 'organic' view, the Court here emphasised that even in public undertakings, the '*actual exercise* of [State] control *in a particular case* cannot be automatically presumed'.[66] The actual decision to grant the loan would thus have to be imputable to the State – not a private employee or manager of the bank. And to make this fine distinction, the Court provided a range of indicators as to when aid granted by a public undertaking was imputable to the State.[67]

[63] *Ibid*., at 19 (emphasis added). This is settled jurisprudence, see e.g. Case C-387/92, *Banco Exterior de España* [1994] ECR I-877, para. 13.

[64] Case C-482/99, *France* v. *Commission (Stardust)* [2002] ECR I-4397.

[65] *Ibid*. para. 37 (emphasis added).

[66] *Ibid*., para. 52.

[67] *Ibid*., para. 55–6: 'For those reasons, it must be accepted that the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken. In that respect, the Court has already taken into consideration the fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities or the fact that, apart from factors of an organic nature which linked the public undertakings to the State, those undertakings, through the intermediary of which aid had been granted, had to take account of directives issued . . . Other indicators might, in certain circumstances, be relevant in concluding that an aid measure taken by a public undertaking is imputable to the State, such as, in particular, its integration into the structures of the public administration, the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law), the intensity of the supervision exercised by the public authorities over

cc. Economic Advantage versus Economic Compensation

Not all monies granted by the State out of State resources will automatically constitute State aid. For Article 107(1) to apply, the State must act *above* the market. By contrast, where the State simply operates *under* 'normal market conditions'[68] – say, to buy office equipment – the use of State resources will not count as State aid. Article 107 will indeed not cover situations where the State acts like an 'ordinary economic agent'.[69] It only applies where the use of State resources confers an economic advantage to an undertaking.[70] The test exploring the existence of 'economic favours' is called the 'private investor' or 'private creditor' test.[71]

The question of whether or not the State offers an economic advantage to an undertaking has received particular attention in the context of SGEI. The core issue here is if, and when, any compensation paid to a private undertaking offering 'public' services counts as State aid.

In light of the special status of SGEI confirmed in Article 106(2) TFEU,[72] two constitutional possibilities here existed. They are neatly summed up as the 'State

the management of the undertaking, or any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains.'

[68] Case C-39/94, *Syndicat français de l'Express international (SFEI) and others* v. *La Poste and others* [1996] ECR I-3547, para. 60: '[I]n order to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions.'

[69] Case C-56/93, *Belgium* v. *Commission* [1996] ECR I-723, para. 10.

[70] Case C-39/94, *SFEI* (n. 68 above).

[71] The test was originally developed in the context of capital investments, from which it derives its name. It is, by extension, also called the 'private creditor' test. For a judicial exploration of the nature of the test, see Case C-305/89, *Italy* v. *Commission* [1991] ECR I-1603, esp. para 20: 'It should be added that although the conduct of a private investor with which the intervention of the public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realizing a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy – whether general or sectorial – and guided by prospects of profitability in the longer term.'

The 'private investor' test has received some criticism, for it encounters a number of problems in contexts where the comparison of the State with a private economic agent does not really work, for example in former State monopolistic markets; see Joined Cases C-83/01 P and C-93–4/01 P, *Chronopost SA, La Poste and French Republic* v. *Union française de l'express (Ufex) and others* [2003] ECR I-6993. The Court has here found that 'in the absence of any possibility of comparing the situation [with regard to a public undertaking] with that of a private group of undertakings not operating in a reserved sector, normal conditions, which are necessary hypothetically, must be assessed by reference to the objective and verifiable elements which are available' (*ibid*., para. 38).

For an analysis of the 'private investor' test and its shortcomings, see G. Abbamonte, 'Market Economy Investor Principle: A Legal Analysis of an Economic Problem' (1996) 17 *ECLR* 258; as well as M. Parish, 'On the Private Investor Principle' (2003) 28 *EL Rev* 70.

[72] For an analysis of this provision, see section 1(b) above.

aid approach' and the 'compensation approach'.[73] According to the former, 'State funding granted to an undertaking for the performance of general interest obligations constitutes State aid within the meaning of Article [107(1)] which may however be justified under Article [106(2)] if the conditions of that derogation are fulfilled.'[74] By contrast, the second approach excludes from the very scope of the State aid provisions situations in which the State simply pays appropriate compensation to a public service provider. 'Under that approach State funding of services of general interest amounts to State aid within the meaning of Article [107(1)] *only if and to the extent that the economic advantage which it provides exceeds such an appropriate remuneration*[.]'[75]

Which approach have the European Courts adopted? After a period of doubt,[76] the European Court has firmly settled on the compensation approach. In *Ferring*,[77] we encounter a challenge to a tax exception granted to wholesale distributors of medicinal products but refused to pharmaceutical laboratories directly selling to pharmacies. The different treatment of these two distribution channels appeared to grant State aid to the wholesalers; yet, the French legislature had justified the beneficial treatment by reference to their public service obligation to keep at their disposal a permanent stock of medicinal products to guarantee an adequate supply at all times. The Court accepted this view in a passage that is worth quoting at some length:

> [L]eaving aside the public service obligations laid down by French law, the tax on direct sales may in fact constitute State aid within the meaning of Article [107(1)] of the Treaty inasmuch as it does not apply to wholesale distributors. However, it is necessary to consider whether the specific public service obligations imposed on wholesale distributors by the French system for the supply of medicines to pharmacies precludes the tax from being State aid . . .
>
> [P]rovided that the tax on direct sales imposed on pharmaceutical laboratories corresponds to the additional costs actually incurred by wholesale distributors in discharging their public service obligations, not assessing wholesale distributors to the tax may be regarded as compensation for the services they provide and hence not State aid within the meaning of Article [107] of the Treaty. Moreover, provided there is the necessary equivalence between the exemption and the additional costs incurred, wholesale distributors *will not be enjoying any real advantage for the purposes of Article [107(1)] of the Treaty because the only effect of the tax will be to put distributors and laboratories on an equal competitive footing*.[78]

[73] Advocate General Jacobs in Case C-126/01, *Ministère de l'Économie, des Finances et de l'Industrie* v. *GEMO* [2003] ECR I-13769, paras. 93–5.
[74] *Ibid*., para. 94.
[75] *Ibid*., para. 95 (emphasis added)
[76] For an analysis of the early case law, see *ibid*., paras. 96 *et seq*.
[77] Case C-53/00, *Ferring SA* v. *Agence centrale des organismes de sécurité sociale (ACOSS)* [2001] ECR I-9067.
[78] *Ibid*., paras. 18–27 (emphasis added).

Where the State thus uses State resources to pay for public service obligations discharged by private undertakings, this was not an 'aid' because it simply 'compensated' for the additional costs involved. (The compensation approach thus operates like a 'rule of reason'. It removes from the scope of Article 107(1) TFEU apparent State aid measures that, by closer analysis, turn out to be ordinary market operations; and in these situations, there is no need to justify the aid under Article 106(2) TFEU.)

The Court has however imposed strict conditions on its compensation approach. In *Altmark*,[79] it insisted that the payment for public service obligations would only not count as aid where four – cumulative – conditions are fulfilled:

> First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined . . .
>
> Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings . . .
>
> Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations . . .
>
> Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.[80]

These four '*Altmark* conditions' require the State to act, as far as possible, like an ordinary economic actor. (The fourth condition, especially, prefers the State to leave the selection of the public service provider to market forces.) The Courts have confirmed and developed these four conditions in subsequent jurisprudence.[81] The Commission has equally offered an – extensive – administrative interpretation in a Communication on 'State Aid in the form of public service compensation'.[82]

[79] Case C-280/00, *Altmark* (n. 52 above). [80] *Ibid*., paras. 89–93.

[81] For an extensive discussion of the *Altmark* conditions, see Case T-289/03, *BUPA* (n. 32 above). For a general analysis of the post-*Altmark* case law, see A. Renzullo, 'Services of General Economic Interest: The Post-*Altmark* Scenario' (2008) 14 *European Public Law* 399. For a critical analysis of this condition, see N. Fiedziuk, 'Putting Services of General Economic Interest Up for Tender: Reflections on Applicable EU Rules' (2013) 50 *CML Rev* 87.

[82] Commission, 'Communication: European Union Framework for State Aid in the Form of Public Service Compensation' (2012/C8/15).

The Communication specifies, in great detail, the conditions that need to be fulfilled. It has been flanked by a Commission Decision on the application of Article 106(2) to public service compensation,[83] and a Commission Regulation on *de minimis* aid for SGEI.[84] The latter exempts, under certain conditions, all *de minimis* 'aid' provided the total amount of the aid granted to one undertaking offering services of general economic interest does not exceed €500,000 over any period of three fiscal years.[85]

b. Selectivity of the Aid

The notion of aid in Article 107(1) refers to the transfer of State resources that grant an economic advantage. This advantage however needs to be an advantage to *particular* undertaking(s). The State measure must favour '*certain* undertakings or the production of *certain* goods'.[86] Article 107 will consequently not apply to economic advantages that a State generally grants to *all* undertakings within its territory.[87] (A low corporate tax rate grants an economic advantage to *Irish* companies when compared to *British* companies, but this economic advantage is open to *all* Irish companies and therefore outside the scope of Article 107(1).) To qualify as State aid, a national measure must be 'selective' *within the national territory*.

