Revisiting the State's Role in the Private Sector: Reflections on the EU's System of Checks and Balances in the Age of Covid-19

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Introduction

Long before the advent of the Covid-19 pandemic, there was a growing consensus across the European Union that over a decade of austerity since the market failures of the financial crisis of 2008 had weakened the ability of many sovereign states' institutions to deliver key public services.[1] In response to the financial crisis, EU Member States felt compelled to prop up their corners of the international financial system through huge cash injections into ailing banks that were funded by taxpayers, and the European Commission (the 'Commission') supported them in those efforts.[2]

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1 Eg, refer to, inter alia, Benjamin Mueller, 'What Is Austerity and How Has It Affected British Society?' *New York Times* (New York, 24 February 2019); Odysseas Christou, Christina Ioannou and Anthos Shekeris, 'Social Cohesion and the State in times of Austerity', *Friedriche Ebert Stiftung*, September 2013.

2 See Adrian Blundell-Wignall and Paul Atkinson, 'The Sub-Prime Crisis: Causal Distortions and Regulatory Reform', Lessons from the Financial Turmoil of 2007 and 2008 (2008) www.rba.gov.au/publications/confs/2008/pdf/blundell-wignall-atkinson.pdf; Sol Trumbo Vila, 'The Bail-out Business in the EU: 1.5 trillion Euros to rescue ailing banks in EU', *Euractiv*, 23 February 2017; refer, eg, to the long list of Commission state aid decisions involving the financial services sector adopted over the period 2008–2014 https://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=3 accessed 27 November 2020.

More recently, political leaders in former bastions of free market jurisdictions have been building their political platforms around the professed desire to combat the undermining of local industries by the forces of globalisation.[3] The antidote they prescribe is found in a cocktail of measures made up of trade sanctions, refusals to permit certain types of transactions from occurring where the acquirer is based outside the jurisdiction and direct investments in businesses so that the state holds a strategic interest.

The latest blow to free markets and globalisation has been struck by the response of governments to Covid-19 in response to profound public health concerns, rather than in any response to a market failure such as that triggered by the financial crisis. The reaction to the Covid-19 pandemic has been less protectionist to date but rather, in the spirit of Keynesian economics, has been expansionist insofar as it envisages an unparalleled involvement of the state in the private sectors. The amounts dispensed by governments to address the economic fallout of the Covid-19 pandemic are eye-watering, matching or exceeding the support measures introduced to provide a lifeline to the financial services sector post-2008,[4] which most Member States are still paying off. The swift support of the Commission has been readily forthcoming in approving such measures.[5] Yet the economic harm to many industries is estimated to be so great that the state will not be able simply to dispense cash in the short term to overcome identified

3 Refer to discussions in, inter alia, Joseph Stiglitz, 'Rethinking Globalization in the Trump Era: US-China Relations', *Roosevelt Institute*, June 2017; Fareed Zakaria, 'The World is de-globalizing. Trump set the example' *Washington Post* (Washington, DC, 14 January 2020).

4 The current Covid-19 bail-out packages for EU Member States issued by the Commission reflect debt ratios unseen since the Second World War. See discussions in Matei Rosca, Bjarke Smith-Meyer, Paola Tamma and Hannah Brenton, 'The Coronavirus Economy: How Bad Will It Get?', *Politico*, 2 and 7 September 2020; see also BBC.com of 21 July 2020, 'Coronavirus: European Leaders Reach Recovery Deal After Marathon Summit' (referring to the €750bn bailout). In the United Kingdom, refer to discussions in, inter alia, Daniel Thomas and George Parker, 'UK Bailout Schemes Could Create Coronavirus Debt Trap, Warn Banks' *Financial Times* (London, 25 May 2020). The US bailout, by comparison, dwarfs the EU package: see BBC.com of 30 March 2020, 'Coronavirus: Trump Signs Into Law Largest Bailout in US history'.

5 Of the numerous individual Commission decisions permitting the grant of state aid measures in response to the economic disruptions caused by the Covid-19 pandemic more generally, but especially in relation to certain industries, a representative example of such measures is addressed in the following Decisions: SA.57408 COVID-19: Framework scheme for state aid in the form of subsidised loans and guarantees on loans (Romania), of 1 July 2020; SA.58763 COVID-19: Aid to hotels and aparthotels (Belgium), of 25 September 2020; SA.58794 COVID-19: Amendment to transparency aid to undertakings in primary agricultural production (Finland), of 29 September 2020. See also Marcel Boyer, 'Competition, Open Social Democracy, and the COVID-19 Pandemic', *Concurrences*, No 2, 2020, pp 33–38.

economic hardships. Rather, it will increasingly view state investments in struggling corporations as a necessary, possibly even unavoidable, measure as opposed to a piece of ideological posturing.

These changes in the level of state intervention in European companies and the relationship between the state and business are likely to be as profound as those changes that characterised the rebuilding experience in Europe after the Second World War.[6] By engaging in such investments, the state must be mindful of the fact that the complex legal culture of the EU is one that is very much pro-liberalisation, pro-market and pro-rule of law (as opposed to ministerial fiat). The many recent appeals brought by Ryanair in response to the Commission's acceptance of widespread state aid bail-outs to national flag carriers has highlighted what it believes to be the market-distorting aspects of these interventions.[7] There will no doubt also be times when the long arm of government may rely on the extraordinary circumstances created by the pandemic as the excuse to extend executive authority beyond what is strictly necessary to protect the public,[8] but EU law has a series of checks and balances that are designed to minimise the distortive effects on competition that might be brought about by state intervention in markets.

The incursion of the state into the private sector in response to Covid-19 will mean that the delicate relationship between the state and its citizens, on the one hand, and the state and the private economy, on the other, will need to be recalibrated over time. Public services will need to be better supported, private companies will need to be propped up and citizens'

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6 Refer to Tony Judt, *Postwar – A History of Europe since 1945* (Vintage Books 2010), c III. *The Economist* has its own perception of the types of challenges that are at stake for Europe, when it remarks that:

> 'Across the continent, suspended bankruptcy rules, tacit forbearance by banks and a flood of discretionary state aid risk prolonging the life of zombie forms that should be allowed to fail. This is all the more worrying given that, before the [Covid-19] crisis, France and Germany were already embracing an industrial policy that promoted national champions. If Europe sees the pandemic as a further reason to nurture a cosy relationship between government and incumbent businesses, its long term relative decline could accelerate.'

'Winners and losers: The pandemic has caused the world's economies to diverge', *The Economist*, (London, 10-16 October 2020), p11. In the same article, the following is also used when discussing the enormity of the EU package designated to address economic harm caused by the pandemic: 'An even deeper economic catastrophe was avoided thanks only to unprecedented interventions in financial markets by central banks, government aid to workers and failing firms, and the expansion of budget deficits to near war-time levels'.

7 Refer to cases discussed in Saim Saeed, 'Ryanair Goes To War Against Coronavirus Bailouts', *Politico*, 12 and 13 May 2020.

8 In the case of Hungary, eg, refer to discussion in Editorial, 'Orban's Power Grab' *The Guardian* (London, 29 March 2020).

livelihoods will need to be supported. Many Member States are therefore heading into unchartered waters. However, the institutional structures of the EU and the way in which EU law applies provide the basis upon which the state, for so long a key player in many industries in the past (especially utility and network sectors), can re-enter what are currently private sector markets through minority shareholdings without distorting their competitive equilibrium. These structures and legal principles are arguably designed in such a way that does not facilitate any desire of the state to distort those markets irreversibly, and in most cases Member State withdrawal from such companies is envisaged expressly.

This article explores those areas of EU law that permit a Member State to legitimately interfere in markets, coupled with the unique set of checks and balances available under EU law that are designed to ensure that a Member State, when exercising its legitimate interests, does not do so in ways that subvert the free trade principles upon which the EU is based. The working premise of this article is that those checks and balances within the EU legal order should mean that any state of 'new normal' in the business world in the wake of Covid-19 has the potential to revert to a more old-fashioned 'normal' once economic circumstances have changed fundamentally. The political and legal challenges for forging a new balance between the state and industry, given the lack of such instruments, might be much more challenging in many other parts of the world without the web of checks and balances that exist in the very special 'federal' structure that characterises the EU.