The 'selectivity' criterion has had a complex judicial career that is best analysed by distinguishing a 'material' dimension and a 'geographic' dimension.

aa. Material Dimension: Selectivity as 'Special' Favours

To be selective, a national measure must grant a 'special' advantage to an undertaking. But how special need that advantage be? The question will hardly arise where a State grants aid to one particular undertaking. It has however raised much controversy in the context of seemingly 'general' aid schemes and seemingly 'general' tax exceptions.[88] For example, would an Italian measure that

[83] (Commission) Decision 2012/21on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L 7/3.

[84] (Commission) Regulation 360/2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest [2012] OJ L 114/8.

[85] *Ibid*., Art. 2(2).

[86] Emphasis added. The Court has clarified that the reference to 'goods' is not meant to exclude 'services'; see Case C-143/99, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH* v. *Finanzlandesdirektion für Kärnten* [2001] ECR I-8365.

[87] *Ibid*., para. 35: 'A State measure which benefits all undertakings in national territory, without distinction, cannot therefore constitute State aid.'

[88] For an overview of this area, see B. Kurcz and D. Vallinda, 'Can General Measures Be . . . Selective? Some Thoughts on the Interpretation of a State Aid Definition' (2008) 45 *CML Rev* 159; as well as A. Bartosch, 'Is there a Need for a Rule of Reason in European State Aid Law? Or How to Arrive at a Coherent System of Material Selectivity' (2010) 47 *CML Rev* 729; and M. Prek and S. Lefevre, 'The Requirement of Selectivity in the Recent Case Law of the Court' (2012) 11 *European State Aid Law Quarterly* 335.

(temporarily) reduced the employers' part of sickness contributions for all female workers favour 'certain undertakings', or was it a general measure that applied to all Italian undertakings equally?[89] The Court has – surprisingly – held the measure to be selective since it was 'favouring *certain* Italian *industries employing large numbers of female employees*, such as, in particular, those in the textile, clothing, footwear and leather-goods sector'.[90]

This – very – broad concept of selectivity was further developed in *Belgium* v. *Commission*.[91] The Court here dealt, once more, with a national scheme that involved the reduction of employers' social security contributions. Presented as a general measure to promote the creation of jobs in the industrial sector, the national scheme was (principally) confined to manual workers, and the question arose whether this was a selective advantage under Article 107(1). The Court's answer provides an important gloss on the meaning of selectivity:

> [A]id in the form of an aid programme may concern a whole economic sector and still be covered by Article [107(1)] of the Treaty and a measure designed to give the undertakings of a particular industrial sector a partial reduction of the financial charges arising from the normal application of the general social security system, *without there being any justification for this exemption on the basis of the nature or general scheme of this system*, must be regarded as aid. Consequently, a measure aimed at promoting the creation of jobs by reducing, for certain undertakings, the amount of social security contributions which they must pay must be regarded as State aid *when it is not justified by the nature or general scheme of the social welfare system*.[92]

The Court here clarified that even measures that applied to an entire economic sector could be 'selective' and thus fall within the scope of Article 107(1). It seemed that whenever the State made a distinction between undertakings – favouring some over others – Article 107 could become involved. Yet the Court also clarified that where the distinction could be justified 'on the basis of the nature or general scheme' of the national measure, there would be no 'favouring of *certain* undertakings or the production of *certain* goods'. In other words, where the distinction between undertakings flowed from the general logic of the regulatory system and was justified by objective differences, the State measure was a general measure that fell outside Article 107(1). The provision did not oblige Member States to treat all undertakings in the same way; it merely prohibited a discriminatory treatment that was not objectively justified.[93]

This (objective) discrimination test was confirmed in *Adria-Wien*.[94] The plaintiff here challenged Austrian legislation that granted a rebate on energy taxes to undertakings producing goods. This excluded undertakings that – like the plaintiff – were primarily concerned in the provision of services. The

[89] Case 203/82, *Commission* v. *Italy* [1983] ECR 2525. [90] *Ibid*., paras. 4 and 9.
[91] Case C-75/97, *Belgium* v. *Commission (Mirabel bis/ter)* [1999] ECR I-3671.
[92] *Ibid*., paras. 33–4 (emphasis added).
[93] The Court did not find this to be the case here: *ibid*., paras. 38–9.
[94] Case C-143/99, *Adria-Wien Pipeline* (n. 86 above).

preliminary question raised by the Austrian Constitutional Court was thus whether 'a difference in the rebate of those taxes as between *undertakings producing goods* and *undertakings supplying services* is sufficient to render the measure selective, and may therefore bring it within the scope of the State aid rules'.[95]

In its judgment, the European Court summarised its past jurisprudence through a number of points. First, 'neither the large number of eligible undertakings nor the diversity and size of the sectors to which those undertakings belong provide any grounds for concluding that a State initiative constitutes a general measure of economic policy'.[96] However, where, secondly, 'a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part, [that measure] does not fulfill that condition of selectivity'.[97] In the present case, there existed no objective reason – say, environmental protection – to distinguish between manufacturers of goods and service providers.[98] It thus followed that 'the criterion applied by the national legislation at issue is not justified by the nature or general scheme of that legislation, so that it cannot save the measure at issue from being in the nature of State aid'.[99]

bb. Geographic Dimension: National or Regional Frame?

The Treaties traditionally disregard 'internal' constitutional divisions within a Member State. It generally will not matter for the application of the State aid provisions whether the central or a regional government grants the aid. The regional 'blindness' of the Treaties simplistically regards *regional* aid as *State* aid.[100]

The view that reduces Member States to unitary States is however gradually waning. In the context of Article 107, it has indeed suffered a spectacular defeat in *Portugal* v. *Commission*.[101] For the Court here accepted the possibility of a regional – as opposed to national – framework when determining the selectivity of the aid. The introduction of a *region*-sensitive selectivity criterion means that

[95] *Ibid*., para. 11 (emphasis added). [96] *Ibid*., para. 48. [97] *Ibid*., para. 42.

[98] *Ibid*., para. 52: '[T]he ecological considerations underlying the national legislation at issue do not justify treating the consumption of natural gas or electricity by undertakings supplying services differently than the consumption of such energy by undertakings manufacturing goods. Energy consumption by each of those sectors is equally damaging to the environment.'

[99] *Ibid*., para. 53.

[100] Case 248/84, *Germany* v. *Commission* [1987] ECR 4013, para. 17: 'First of all, the fact that the aid programme was adopted by a State in a federation or by a regional authority and not by the federal or central power does not prevent the application of Article [107(1)] of the Treaty if the relevant conditions are satisfied. In referring to "any aid granted by a Member State or through State resources in any form whatsoever" Article [107(1)] is directed at all aid financed from public resources. It follows that aid granted by regional and local bodies of the Member States, whatever their status and description, must be scrutinized to determine whether it complies with Article [107] of the Treaty.'

[101] Case C-88/03, *Portugal* v. *Commission* [2006] ECR I-7115. For an extensive analysis of this case, see R. Greaves, 'Autonomous Regions, Taxation and EC State-aid Rules' (2009) 34 *EL Rev* 779.

measures adopted by a regional government will not automatically be 'selective' because they only apply to a 'selective' part of a State.

Portugal v. *Commission* involved a provision in the Portuguese Constitution that granted the Azores – a small group of islands in the Atlantic – the status of an autonomous region endowed with autonomous tax powers. In order to attract businesses, the latter used its regional tax powers to drastically drop its corporation and income tax rate. For the Commission this was a 'selective' tax exemption that fell within the scope of Article 107(1):

> [I]t is clear from the scheme of the Treaty that the selectivity of a measure must be determined by reference to the national framework. To take the region which adopted the measure as the reference framework would be to disregard the functioning and rationale of the Treaty rules on State aid.[102]

The Court famously disagreed:

> [T]he reference framework need not necessarily be defined within the limits of the Member State concerned, so that a measure conferring an advantage in only one part of the national territory is not selective on that ground alone for the purposes of Article [107(1) TFEU]. It is possible that an *infra-State body enjoys a legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State*, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate. *In such a case it is the area in which the infra-State body responsible for the measure exercises its powers, and not the country as a whole, that constitutes the relevant context for the assessment of whether a measure adopted by such a body favours certain undertakings in comparison with others in a comparable legal and factual situation, having regard to the objective pursued by the measure or the legal system concerned.*[103]

A region within a State – not the national territory as such – could thus provide the geographical framework for deciding whether a measure was general or selective.