Limits to state protectionism

Since its formation, the EU has been designed to facilitate trade between undertakings from different Member States (the internal market) and between those Member States and other parts of the world (external trade policy). Accordingly, protectionist desires have consistently taken a back seat to those policies that promote liberalisation and fair trade. Nevertheless, there remain a number of areas where the residual balance of power between the EU and its Member States has given way to certain important derogations being available to the Member States to depart from such an open markets policy path – whether in terms of sectors excluded from the full impact of EU law or where Member States can intervene to protect their national interests by deterring or preventing the takeover of key domestic companies. One can expect that, in a post-Covid-19 environment, the political pressure to rely on such derogations will be heightened.

Coordinated foreign investment curbs

The classic means of protecting local market actors is by systematically restricting the ability of foreign buyers to purchase companies working in strategic sectors of the economy especially where those buyers are considered to shield the interests of foreign states. Many jurisdictions around the world already have well-established legal regimes that permit the state to intervene to prevent such strategic acquisitions.[9] The Foreign Direct Investment (FDI) Regulation,[10] which was due to be implemented into the national laws of the EU Member States by October 2020, establishes an EU-coordinated system of cooperation among Member States when exercising powers to restrict foreign investment. This new scheme is the result of the EU's efforts to strike a balance between the opportunities offered by globalisation, on the one hand, and the potential cross-border impact of FDI inflows on the security or public order considerations of the Member States and the EU as a whole, on the other.

The FDI Regulation neither aims to harmonise national screening mechanisms nor does it replace national screening mechanisms with a single EU screening mechanism (ie, it does not create a European one-stop shop solution). Thus, the FDI Regulation does not oblige Member States without screening mechanisms in place to establish them. The decision as to whether to set up a screening mechanism, or to screen a particular FDI, remains the sole responsibility of the Member State concerned. Any maintenance, amendment or adoption of a screening mechanism, however, needs to be put into effect in accordance with the provisions set forth in the FDI Regulation.[11]

The nature of the coordination

Prior to the adoption of the FDI Regulation, there was no comprehensive legal framework at EU level for the screening of FDI on the grounds of security or public order, neither between the Commission and the Member States nor among the Member States themselves. When the Commission presented its draft proposal for the FDI Regulation in September 2017, only 12 out of 28 Member States had a national mechanism for screening of FDI in place at the time. These national FDI screening mechanisms were not aligned, differing widely in their scope and in their design.

9 Eg, refer to Investment Canada Act 1985 – Canada; Foreign Acquisitions and Takeovers Act 1975 and Foreign Acquisitions and Takeovers Fees Imposition Act 2015 – Australia; and the Foreign Investment Risk Review Modernization Act of 2018 (CFIUS) – United States.

10 See Foreign Direct Investments Regulation (Regulation (EU) 2019/452 of 19 March 2019 (the 'FDI Regulation').

11 See the FDI Regulation, Recital 8, Arts 1(3) and 3(1).

By establishing a common legal framework for the screening of certain mergers by Member States and by establishing a mechanism for cooperation at EU level concerning FDI, the FDI Regulation seeks to provide legal certainty for those Member States that do decide to introduce screening mechanisms on the ground of the preservation of security and public order.[12]

The creation of designated contact points among Member States and the regulated exchange of information at an EU level is aimed at increasing transparency and awareness on FDI that is likely to affect security or public order. The FDI Regulation also provides the Members States and the Commission with the means of addressing such risks to security or public order, with the Commission being able to issue an opinion on the exercise of such powers in any given case and the other Member States being able to provide comments on such actions. Although such comments are non-binding, they need to be given due consideration by the Member State where the FDI is due to occur or where it has been completed.

Where an FDI is likely to affect projects and programmes of EU-wide interest (ie, in areas such as research, space, transport and energy), the Member State concerned will need to take the 'utmost account' of the Commission's opinion and must provide an explanation to the Commission supporting their decision if the opinion of the Commission is not being followed (see discussion below).

Even though the FDI Regulation stresses that Member States without screening mechanisms are not required to create a screening mechanism, the existence of a new EU framework may nonetheless increase the likelihood of more Member States establishing a national screening mechanism. Such examples include Member States such as France, Germany, Spain, Denmark and Hungary.[13] The establishment of a harmonised screening framework will also have an impact on screening mechanisms already in place, most of which will have to be adjusted to allow for the integration of the new EU cooperation process.

Security or public order grounds

The FDI Regulation provides for a non-exhaustive list of factors that the Member States and the Commission may take into consideration when determining whether an FDI is likely to affect security or public order.

First, the Member States and the Commission may consider the FDI's potential effects on, inter alia:

12 *Ibid*, Recital 7.

13 The Member State screening mechanisms that have been notified to the Commission, as of 7 October 2020, are listed on https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf accessed 27 November 2020.

- *critical infrastructure*, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure and sensitive facilities (as well as land and real estate crucial for the use of such infrastructure);
- *critical technologies* and dual-use items, as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009,[14] including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies;
- the supply of *critical inputs*, including energy and raw materials, as well as food security;
- *access to sensitive information*, including personal data, or the ability to control such information; and
- the *freedom* and *pluralism* of the media.

Second, when taking into account the above considerations, the Member States and the Commission may also take into account, in particular:

- whether the foreign investor is *directly or indirectly controlled by the government*, including state bodies or armed forces, *of a third country*, including through ownership structure or significant funding;
- whether the foreign investor has already been *involved in activities affecting security or public order* in a Member State; or
- whether there is a serious risk that the foreign investor will engage in *illegal or criminal activities*.

Consultation procedure

By creating a framework for screening mechanisms of Member States, the FDI Regulation aims to provide legal certainty for Member States and investors. Screening mechanisms of Member States need to be based on the grounds of security and public order, which are in compliance with the requirements for imposing restrictive measures under the General Agreement on Trade in Services (GATS),[15] the Organisation for Economic

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14 Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (OJ L 134 29 May 2009, p 1). The expression 'dual-use items' refers to such items, including software and technology, which can be used for both civil and military purposes, and includes all goods that can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices.

15 The GATS is a treaty of the World Trade Organization (WTO), which establishes a framework of rules to ensure that services regulations are administered in a reasonable, objective and impartial manner, and do not constitute unnecessary barriers to trade.

Co-operation and Development (OECD)[16] or free trade agreements (FTAs), which in turn sends a signal against the use of naked protectionist measures. Member States shall apply timeframes under their screening mechanisms that allow for the consideration of comments lodged by other Member States and also the opinion of the Commission. Rules and procedures relating to screening mechanisms shall provide for the protection of confidential information made available to the Member State conducting the screening, shall not discriminate between third countries and shall be transparent in terms of setting out the circumstances triggering the screening, the grounds for the screening and the applicable detailed procedural rules that govern the screening process. National screening mechanisms shall also be equipped with measures necessary to identify and prevent circumvention of the screening mechanisms and screening decisions, and shall provide foreign investors and target companies concerned with the possibility of seeking recourse against the screening decisions of the national authorities.

Other Member States may provide comments to the Member State conducting the FDI screening process if they consider that the FDI is likely to affect their security or public order, or if they have information relevant for such a screening. The Commission may in turn issue an opinion addressed to the Member State conducting the screening if it considers that the FDI is likely adversely to affect security or public order in more than one Member State, or if it has relevant information in relation to that FDI. The Commission shall, however, adopt an opinion only where justified following the receipt of comments from at least one-third of Member States that have considered whether the FDI is likely to affect their security or public order. The Member State conducting the screening may also request that the Commission adopt an opinion, or that other Member States provide comments where it considers that the FDI is likely to affect its security or public order.