But how autonomous would a region have to be here? The Court insisted on three – cumulative – criteria that needed to be fulfilled. A region would have to be *institutionally*, *procedurally* and *economically* autonomous.[104] Institutional autonomy meant that the region had 'from a constitutional point of view, a political and administrative status separate from that of the central government'.[105] Procedural autonomy meant that the regional measure 'must have been adopted without the central government being able to directly intervene as regards its content'.[106] Finally, economic autonomy requires that 'the financial consequences of a reduction of the national tax rate for undertakings in the region must not be

[102] Case C-88/03, *Portugal* v. *Commission* (n. 101 above), para. 42.
[103] *Ibid.*, paras. 57–8 (emphasis added). [104] *Ibid.*, para. 67. [105] *Ibid.* [106] *Ibid.*

offset by aid or subsidies from other regions or central government'.[107] In its subsequent jurisprudence, the Court has clarified each of these three criteria,[108] and in particular the requirement that insists on the economic independence of the region.[109]

3. State Aid II: Substantive Aspects

While triggering the procedural obligation(s) to notify the aid to the Commission,[110] a positive finding of 'State aid' under Article 107(1) will not automatically mean that the aid cannot be granted. For the general prohibition in Article 107(1) is not absolute. State aid may be justified under Articles 107(2)–(3). Both paragraphs list a range of legitimate grounds that may render the aid compatible with the internal market.

The difference between Article 107(2) and Article 107(3) thereby lies in the degree of discretion enjoyed by the Commission. Whereas Article 107(2) mandatorily declares that the aid categories listed there '*shall* be compatible with the internal market', the aid falling into Article 107(3) only '*may* be considered to be compatible with the internal market'. Aid qualifying under Article 107(2) is thus legally entitled to be exempted. By contrast, the decision to exempt aid under Article 107(3) falls to the political discretion of the Union executive.

a. Automatic Justifications: Article 107(2)

Three types of aid categories are declared to be automatically compatible with the internal market. The Commission here has no discretion.[111] Article 107(2) 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;

[107] *Ibid.*

[108] See Joined Cases T-211/04 and T-215/04, *Government of Gibraltar and United Kingdom* v. *Commission* [2008] ECR II-3745; as well as Joined Cases C-428–34/06, *Unión General de Trabajadores de La Rioja (UGT-Rioja) and others* v. *Juntas Generales del Territorio Histórico de Vizcaya and others* [2008] ECR I-6747.

[109] In Case C-88/03, *Portugal* v. *Commission* (n. 101 above), this third criterion was not fulfilled. The Court found that the fiscal policy of the regional government and the budgetary transfers of the central government were 'inextricably linked' (*ibid.*, para. 76), for due to the constitutional principle of national solidarity, the national government was legally obliged to always correct territorial inequalities and to develop economic and social convergence with the rest of the national territory.

[110] For a brief overview of the procedural regime governing State aid, see section 4(b) below.

[111] Case 730/79, *Philip Morris* (n. 51 above), para. 17; as well as K. Bacon, *European Union Law of State Aid* (Oxford University Press, 2013), 95.

(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. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.[112]

This is an exhaustive list of legal exceptions, which the Court will interpret narrowly.[113] The three exemptions may be – somewhat simplistically – summed up as 'social aid', 'disaster aid' and 'German aid'.

'Social aid' is designed to exempt State aid measures helping consumers from poor backgrounds. For example, where the State gives food stamps or travel vouchers to lower-income groups that can subsequently be redeemed with a private undertaking, this indirect form of State aid can be justified by Article 107(2)(a). Two conditions need however be fulfilled. First, the aid must be given to *individual* consumers – not to individual undertakings; and, secondly, the aid must be granted 'without discrimination related to the origin of the products concerned'. The latter requirement imposes an obligation on the Member State not to 'pre-select' a national or local undertaking that would exclusively be able to accept the social vouchers.[114]

States may also grant 'disaster aid' for damage caused by a natural disaster or an exceptional occurrence. Natural disasters include droughts, earthquakes, and floods.[115] The reference to exceptional circumstances has, for instance, been used to justify aid to cover economic losses caused by the 9/11 terrorist attacks.[116] The Court insists on a very strict interpretation that only includes 'natural calamities or other extraordinary events'.[117] Prolonged bad weather conditions or outbreaks of animal diseases will normally not qualify.[118] Moreover, the Court has insisted on a 'direct link' between the aid and the damage incurred.[119] Where aid is used to compensate for the economic consequences following on from a crisis, like high interest rates, such general coverage will not be allowed.[120]

The legal justification for 'German aid' was originally designed to compensate for the economic disadvantages resulting from the division of Germany into two States between 1949 and 1990. Despite German unification, the justification in Article 107(2)(c) has been retained; yet the Courts have interpreted it very

[112] Emphasis added.
[113] See e.g. Case C-156/98, *Germany* v. *Commission* [2000] ECR I-6857, para. 49.
[114] Joined Cases T-116/01 and T-118/01, *P & O European Ferries and Diputación Foral de Vizcaya* v. *Commission* [2003] ECR II-2957.
[115] See Commission Decision in N 459/A/2009 (Abruzzo Earthquake).
[116] Case T-70/07, *Canter Navali Termoli SpA* v. *Commission* [2008] ECR II-250, esp. para. 59.
[117] Joined Cases C-71/09 P, C-73/09 P and C-76/09 P, *Comitato 'Venezia vuole vivere' and others* v. *Commission* [2011] ECR I-4727, para. 175.
[118] For the BSE crisis, see Commission Decision NN46/2001, SG(2001) D/ 290557.
[119] See Joined Cases C-346/03 and C-529/03, *Atzeni and others* v. *Regione autonoma della Sardegna* [2006] ECR I-1875.
[120] *Ibid*., para. 80.

restrictively. Germany's attempt to use it to fully compensate for the economic backwardness of the (new) East German *Länder* was thus rejected out of hand.[121] The provision would only apply to 'economic disadvantages caused in certain areas of Germany by the isolation which the establishment of that physical frontier entailed, such as the breaking of communication links'.[122]

b. Discretionary Justifications: Article 107(3)

In addition to the 'hard' justifications in Article 107(2), Article 107(3) adds a range of softer discretionary grounds. It states:

> The following *may* be considered to be compatible with the internal market:
> (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, 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;
> (d) aid to promote *culture and heritage conservation* where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
> (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.[123]

The list in Article 107(3) may be broken down into five categories.[124]

Regional aid is addressed in paragraphs (a) and (c) and refers to aid that a Member State transfers to impoverished areas within its territory. Article 107(3) here distinguishes two types of areas which will be discussed in greater detail below.

Project aid in paragraph (b) covers aid measures that assist a 'European project', that is: a project that benefits economic actors in more than one State.[125] A good example of such a transnational project is the Channel tunnel rail connection.[126]

[121] See e.g. Case C-156/98, *Germany* v. *Commission* [2000] ECR I-6857.
[122] *Ibid*., para. 52.
[123] Emphasis added. The list of discretionary grounds is potentially open-ended with the Council being entitled to include additional categories. However, as Bacon points out, 'Article 107(3)(e) has been used only infrequently' (Bacon, *European Union Law of State Aid* (n. 111 above), 126).
[124] The General Block Exemption Regulation (n. 134 below) uses slightly different aid categories; and academic commentary has taken up these administrative classifications instead of using the constitutional categories of Art. 107(3) TFEU. We shall nonetheless here remain loyal to the constitutional categories.
[125] See e.g. Joined Cases 62/87 and 72/87, *Exécutif régional wallon and SA Glaverbel* v. *Commission* [1988] ECR 1573, para. 22.
[126] Commission Decision N 706/2001 (Channel Tunnel Rail Link), C(2002)1446fin.

The *crisis aid* justification in paragraph (b) has traditionally been interpreted very restrictively. However, in the wake of the global financial crisis, the Commission has abandoned its originally conservative stance and permitted the extensive use of State aid to rescue and stabilise the European banking system.[127]

Article 107(3)(c) provides the broadest discretionary justification. It not only allows for a second form of regional aid, but equally covers 'aid to facilitate the development of certain economic activities'. This has become 'the primary exception for most forms of horizontal aid',[128] such as research and development aid and environmental aid.

Finally, *cultural aid* in paragraph (d) may cover State aid to the film industry, theatre or music companies. Whether sport activities are also covered has remained a controversial issue.[129]

What is the Commission's discretion under Article 107(3)? The Court has found that 'it is settled law that, as regards the application of Article [107(3)] of the Treaty, the Commission enjoys *a wide discretion*, the exercise of which involves assessments of an economic and social nature which must be made within a [Union] context'.[130] The Court would here 'restrict itself to determining whether the Commission has exceeded the scope of its discretion by a *distortion or manifest error of assessment of the facts or by misuse of powers or abuse of process*'.[131]

The Commission may, of course, decide to structure its discretion through the adoption of formal or informal regulatory acts.[132] Acting on the basis of Article 109, the Council has thereby granted the Commission the power to adopt block exemptions in a number of areas;[133] and the Commission has used this power to adopt the General Block Exemption Regulation 651/2014 (GBER).[134] In addition to 'formal' secondary law, the Commission has also issued a range of 'informal' soft law measures. These 'communications' or 'guidelines' will informally structure the Commission's discretion. Interested

[127] Commission, 'Communication on the Application of State Aid Rules to Measures in Relation to Financial Institutions in the Context of the Current Global Financial Crisis' [2008] OJ C 270/8. See also Editorial Comment, 'From Rescue to Restructuring: The Role of State Aid Control for the Financial Sector' (2010) 47 *CML Rev* 313.

[128] Bacon, *European Union Law of State Aid* (n. 111 above), 111.

[129] *Ibid*., 113.

[130] Case C-225/91, *Matra SA* v. *Commission* [1993] ECR I-3203, para. 24.

[131] *Ibid*., para. 25 (emphasis added).

[132] On the status of informal acts, see note 135 below.

[133] The central act here is Council Regulation 994/98 on the application of Articles 107 and 108 of the Treaty to certain categories of horizontal State aid [1998] OJ L 142/1. The Regulation has been amended by Regulation 733/2013 on the application of Articles [107 and 108] of the Treaty establishing the European Community to certain categories of horizontal State aid [2013] OJ L 204/11. Art. 1 here lists more than a dozen areas that can be subject to a block exemption. In addition, Art. 2 of the Regulation allows the Commission to adopt a *de minimus* Regulation, where the amount of aid does not exceed a certain fixed – minimum – amount.

[134] (Commission) Regulation 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1.

Table 17B.2 Formal and Informal State Aid Measures (Selection)

Horizontal Measures	Vertical Measures
(Commission) Regulation 651/2014 declaring certain categories of aid compatible with the internal market (GBER)	(Commission) Guidelines on financing of airports and start-up aid to airlines departing from regional airports
(Commission) Regulation 1407/2013 on the application of Articles 107 and 108 to *de minimis* aid	(Commission) Communication on the application of State aid rules to public service broadcasting
[Union] framework for state aid for research and development and innovation	(Commission) Notice on the postal sector and on the assessment of certain State measures relating to postal services
(Commission) Guidelines on regional State aid for 2014–2020	(Commission) Communication on the support measures in favour of banks in the context of the financial crisis

parties may thus be entitled to rely on these soft measures when challenging an individual decision.[135]

c. In Particular: Regional Aid

Modern States often wish to create a degree of social cohesion within their territories. This is not only to prevent unwanted migration flows from one region to another. A national cohesion policy is built on a feeling of national solidarity. Each citizen, regardless of her regional birth, is entitled to substantially similar living conditions. The standard of life in the (poorer) north of England should therefore not be dramatically lower than in the (richer) south of England; and the

[135] Case C-313/90, *CIRFS* v. *Commission* [1991] ECR I-2557, esp. para. 4 (Summary): 'The rules applicable to State aid in a particular sector, as set out by the Commission in a communication on its policy in that area ("discipline") and accepted by the Member States, have a binding effect. They constitute a measure of general application and may not be impliedly amended by an individual decision, which cannot be subsequently relied upon, on the basis of the principles of equal treatment and protection of legitimate expectations, in order to justify a further infringement of those rules.' See also Case T-214/95, *Vlaamse Gewest (Flemish Region)* v. *Commission* [1998)] ECR II-717, para. 89: '[The Commission] can specify the criteria it intends to apply in guidelines which are consistent with the Treaty. The adoption of such guidelines by the Commission is an instance of the exercise of its discretion and requires only a self-imposed limitation of that power when considering the aids to which the guidelines apply, in accordance with the principle of equal treatment. By assessing specific aid in the light of such guidelines, the Commission cannot be considered to exceed the limits of its discretion or to waive that discretion.' For an analysis of this point, see A. Giraud, 'A Study of the Notion of Legitimate Expectations in State Aid Recovery Proceedings: "Abandon All Hope, Ye Who Enter Here?"' (2008) 45 *CML Rev* 1399.

less-developed parts of southern Italy should benefit from the greater prosperity of the northern regions of that country.

This idea of social cohesion is often realised by means of 'regional aid', that is: transfers of State resources to assist a backward region in its progress towards the national average. Article 107(3) acknowledges that such regional aid may be compatible with the internal market, but distinguishes between two types of regional aid. Article 107(3)(a) exempts regional aid granted to 'promote the economic development of areas *where the standard of living is abnormally low or where there is serious underemployment*'. This first exemption is complemented by a second exemption in Article 107(3)(c) that concerns aid aimed 'to facilitate the *development . . . of certain economic areas*'.

Why did the State aid rules distinguish between two forms of regional aid; and what is their respective sphere of application? The Court has given an insightful and concise answer in *Germany* v. *Commission (North-Rhine Westphalia)*:

> When a programme of regional aid falls under Article [107(1)] of the Treaty it must be determined to what extent it may fall within one of the exceptions in Article [107(3)(a) and (c)]. *In that respect the use of the words 'abnormally' and 'serious' in the exemption contained in Article [107(3)(a)] shows that it concerns only areas where the economic situation is extremely unfavourable in relation to the [Union] as a whole.* The exemption in Article [107(3)(c)], on the other hand, is wider in scope inasmuch as it permits the development of certain areas without being restricted by the economic conditions laid down in Article [107(3)(a)], provided such aid 'does not adversely affect trading conditions to an extent contrary to the common interest'. *That provision gives the Commission power to authorize aid intended to further the economic development of areas of a Member State which are disadvantaged in relation to the national average.*[136]

Article 107(3)(a) may thus exempt State aid for regions that are 'underdeveloped' when measured against an – absolute – Union standard, while Article 107(3)(c) potentially exempts State aid to regions that are below the – relative – national standard.

The regional aid exemption in Article 107(3)(a) concerns regions whose economic development is extremely unfavourable when viewed against the Union average.[137] The Regional Aid Guidelines have defined these regions by reference to 'a gross domestic product (GDP) per capita below or equal to 75% of the Union's average'.[138] State intervention to positively develop these areas will therefore not only follow a *national* cohesion objective; it will also be in line with the Union's own cohesion policy.[139] Due to this additional element of Union solidarity, the

[136] Case 248/84, *Germany* v. *Commission* [1987] ECR 4013, para. 19 (emphasis added).
[137] The terminology of 'a region' is used in the (Commission) 'Guidelines on Regional State Aid for 2014–2020' [2013] OJ C 209/1, para. 20.
[138] *Ibid.*, para. 150.
[139] On the Union's own Cohesion Policy, see Chapter 18, section 4 below.

Commission will enjoy 'a *broader discretion*' when exempting 'an aid project intended to promote the development of a region coming under paragraph 3(a) than it has in the case of identical aid to a region covered by paragraph 3(c)'.[140]

This broader discretion originally seemed to stem from a second source also: unlike Article 107(3)(c), there is no express reference to the condition that regional aid must 'not adversely affect trading conditions to an extent contrary to the common interest' in Article 107(3)(a).[141] The Court has however insisted that 'that difference in wording cannot lead to the conclusion that the Commission should take no account of the [Union] interest when applying Article [107(3)(a)]'.[142] '[T]he application of both Article [107(3)(a)] and Article [107(3)(c)] presupposes the need to take into consideration not only the regional implications of the aid covered by those provisions but also, in the light of Article [107(1)], its impact on trade between Member States and thus the sectoral repercussions to which it might give rise at [Union] level.'[143] This seems to suggest that while the Commission is not legally bound by the limitation in Article 107(3)(c), it must still exercise its discretion – and deny regional aid – when it considers the aid to go against the common interest of the Union.

The second regional aid exemption is offered by Article 107(3)(c). Unlike aid exempted under Article 107(3)(a), there is no Union criterion to define 'c-regions'. (The designation of 'c-regions' is left to the Member States but subject to a Union methodology and a total coverage ceiling for each Member State.) The State aid granted to c-regions is likely to be reviewed more strictly. For the danger of any relative national standard is that a backward region in a 'rich State' – like Germany – may still be much better off than the most developed region in a poorer State of the Union. Moreover, Article 107(3)(c) expressly subjects regional aid to the condition that it 'does not adversely affect trading conditions to an extent contrary to the common interest'. In *Philip Morris*,[144] State aid to a tobacco manufacturer was thus rejected because 'the increase in the production of cigarettes envisaged would be exported to the other Member States, in a situation where the growth of consumption has slackened'.[145]

The respective administrative regime for 'a-regions' and 'c-regions' is laid down in the GBER and the Commission Guidelines on Regional Aid. The overall number of regions eligible for State aid within the Union will always be lower than 50 per cent of all European regions.[146] The eligible areas within a Member State must be approved in a 'regional aid map', which is drawn up by each individual Member State with the approval of the Commission (see Figure 17B.2 for the Polish Regional Aid Map).

[140] Case T-380/94, *AIUFFASS and others* v. *Commission* [1996] ECR II-2169, paras. 54–5.

[141] Case C-169/95, *Spain* v. *Commission* [1997] ECR I-135, para. 16: 'Conversely, the absence of that condition in the derogation under Article [107](3)(a) implies greater latitude in granting aid to undertakings in regions which do meet the criteria laid down in that derogation.'

[142] *Ibid.*, para. 17. [143] *Ibid.*, para. 20.

[144] Case 730/79, *Philip Morris Holland BV* v. *Commission* (n. 51 above). [145] *Ibid.*, para. 26.