In turn, the Member State conducting the screening needs to give due consideration to the comments of the other Member States and to the opinion of the Commission. Recital 17 of the FDI Regulation elaborates this obligation insofar as a Member State should give due consideration to, where appropriate, measures available under its national law, or in its broader policy-making, consistent with its duty of 'sincere cooperation' laid down in Article 4(3) of the Treaty on the EU (TEU).

16 The OECD is an international organisation committed to the promotion of policies to improve the economic and social well-being of people around the world by providing a forum in which governments can work together to share experiences and seek solutions to common problems.

The final screening decision in relation to any FDI, however, remains the sole responsibility of the Member State conducting the screening, with the Commission and the other Member States not having the power to overrule the screening decision made by the competent national authority of the Member State conducting the screening. Since the adoption of the FDI Regulation, a number of Member States have implemented new measures, which, arguably spurred on by the catalyst of Covid-19, have *expanded* the scope of their FDI regimes.[17]

Programmes of 'EU interest'

If an FDI potentially affects 'projects or programmes of EU interest' on the alleged grounds of security and public order, the Commission's opinion carries more weight, insofar as the Member State in which the FDI is planned to occur or has been completed (ie, regardless of whether or not the FDI is undergoing screening) needs not only to give due consideration to, but needs to take the 'utmost account' of, the Commission's opinion. Additionally, it must provide an explanation to the Commission in the event that the Commission's opinion is not to be followed. In this regard, Recital 19 of the FDI Regulation elaborates that a Member State should take utmost account of the opinion received from the Commission and, if it does not follow its opinion, it needs to provide an explanation to the Commission consistent with its duty of 'sincere cooperation' under Article 4(3) of the TEU. The underlying objective is to provide the Commission with a tool by which to protect projects and programmes that serve the EU as a whole, and that represent an important contribution to its economic growth, jobs and competitiveness.[18]

'Projects or programmes of EU interest' are defined as including projects and programmes that involve a substantial amount or a significant share of EU funding, or that are covered by EU law regarding critical infrastructure, critical technologies or critical inputs, which are essential for security or public order. In its annex, the FDI Regulation sets out a list of eight projects and programmes of EU interest, namely:

1. the European global navigation satellite system (GNSS) programmes (Galileo and European geostationary navigation overlay service (EGNOS));
2. Copernicus;

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17 See discussion in Christian Ahlborn and Christoph Barth, 'Foreign Investment Lockdown', *Concurrences* No 2-2020, pp 21–26; cf Mario Siragusa and Cesare Rizza, 'Two Challenges Posed by the Economic Shock caused by COVID-19 to the Level Playing Field in the EU internal market', *Concurrences* No 2-2020, pp 103–106.

18 See FDI Regulation, Recital 19.

3. Horizon 2020;
4. Trans-European Networks for Transport (TEN-T);
5. Trans-European Networks for Energy (TEN-E);
6. Trans-European Networks for Telecommunications;
7. European Defence Industrial Development Programme; and
8. the Permanent structured cooperation (PESCO).

The Commission is authorised to amend this list by adopting a delegated act.

The cooperation mechanism procedure for FDI screenings is subject to three major exceptions:

1. the Member State conducting the screening may indicate in the FDI notification whether it considers that the FDI is likely to affect projects and programmes of EU interest;
2. the Commission's opinion shall be sent to the other Member States (instead of the Commission only notifying the other Member States of the fact that an opinion was issued); and
3. the Member State where the FDI is planned or has been completed needs to take the 'utmost account' of the Commission's opinion and to justify its position to the Commission in case the opinion of the Commission is not followed.

Conclusions

While the creation of a new regime that coordinates the responses of Member States to foreign takeovers might not seem an obvious candidate for a measure that is *not* protectionist, the consultation procedure that needs to be satisfied by a Member State seeking to prevent a takeover by a foreign (non/EU) firm ensures that any decision to intervene will be anything but simple. First, it needs to be remembered that all larger mergers that satisfy the revenue thresholds under the EU Merger Regulation fall within the exclusive 'one-stop shop' jurisdiction of the Commission. This means that Member States cannot exercise a veto in relation to such transactions, as the decision-maker is the Commission. Second, the net is drawn fairly widely as to what constitutes those areas with a uniquely 'European' interest, which can in practice override any Member State objections.