[146] 'Guidelines on Regional State Aid' (n. 137 above), paras. 146 and 148.

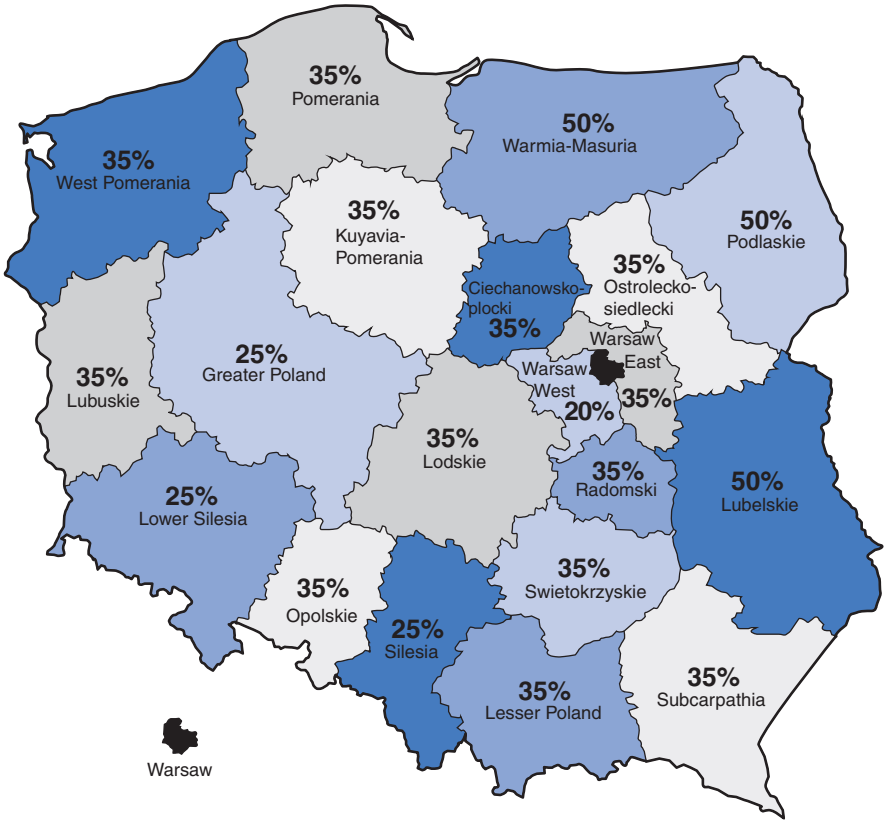

Figure 17B.2 Polish Regional Aid Map

One of the general principles underlying all regional aid within the Union is the idea that the aid must never cover the entire costs of a subsidised project. Depending on the regional backwardness and the size of the enterprise, the Union has created various 'aid intensity' thresholds. These thresholds set the maximum degree to which a State may contribute to the 'gross grant equivalent' of a regional project involved.

4. Enforcing EU Competition Law

The enforcement of EU law may be effected *by* the Member States or *against* the Member States. In the former situation, national authorities act on behalf of the Union when applying European law against private parties. This decentralised administration of European law constitutes the general norm within the Union's executive federalism.[147]

[147] On this constitutional choice, see Chapter 9, section 4 above.

The indirect enforcement of Union law by State authorities was however originally *not* used within the context of EU competition law. For more than 40 years, the Union here preferred a centralised enforcement system that relied on the direct administration by the Union institutions, that is: the Commission. This original system was dramatically reformed in 2004, and today the Member States indeed play a primary role in the enforcement of EU competition law. The State enforcement of Union competition law is however still (very) limited in the context of the State aid rules.[148] These rules are, after all, enforced against the States and here a centralised enforcement mechanism seems appropriate.

a. Enforcement through the States: Articles 101 and 102

The Treaty section dealing with the competition rules applicable to private undertakings contains three provisions on 'administrative' matters. Articles 103–5 TFEU deal, respectively, with the Council, the States and the Commission. Article 103 entitles the Council to adopt measures 'to give effect to the principles set out in Articles 101 and 102', and in particular 'to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other'.[149] Article 104 designates the Member States to be – temporarily – responsible for the application of the competition rules in the absence of a Council regulation on the matter.[150] Lastly, Article 105 emphasises the central role of the Commission.

Despite their verbose character, none of the three provisions conclusively determines how exactly the Union competition rules were to be administered. How 'central' would the Commission be in their enforcement; and what role would national authorities – executive and judicial – have in the application of the EU competition rules?

aa. Public Enforcement: From Centralised to Decentralised System

The first Regulation to implement Articles 101 and 102 – Regulation 17/62 – created a centralised enforcement system in which the Commission was absolutely dominant. Its aim was the *uniform* application of the EU competition rules;[151] and

[148] A centralised enforcement system equally continues to exist within the context of EU merger control. The procedural aspects of the EUMR will however not be discussed here. For an overview of this area, see e.g. J. Goyder and A. Albors-Llorens, *Goyder's EC Competiton Law* (Oxford University Press, 2009), Chapter 17; as well as M. Rosenthal and S. Thomas, *European Merger Control* (Hart, 2010), Chapter E.

[149] Art. 103(2)(b) TFEU.

[150] For a ruling on Art. 104 TFEU, see Case 13/61, *Kledingverkoopbedrijf de Geus en Uitdenbogerd* v. *Bosch* [1962] ECR 45.

[151] For an excellent discussion of the social and cultural reasons behind this desire for legal uniformity, see C.-D. Ehlermann, 'The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) 37 *CML Rev* 537 at 540: '[T]he dominant legal and administrative culture of the [EU] of the "Six" was still rather centralist. France was clearly the politically dominant Member State. French views heavily influenced [EU] legislation

uniformity was achieved through a central authorisation system that made it obligatory 'for undertakings which seek application of Article [101(3)] to notify to the Commission their agreements'.[152] Undertakings whose agreements fell within Article 101(1) should here only benefit from the exception clause in Article 101(3), where a positive decision had been taken. Under Regulation 17/62 the Commission indeed enjoyed the 'sole power to declare Article [101(1)] inapplicable pursuant to Article [101(3)] of the Treaty'.[153] This centralised enforcement system left little space to national authorities. The latter remained competent to apply Article 101(1) but only '[a]s long as the Commission ha[d] not initiated any procedure'.[154] This asphyxiated national enforcement ambitions and effectively channelled all notifications to the Commission.

This over-centralisation would have bitter consequences. Drowning in notifications for (relatively) innocuous agreements, the Commission, over the years, lost much of its ability to investigate dangerous non-notified agreements. In an attempt to stem the tide, it gradually engaged in a number of decentralisation efforts in the 1990s.[155] Its reform efforts climaxed in the adoption of Regulation 1/2003.[156] This – second – Regulation implementing Articles 101 and 102 repealed the old system and modernised the enforcement of EU competition law. The key 'revolution' here lay in the elimination of the prior authorisation mechanism for Article 101(3).[157] Giving the latter direct effect, Article 101(3) could henceforth be applied by national executive (and judicial) authorities.

and administration ... In addition, there were hardly any administrative structures in the Member States that would have allowed an efficient decentralized application of [EU] competition law in general ... During the first decades of the [EU], there was no "competition culture" comparable to the one we have today.'

152 Regulation No. 17: First Regulation implementing [ex-]Articles 85 and 86 of the Treaty [1962] OJ L 13/204, preamble 3.

153 *Ibid.*, Art. 9(1).

154 *Ibid.*, Art. 9(3). In Case 127/73, *BRT and others* v. *Sabam and others* [1974] ECR 51, the Court clarified that national courts, even if falling within the wording of Art. 9(3) of the Regulation, would derive their powers from Arts. 101 and 101 TFEU directly (*ibid.*, paras. 18–20): 'The fact that Article 9(3) refers to "the authorities of the Member States" competent to apply the provisions of Articles [101(1) and 102] "in accordance with Article [104]" indicates that it refers solely to those national authorities whose competence derives from Article [104]. Under that Article the authorities of the Member States – including in certain Member States courts especially entrusted with the task of applying domestic legislation on competition or that of ensuring the legality of that application by the administrative authorities – are also rendered competent to apply the provisions of Articles [101 and 102] of the Treaty. The fact that the expression "authorities of the Member States" appearing in Article 9(3) of Regulation No 17 covers such courts cannot exempt a court before which the direct effect of Article [102] is pleaded from giving judgment.'

155 See Notice on National Courts (1993), National Authorities Notice (1997) and, finally, the White Paper on Modernisation. For an extensive and brilliant analysis of the White Paper, see Ehlermann, 'The Modernization of EC Antitrust Policy' (n. 151 above), at 544 *et seq.*

156 Regulation 1/2003 on the implementation of the rules on competition laid down in Articles [101 and 102] of the Treaty [2003] OJ L 1/1.

157 *Ibid.*, Art. 1(2): 'Agreements, decisions and concerted practices caught by Article [101(1)] of the Treaty which satisfy the conditions of Article [101(3)] of the Treaty shall not be

This shift from centralised to decentralised enforcement was dramatic. Regulation 1/2003 turned national competition authorities (NCAs) into important players in the enforcement of EU competition law. Yet the unresolved problem under the Regulation was the (horizontal) division of competences between the various NCAs. While Regulation 1/2003 demands that they should 'form together a network of public authorities applying the [Union] competition rules in close cooperation',[158] the legal principles with regard to case allocation within this 'European Competition Network' (ECN) have remained underdetermined. The Regulation indeed appears to accept a system of parallel competences in which each NCA has the power – independent of each other – to unilaterally enforce EU competition law.[159] Jurisdictional conflicts between NCAs have thus remained unresolved, even if the Regulation permits each NCA to – voluntarily – reject an investigation on the ground that another national authority is or has been dealing with the case.[160]

Slightly clearer principles govern the vertical division of executive powers. Regulation 1/2003 here clearly sets the Commission above the NCAs. Indeed, once the Commission decides to initiate proceedings, the exercise of its (shared) competence 'shall relieve the competition authorities of the Member states of their competences to apply Articles [101 and 102]'.[161] This Commission thus

prohibited, no prior decision to that effect being required.' The Regulation also clarified the direct effect of Art. 102 in Art. 1(3) of the Regulation.

158 *Ibid.*, recital, 15. On the ECN, see e.g. A. Burnside, 'Co-operation in Competition: A New Era' (2005) 30 *EL Rev* 234.

159 See Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C 101/03, para. 5: 'The Council Regulation is based on a system of parallel competences in which all competition authorities have the power to apply Articles [101 and 102] of the Treaty and are responsible for an efficient division of work with respect to those cases where an investigation is deemed to be necessary. At the same time each network member retains full discretion in deciding whether or not to investigate a case.' The Notice offers however a number of – soft – guidelines as to when a competition authority is 'well placed' to deal with a case; see *ibid.*, paras. 10 and 12: 'a single NCA is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory . . . Parallel action by two or three NCAs may be appropriate where an agreement or practice has substantial effects on competition mainly in their respective territories and the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately.' For an excellent early analysis – and criticism – of the allocation system, see S. Brammer, 'Concurrent Jurisdiction under Regulation 1/2003 and the Issue of Case Allocation' (2005) 42 *CML Rev* 1383.

160 Regulation 1/2003, Art. 13(1) and (2).

161 *Ibid.*, Art. 11(6). The Cooperation Notice here guides as follows (n. 159 above, paras. 14 and 54): 'The Commission is particularly well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets) . . . After the allocation phase, the Commission will in principle only apply Article 11(6) of the Council Regulation if one of the following situations arises: (a) Network members envisage conflicting decisions in the same case. (b) Network members envisage a decision which is obviously in conflict with consolidated case law; the standards defined in the judgements of the [Union] courts and in previous

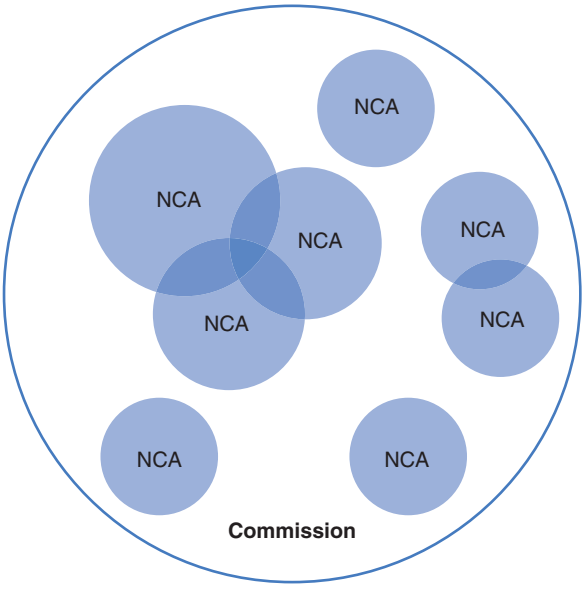

Figure 17B.3 European Competition Network

stands 'above' the NCAs, and its administrative 'supremacy' has recently been confirmed with regard to its power to issue decisions that the EU competition rules have not been violated.

In *Tele 2*,[162] the Polish competition authority had issued a decision that Telekomunikacja Polska had not breached Article 102. A competitor subsequently challenged the decision; and in the course of a preliminary ruling the Court clarified that only the Commission could issue such 'negative' decisions:

> Empowerment of national competition authorities to take decisions stating that there has been no breach of Article 102 TFEU would call into question the system of cooperation established by the Regulation and would undermine the power of the Commission. Such a 'negative' decision on the merits would risk undermining the uniform application of Articles 101 TFEU and 102 TFEU, which is one of the objectives of the Regulation highlighted by recital 1 in its preamble, since such a decision might prevent the Commission from finding subsequently that the practice in question amounts to a breach of those provisions of European Union law. It is thus apparent

decisions and regulations of the Commission should serve as a yardstick; concerning the assessment of the facts (e.g. market definition), only a significant divergence will trigger an intervention of the Commission; (c) Network member(s) is (are) unduly drawing out proceedings in the case; (d) There is a need to adopt a Commission decision to develop [EU] competition policy in particular when a similar competition issue arises in several Member States or to ensure effective enforcement; (e) The NCA(s) concerned do not object.'

[162] Case C-375/09, *Prezes Urzędu Ochrony Konkurencji i Konsumentów* v. *Tele2 Polska sp. z o.o., devenue Netia SA* [2011] ECR I-3055.

> from the wording, the scheme of the Regulation and the objective which it pursues that the Commission alone is empowered to make a finding that there has been no breach of Article 102 TFEU, even if that article is applied in a procedure undertaken by a national competition authority.[163]

What are the executive powers of the NCAs and the Commission within the ECN? While the executive powers of the national competition authorities are principally determined by national law,[164] the executive powers of the Commission are set out in Regulation 1/2003. The Commission is here given extensive *investigative* powers. It is entitled to conduct investigations into sectors of the economy,[165] and it can request undertakings to provide all necessary information.[166] The Commission even enjoys the power to conduct inspections – colloquially called 'dawn raids' – that allow it to enter any business premises of a suspected undertaking.[167] Once the information collected points to a violation of EU competition law, the Commission must inform the parties and allow them to be heard.[168] This second 'adjudicative' stage ends with a formal Commission decision.

Three possible decisions can be taken. The Commission may take an 'infringement decision' that imposes on the undertaking(s) involved 'any behavioural or structural remedies which are proportionate to the infringement committed and

[163] *Ibid.*, paras. 27–9.

[164] But see also, Art. 5 of Regulation 1/2003: 'The competition authorities of the Member States shall have the power to apply Articles [101 and 102] of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions: – requiring that an infringement be brought to an end, – ordering interim measures, – accepting commitments, – imposing fines, periodic penalty payments or any other penalty provided for in their national law. Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.'

[165] *Ibid.*, Art. 17.

[166] *Ibid.*, Art. 18.

[167] *Ibid.*, Art. 20(2)(a). This power of inspection is extended to 'other premises' by Art. 21, but only '[i]f a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection, which may be relevant to prove a serious violation of Article [101] or Article [102] of the Treaty, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and association of undertakings concerned'. The power to conduct inspections has been very controversial and is subject to an extensive human rights jurisprudence in the context of the rights of defence; see Case 136/79, *National Panasonic* v. *Commission* [1980] ECR 2033; Case 46/87, *Hoechst AG* v. *Commission* [1989] ECR 2859; as well as Case C-94/00, *Roquette Frères SA* v. *Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission* [2002] ECR I-9011.

[168] Regulation 1/2003, Art. 27: '[T]he Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection.' On the role and function of the 'Hearing Officer', see Commission Decision 2011/695 on the function and terms of reference of the hearing officer in certain competition proceedings [2011] OJ L 275/29.

Table 17B.3 Regulation 1/2003 – Structure

Enforcement Regulation 1/2003	
Chapter I: Principles	Chapter VII: Limitation Periods
Chapter II: Powers	Chapter VIII: Hearings & Secrecy
Chapter III: Commission Decisions	Chapter IX: Exemption Regulations
Chapter IV: Cooperation	Chapter X: General Provisions
Chapter V: Powers of Investigation	Chapter XI: Final Provisions
Chapter VI: Penalties	(Implementing) Regulation 773/2004

necessary to bring the infringement effectively to an end'.[169] The Commission might decide to adopt a 'commitment decision' that 'settles' the case prior to a formal decision,[170] or it may adopt an 'inapplicability decision' in situations '[w]here the [Union] public interest relating to the application of Articles [101 and 102] of the Treaty so requires'.[171]

bb. Private Enforcement: The Role of the (National) Courts

Courts are traditionally 'passive' cogs in the enforcement machinery. Someone from outside the judicial sphere will normally need to put them into motion. In the case of competition law, these external impulses often come from private parties – be it unhappy competitors or disgruntled consumers.