Third, the level of transparency and interaction between Member States under the FDI coordination regime means that any Member State wishing to exercise FDI vetting powers must be very committed to that cause. Peer review, whether in the form of the Commission rallying critical Member States against intervention, particular regional preferences being expressed against the unilateral action of a given Member State or even the antagonism of those Member States that have set themselves up as magnets for inward

investment, will mean that the arbitrary exercise of FDI powers is difficult to put into effect and will need to garner support from others involved in the process. Hence, one finds it difficult to imagine that the FDI regime will act as a protectionist deterrent that will deter large numbers of foreign takeovers of smaller EU firms, other than in those cases where significant national interests are at stake or where a foreign state effectively sponsors the acquisition while at the same time shielding the acquirer from market dynamics in its 'home' jurisdiction.[19]

Discretionary ministerial interventions

Unlike the recently adopted FDI regime (discussed above), which establishes a comprehensive screening mechanism for foreign takeovers in strategically critical areas, a more limited number of Member States have had the freedom to intervene by ministerial fiat to *override* the decisions of their Member State competition authority, which would presumably be adopted purely on economic grounds based on competition law principles. Such regimes are not designed to be protectionist in nature. Rather, they are designed to permit the taking of an overtly political decision on non-economic grounds, which are not capable of being justified in terms of pure competition law economics. In lay terms, the exercise of such ministerial powers will usually mean that employment concerns (which garner votes) will trump competition concerns. Less obviously, it might also trigger the buying of political favours at a regional level, which may be rewarded at the ballot box.

The most prominent of these regimes is found in Germany, where a merger ruling of the German Cartel Office can be overridden by the Ministry for Economic Affairs and Energy on the basis of overtly public policy

19 The submission of the Dutch Government in December 2019 to confer power to the EU to take action against third countries that restrict competition is an extreme reflection of this type of concern; see www.permanentrepresentations.nl/documents/publications/2019/12/09/non-paper-on-level-playing-field accessed 27 November 2020.

(ie, public interest) grounds.[20] In so doing, however, a ministerial decision to override the ruling of the national competition authority on public interest grounds is exercised in a transparent manner, with the rationale being that the voting public is in a position to judge at the ballot box the decisions of responsible ministers who seek to override a purely economic assessment by a national competition authority by reference to various public interest criteria. This regime also explains why, in Germany, it is perfectly reasonable for the national competition authority and the German government to be at odds with one another[21]

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20 According to s 42 GWB, a merger that is otherwise prohibited by the Bundeskartellamt may be authorised by the Minister for Economy Affairs and Energy. The basis for receiving such a ministerial exemption lies in the fact that the competitive restraint identified by the Bundeskartellamt is considered to be outweighed by advantages to the economy as a whole, or the merger is justified by an overriding public interest. There is a limit to the minister's exercise of this discretionary power, insofar as the market economy system must not be jeopardised by the ministerial authorisation. In turn, it is subject to an appeal to the courts. The decision granting the ministerial authorisation is open to appeal to the Oberlandesgericht Düsseldorf on the basis of procedural errors and errors in reasoning. Past practice suggests that maintaining valuable technical know-how, improving the security of supply, stabilising agricultural markets and successful participation in international competition have been acknowledged as advantages that can lead to a ministerial authorisation. In general, preserving job security is – in and of itself – not a viable advantage. The overriding interest of the general public has been found to be the case in the relief provided to the state budget through the privatisation of a state-owned company and where environmental policy goals can be achieved by an approval of the merger. (See Alexander Riesenkampff and Sebastian Steinbarth in Ulrich Loewenheim, Karl M Meessen, Alexander Riesenkampff, Christian Kersting and Hans Jürgen Meyer-Lindemann, *Kartellrecht* (3rd edn, 2016), GWB s 42, paras 2–7.)
In total, 22 applications for ministerial authorisation have been granted since the 1970s. The full list of authorisations is available at www.bmwi.de/Redaktion/DE/Downloads/Wettbewerbspolitik/antraege-auf-ministererlaubnis.pdf?__blob=publicationFile&v=5.
The most recent instance of ministerial authorisation occurred in 2016, which related to a supermarket merger, and which was subject to significant controversy (see Deutsche Welle www.dw.com/en/regulators-overruled-in-supermarket-takeover/a-19122420) accessed 27 November 2020 accessed 27 November 2020. Such authorisation was challenged and suspended by the Düsseldorf Court (see https://www.dw.com/en/germanys-economics-minister-in-the-firing-line-again/a-19421048). Shortly after this decision, the German law was amended to restrict the possibility of appeals by third parties against the ministerial authorisation, under the Ninth Amendment of the Act Against Restraints of Competition.