The application of the EU competition rules by the European Courts is clearly envisaged by the Treaties; yet what about the decentralised enforcement through the national courts? The question of whether EU competition law, especially Article 101, had direct effect was not easy to answer. For if Article 101(1) and (3) were seen as 'forming an indivisible whole',[172] the (old) administrative procedure established by Regulation 17/62 could have been a major obstacle to the direct effect of the whole provision. The European Court nonetheless clarified in *BRT* v. *SABAM* that 'the prohibitions of Articles [101(1) and 102] *tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard*'.[173] The direct effect of Articles 101 and 102 thus allows private parties to enforce their European rights in the national courts. Yet the private enforcement of EU

[169] Regulation 1/2003, Art. 7(1). For a recent overview of the various competition law remedies, see E. Hjelmeng, 'Competition Law Remedies: Striving for Coherence or Finding New Ways' (2013) 50 *CML Rev* 1007.

[170] Regulation 1/2003, Art. 9. For an extensive analysis of Art. 9 decisions, and their dangers, see F. Wagner-von Papp, 'Best and Even Better Practices in Commitment Procedures after *Alrosa*: The Dangers of Abandoning the "Struggle for Competition Law"' (2012) 40 *CML Rev* 929.

[171] Regulation 1/2003, Art. 10.

[172] Case 13/61, *Bosch* (n. 150 above), 52.

[173] Case 127/73, *BRT* v. *SABAM* (n. 154 above), para. 16 (emphasis added).

competition law has never been very active in Europe, and the Union has therefore repeatedly tried to galvanise individuals into more antitrust litigation.[174]

When deciding a dispute, national courts are bound by all Union competition law – including past Commission decisions.[175] The judicial proceedings in a national court may however sometimes run 'alongside' the administrative proceedings pursued by the Commission. For unlike, the powers of the Commission to divest national competition authorities,[176] no such pre-emptive power exists in relation to national courts. The Union legal order has therefore tried to coordinate the (national) judicial and the (Union) executive enforcement of EU competition law.

This desire to avoid – future – conflicting decisions was clearly expressed in *Delimitis*,[177] and was subsequently codified into Regulation 1/2003. The Regulation obliges national courts to 'avoid giving decisions which would conflict with a decision *contemplated by the Commission in proceedings it has initiated*' and invites the national court concerned to '*assess whether it is necessary to stay its proceedings*'.[178] On a more positive note, national courts are however entitled to request information from the Commission,[179] while the Commission is allowed to act as *amicus curiae* before the national court.[180]

b. Enforcement against the States: State Aid

The State aid provisions are directed *against* State actions.[181] Unsurprisingly, the Union institutions are here less confident to recruit national

[174] See Case C-453/99, *Courage* v. *Crehan* [2001] ECR I-6297; as well as Joined Cases C-295–8/04, *Manfredi* v. *Lloyd Adriatico Assicurazioni and others* [2006] ECR I-6619 – the cases are extensively discussed in Chapter 11, section 4(b). See also Proposal for a directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM (2013) 404 final. On this question of private damages generally, see A. P. Komninos, *EC Private Antitrust Enforcement* (Hart, 2008); as well as W. P. J. Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 *World Competition* 3.

[175] On the supremacy of European law, see Chapter 11, Introduction above. See also more specifically, Art. (16/1) of Regulation 1/2003 (n. 156 above): 'When national courts rule on agreements, decisions or practices under Article [101] or Article [102] of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.'

[176] Regulation 1/2003, Art. 11(6).

[177] Case C-234/89, *Delimitis* v. *Henninger Bräu* [1991] ECR I-935, esp. paras. 47 *et seq*. See also Case C-344/98, *Masterfoods* v. *HB Ice Cream* [2000] ECR I-11369, esp. 51 *et seq*.

[178] Regulation 1/2003, Art. 16 (emphasis added). See also Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles [101 and 102] [2004] OJ C 101/04.

[179] Regulation 1/2003, Art. 15(1). [180] *Ibid*., Art. 15(3).

[181] On the bilateral (procedural) relation between the Union and the States, see Case C-367/95P, *Commission* v. *Sytraval* [1998] ECR I-1719, para. 45: 'decisions adopted by the Commission in the field of State aid must be held to be addressed to the member states concerned'. Private parties, like the beneficiary of the aid, are therefore from a procedural point of view 'third parties'.

authorities, for the decentralised administration here entails the danger that a (guilty) defendant is ultimately called upon to enforce the law against itself. The Treaties have therefore traditionally relied on a centralised enforcement mechanism in this context. It is laid down in Article 108 TFEU, which states:

> 1. The Commission shall, in cooperation with Member States, *keep under constant review all systems of aid existing in those States*. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.
> 2. If, after giving notice to the parties concerned to submit their comments, *the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid* within a period of time to be determined by the Commission ...
> 3. *The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid*. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. *The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision* ... [182]

The provision stands – uncomfortably – on its head. It is best read from bottom to top. Starting with Article 108(3), the article demands that every Member State must inform the Commission of any plans to grant *new aid*. That aid must not be implemented until the Commission has positively authorised it as compatible with the internal market. (The individual authorisation requirement may however not apply where the Commission has adopted a block exemption.[183])

[182] Emphasis added. There is a fourth paragraph to the provision, which states: 'The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.'

[183] See Art. 108(4) TFEU. There is a second exemption mentioned in Art. 108(2) – third and fourth indent (see below): 'On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known. If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.'

Where the authorisation procedure is not followed, the aid will formally become 'unlawful aid'. Unlawfully granted aid is nevertheless not *ipso facto* incompatible with the internal market. The Court has thus held that the violation of the notification requirement in Article 108(3) does not release the Commission from its obligations under Article 108(2).[184]

Under Article 108(2), the Commission must analyse whether the aid granted by the State may be justified under Article 107(2) and (3). If there exists a substantive violation of Article 107, 'the State concerned shall abolish or alter such aid'. (And where the State does not comply with this Commission decision, the latter may *directly* refer the matter to the Court of Justice.[185]) By contrast, if the Commission finds that the aid is compatible with the internal market, the aid – even when originally granted as unlawful aid – is authorised. This authorised aid is called 'existing aid'.

Existing aid must, according to Article 108(1), be kept 'under constant review' by the Commission. The constant review obligation is especially important for 'aid schemes', that is: State aid that is regularly and generally granted for an indefinite period of time or for an indefinite amount.

This subsection quickly explores two aspects of the procedural regime governing State aid. First, what are the powers of the Commission vis-à-vis the State authorities? And secondly, what duties do national courts have? The wording of Article 108 is taciturn on both points. It was originally left to the European Courts to establish the relevant procedural rules. With the adoption of Regulation 659/1999 ('Procedural Regulation'),[186] much of the previous case law has however now been codified.

aa. 'New Aid': Powers of the Commission

Where a Member State wishes to grant 'new aid', the aid needs to be positively authorised by the Commission. A Member State must notify all State aid,[187] even if it believes that the aid is compatible with the internal market. For the

[184] For an extensive analysis of the various arguments in favour of and against this view, see Case C-301/87, *France* v. *Commission (Boussac)* [1990] ECR I-307, esp. paras. 9–23.

[185] Art. 108(2) TFEU – second indent states: 'If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.' The advantage of this simplified action is that the administrative stages of Arts. 258 and 259 are omitted.

[186] Regulation 659/99 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union [1999] OJ L 83/1.

[187] The obligation to notify is on the State and cannot be discharged by the undertaking, see Joined Cases C-442/03 P and C-471/03 P, *P&O European Ferries and others* v. *Commission* [2006] ECR I-4845, para. 103: 'It is apparent from the actual structure of Article [108(3) TFEU], which establishes a bilateral relationship between the Commission and the Member State, that only the Member States are under the obligation to notify. That obligation can thus not be regarded as satisfied by notification by the undertaking receiving the aid.'

compatibility evaluation under Articles 107(2) and (3) is not a matter for the States. It falls within the exclusive competence of the Commission.[188]

The powers of the Commission to examine new aid are set out in Chapter 2 of the 'Procedural Regulation' (Articles 2–9). The Regulation here distinguishes between two stages: a 'preliminary examination' and a 'formal investigation procedure'. The first stage allows the Commission to quickly authorise the measure, where it considers that the notified measure does not at all constitute aid under Article 107(1)[189] or, where it has no doubts that the aid is compatible with the internal market, under Article 107(2) or (3).[190] By contrast, where the Commission finds, after a preliminary examination, that 'doubts are raised as to the compatibility with the [internal] market of a notified measure', it will decide to initiate the formal investigation procedure. Whatever decision the Commission takes, the preliminary examination must be closed within two months following receipt of a complete (!) notification.[191] Where the Commission fails to conclude its preliminary examination within that time, the aid is deemed to have been authorised.[192]

The decision to begin the formal investigation procedure will call 'upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month'.[193] (The Commission also enjoys the power to request information with regard to 'all market information necessary to enable the Commission to complete its assessment'.[194])

The second stage of the review procedure ends with a 'decision . . . of the Commission to close the formal investigation procedure'.[195] It can take one of

[188] See e.g. Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and others* v. *France* [1991] ECR I-5505, para. 14. The only exception here is the powers of the Council under Art. 108(2) TFEU (n. 183 above). The Court has however underlined the 'exceptional' character of the provision and has created a 'temporal limitation' to the competence of the Council, see Case C-110/02, *Commission* v. *Council* [2004] ECR I-6333, esp. paras. 32–3).

[189] Regulation 659/99, Art. 4(2).

[190] *Ibid.*, Art. 4(3).

[191] *Ibid.*, Art. 4(5) states: 'The decisions referred to in paragraphs 2, 3 and 4 shall be taken within two months. That period shall begin on the day following the receipt of a complete notification. The notification will be considered as complete if, within two months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information. The period can be extended with the consent of both the Commission and the Member State concerned. Where appropriate, the Commission may fix shorter time limits.'

[192] *Ibid.*, Art. 4(6). The provision codifies the so-called '*Lorenz* Rule' established by the European Court of Justice in Case 120/73, *Lorenz* v. *Germany* [1973] ECR 1471. The Member State is however under an obligation to notify its intention to implement the aid; and Art. 4(5) of the Procedural Regulation has here granted the Commission an additional grace period to take a (negative) decision 'within a period of 15 working days following receipt of the notice'.

[193] Regulation 659/99, Art. 6(1).

[194] *Ibid.*, Art. 6(a)(1). With regard to undertakings, the Commission may even impose fines and periodic penalty payments, where they intentionally or through gross negligence supply incorrect or misleading information (*ibid.*, Art. 6b).

[195] *Ibid.*, Art. 7.

four forms. The Commission can declare that the measure does not constitute aid,[196] that it is unconditionally compatible with the internal market ('positive decision'),[197] that it is conditionally compatible with the internal market ('conditional decision')[198] or that the notified aid is not compatible with the internal market ('negative decision').[199] There are no fixed time limits for the adoption of these decisions; yet the Regulation asks the Commission to 'endeavour to adopt a decision within a period of 18 months from the opening of the procedure'.[200] And once this soft time limit has expired, a Member State may even request that the Commission take a final decision within two months.[201]

bb. 'Unlawful Aid': Powers of the Commission (and National Courts)

'Unlawful aid' is new aid that has not been authorised.[202] The grant of unlawful aid may come to the attention of the Commission through a complaint 'from whatever source'.[203] Any such complaint must be examined 'without undue delay'. The Commission is entitled to request all necessary evidence from a Member State ('information injunction');[204] and it may even request a Member State to suspend any unlawful aid until it has taken a decision on the compatibility of the aid ('suspension injunction').[205]

The greatest power of the Commission however is its ability to order recovery ('recovery injunction'); yet such an injunction will only require 'the Member States *provisionally* to recover any unlawful aid until the Commission has taken a decision on the compatibility of the aid'.[206] Permanent recovery can only be ordered following a negative decision on the compatibility of the aid; but once this is done, the Commission will instruct a Member State to 'take all necessary measures to recover the aid from the beneficiary' ('recovery decision').[207]

Recovery has been described as 'the logical consequence of the finding that [aid] is unlawful'.[208] It is not designed to punish the beneficiary. It simply aims to remove the distortion of intra-Union competition previously created by the State. The only exception to recovery is where it would violate a general principle of Union law. Two general principles are here often invoked. They are the principles of 'legitimate expectations' and

[196] *Ibid.*, Art. 7(2). [197] *Ibid.*, Art. 7(3). [198] *Ibid.*, Art. 7(4). [199] *Ibid.*, Art. 7(5).
[200] *Ibid.*, Art. 7(6). [201] *Ibid.*, Art. 7(7). [202] *Ibid.*, Art. 1(f).
[203] *Ibid.*, Art. 10(1). A complaint will normally be made by a private party competing with the beneficiary of the aid or another Member State.
[204] *Ibid.*, Art. 10(3). [205] *Ibid.*, Art. 11(1).
[206] *Ibid.*, Art. 11(2) (emphasis added). Such a temporary recovery injunction is however conditional on three strict criteria. Not only must there be 'no doubts about the aid character of the measure concerned' and 'an urgency to act', there must also be 'a serious risk of substantial and irreparable damage to a competitor'.
[207] *Ibid.*, Art. 14(1). [208] Case 142/87, *Belgium* v. *Commission* [1990] ECR 959, para. 66

'(absolute) impossibility'.[209] The Union Courts have however given short shrift to both general principles. They have thus held that 'undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation', and that '[a] diligent businessman should normally be able to determine whether that procedure has been followed'.[210] A similarly strict stance has been applied to the impossibility claim, which the Courts have confined to absolute impossibility.[211]

What is the role of national courts in the enforcement of Union law? Since Article 107 TFEU is 'neither absolute nor unconditional', the provision has been held to lack direct effect. It therefore cannot, as such, be enforced by national courts.[212] However, the European Courts have held the last sentence of Article 108(3) to be directly effective.[213] In the words of the European Court:

> National courts must offer to individuals in a position to rely on such breach the certain prospect that *all the necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures*.[214]

This has given national courts a – complex – role next to the Commission. The Commission and the national courts indeed exercise 'complementary but

[209] For an analysis of the both principles, see A. Sinnaeve, 'State Aid Procedures: Development since the Entry into Force of the Procedural Regulation' (2007) 44 *CML Rev* 965 at 1002 *et seq.*; as well as Bacon, *European Union Law of State Aid* (n. 111 above), 477 *et seq.*

[210] Case C-5/89, *Commission* v. *Germany* [1990] ECR I-3437, para. 14. This restrictive definition has been confirmed, *inter alia*, in Case C-24/95, *Land Rheinland-Pfalz* v. *Alcan* [1997] ECR I-1591.

[211] See e.g. Case 52/84, *Commission* v. *Belgium* [1986] ECR 89; and, more recently, Case C-305/09, *Commission* v. *Italy* [2011] ECR I-03225.

[212] See e.g. Case 74/76, *Iannelli & Volpi* v. *Meron* [1977] ECR 557, paras. 11–12: 'Moreover it is apparent both from Article [107(1) and (3)] and the third subparagraph of Article [108(2)] that the incompatibility of aid with the common market as provided for in Article [107(1)] is neither absolute nor unconditional. Article [107(2)] not only provides for exceptions but in addition both Article [107] and Article [108] give the Commission a wide discretion and the Council wide powers to accept State aid in derogation from the general prohibition in Article [107(1)] . . . The parties concerned cannot therefore simply, on the basis of Article [107] alone, challenge the compatibility of an aid with [Union] law before national courts or ask them to decide as to any incompatibility which may be the main issue in actions before them or may arise as a subsidiary issue.' This has been subsequently confirmed and constitutes standing jurisprudence.

[213] The last sentence of Art. 108(3) TFEU states 'The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.' For a ruling that this sentence has direct effect, see e.g. Case 120/73, *Lorenz* (n. 192 above), para. 8: 'the prohibition on implementation referred to in the last sentence of Article [108(3)] has a direct effect and gives rise to rights in favour of individuals, which national courts are bound to safeguard'.

[214] Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires* (n. 188 above), para. 12 (emphasis added).

separate roles'.[215] Their roles have received an extensive administrative interpretation in the Procedural Regulation.[216] But this administrative issue does not interest us here.

Conclusion

This chapter provided an overview of potential State interferences with competition in the internal market. The most direct and permanent market involvement here is public undertakings, such as 'State monopolies'. State enterprises, as well as enterprises endowed with special rights, are subject to Article 106. The provision nominally extends the 'normal' competition rules to these enterprises; yet the Union also recognises a – limited – derogation for undertakings engaged in the operation of services of general economic interest.

We find a second form of market interference by the State in Article 107. The provision regulates the grant of State aid. These State interferences may seriously distort competition within the internal market and the Union has therefore established a strict control regime. Any aid that is granted through State resources and which favours certain undertakings will be outlawed – unless it can be justified by one of the derogations found in Article 107(2) or (3). The most important justification here concerns regional aid, which States may grant to undertakings in backward regions within their territory.

A final section within the chapter looked at the Member States' involvement in the administration of the EU competition rules. The Union here distinguishes between a decentralised and a centralised enforcement regime. It heavily relies on national administrations in the implementation of the rules governing 'private undertakings'; yet it – unsurprisingly – prefers a centralised enforcement system for its State aid regime.

[215] See in particular Case C-39/94, *SFEI* (n. 68 above); and, more recently, Case C-69/13, *Mediaset* v. *Ministero dello Sviluppo economico* EU: C: 2014: 71, paras. 19–20: 'In that regard, it must be borne in mind that the implementation of that system of control is a matter for both the Commission and the national courts, their respective roles being complementary but separate. Under that system, assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union.'

[216] Regulation 659/99, Art. 23a ('Cooperation with national courts'): '1. For the application of Article 107(1) and Article 108 of the TFEU, the courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of State aid rules. 2. Where the coherent application of Article 107(1) or Article 108 of the TFEU so requires, the Commission, acting on its own initiative, may submit written observations to the courts of the Member States that are responsible for applying the State aid rules. It may, with the permission of the court in question, also make oral observations.' And see also Commission Notice on the enforcement of State aid law by national courts [2009] OJ C 85/01.

FURTHER READING

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