21 As occurred, eg, in the *Telefońica/E-Plus* case in 2016 and in the *Alstom/Siemens* case in 2019, both of which were reviewed by the Commission under the EU Merger Regulation, but which witnessed the adoption of dramatically opposed views by the Bundeskartellamt (which opposed both mergers) and the German Government (which supported both mergers). It is highly unlikely that this institutional policy of 'agreeing to disagree' would be capable of being endorsed in most other political cultures outside Germany, whose modern history is characterised by an elaborate set of checks and balances designed to promote plurality in all its various forms.

in relation to decisions relating to specific cases. Comparable rules also foresee the ability of the responsible government officials in Spain,[22] France[23]

22 Spain's Competition Act enables the Council of Ministers to reassess any decision of the Comisión Nacional de los Mercados y la Competencia (CNMC) that may have blocked a merger or subjected it to commitments. The Minister of Economy has 15 days from the adoption of the relevant CNMC decision to raise the issue with the Council of Ministers, which has one month in which to adopt a final decision on the matter (Competition Act, Art 60). When reassessing the concentration, the Council of Ministers can take into account criteria other than competition policy, including the maintenance of national security and defence, the protection of public health, the promotion of technological investigations and developments and the maintenance of the objectives of sectoral regulation (Competition Act, Art 10(4)).

23 In France, the Minister for the Economy holds residual powers in two circumstances as regards the review by the French national competition authority of 'concentrations', namely: (1) even if the concentration is cleared by the authority at the end of the first phase of review, the minister has the discretion to request the authority to open a second phase in-depth review of the concentration (Code de Commerce, Art L430-7-1 (I)) and within a period of five days after the decision is adopted by the French competition authority, the Minister of the Economy can request that the authority conduct a thorough examination of the concentration; and (2) irrespective of the final decision adopted by the authority at the end of the second phase, the minister can substitute his or her decision based on public interest grounds (Code de Commerce, Art L430-7-1 (II)). Within a period of 25 days from the moment the minister has received the decision of the authority, he or she has the right to evoke the 'strategic mergers' exception for reasons of general interest other than the maintenance of competition (ie, mergers raising issues of public policy other than competition, such as industrial development, the competitiveness of the undertakings concerned with regard to international competition or the creation or maintenance of employment). In doing so, the minister must adopt a reasoned decision and can only rule on the transaction in question after having heard the observations of the parties to the concentration. The minister's decision can, in the appropriate circumstances, be made conditional on the effective implementation of commitments. Failure of the parties to comply with the commitments prescribed by the minister can result in a series of censures by the Minister (Code de Commerce, Art L430-8, IV).

In July 2018, the French Minister of Economy and Finance exercised for the first time the power set forth in Art L.430-7-1 of the French Commercial Code, allowing the minister to reassess a merger on public interest grounds. In doing so, the minister concluded that the acquirer of a 'ready-made meals' business did not need to divest a certain brand as a precondition of merger clearance, which had been deemed necessary on competition law grounds as a result of the French national competition authority's (NCA's) clearance decision in June 2018 (*Financière Cofigeo/ Agripole group*, Decision No 18-DCC-95, 14 June 2018). The minister's concerns were focused on the negative impact of the remedy on employment, in a sector that required 'revitalisation' that could be achieved only through the merger. In return for such ministerial dispensation, the buyer gave a commitment to maintain present employment levels for a period of at least two years post-merger.

and the Netherlands[24] to be able to overturn a merger ruling of their respective national competition authorities.

The dangers of a minister exercising a veto power to override the decision of the relevant national competition authority must not be overstated, as that power has to date not been exercised with anything other than restraint. Inevitably, when this power is exercised it is justified by reference to overwhelming national security or social interests (especially employment concerns), where the political fall-out from acting in a manner that is contrary to the interests on the national competition authority might not be so risky when measured at the ballot box. The exercise of such ministerial veto power has the added benefit of allowing the national competition authority to perform its legal review unimpeded, while shifting all the political responsibility to the minister should they decide that the political stakes are high enough for them to take action. Moreover, given the fact that such ministerial fiat can only be exercised in relation to matters that fall under the turnover thresholds of the EU Merger Regulation, it will rarely effect mergers that do not have a very subnational focus (eg, affecting a local production facility, foodstuffs and regional retail stores). Nevertheless, it is not difficult to foresee that these sorts of powers are likely to be exercised more frequently in light of the impact of Covid-19 on many national economies, especially where ministerial concern is prompted by the desire to support employment or key local industries that would otherwise exit the relevant market post-transaction.

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24 Under Art 47 of the Dutch Competition Act, the minister can approve an acquisition that has been blocked by the national competition authority, the Autorité de la concurrence (ACM). This has only occurred once, in September 2019, when the Minister of Economic Affairs and Climate approved the acquisition of Sandd by PostNL, to ensure that postal delivery remains affordable, available and reliable in a strongly shrinking market (ie, reasons of public interest outweighing the expected obstacle to competition). Under s 42 of the UK Enterprises Act 2002, the UK's Secretary of State (SoS) can intervene to approve or block a transaction in relation to a defined public interest consideration. However, the SoS can only add a public interest consideration to the merger review process through the triggering of a clear parliamentary process. Thus far, three discrete public interest concerns have been cited under this power: (1) national security; (2) media plurality; and (3) the stability of the UK financial system (the latter was added in 2002 during the financial crisis and in the context of the Lloyds/HBOS merger). In order to intervene, the SoS must issue a public interest intervention notice prior to the Competition and Markets Authority (CMA) issuing its decision on reference. The 2019–2020 financial year saw intervention notices issued on national security grounds in respect of four transactions: *Connect Bidco/Inmarsat*, *Advent International/Cobham*, *Aerostar/Mettis Aerospace* and *Gardner Aerospace/Impcross*. In the first two cases, the SoS accepted undertakings from the parties in lieu of referring the merger to the CMA for a Phase II investigation. Both the *Aerostar/Mettis Aerospace* and *Gardner Aerospace/Impcross* transactions were ultimately abandoned by the parties.

Government-held 'golden shares'

National governments will be subject to many demands for cash injections, loan guarantees and other supporting measures as a response to the economic hardship caused by Covid-19. Clearly, pressure on governments can only result in partial solutions in many cases, given that the state purse is not without limits under the financial strains imposed by the pandemic. Quite often, the state may therefore be limited to injecting capital to the point of being only a minority shareholder. Having said that, the political trade-off might be that it has conferred upon it super-voting rights in relation to key strategic decisions of the company in which it has invested. These rights are often described as amounting to 'golden shares', which are government-held shares in a company that enable it to exercise special rights (usually in the form of veto rights) over changes in the statutes of the company and changes in ownership, and which are usually reflected in provisions in the company's articles of association.

The golden shares inevitably confer upon the government the right to prevent takeovers judged to be contrary to the public interest. This would include foreign takeovers, whether by restricting the issue of new voting shares, placing constraints on the disposal of assets or guaranteeing the place of government-appointed members on the board of directors. This type of instrument was particularly popular during the privatisation wave of state-owned companies in the 1980s and early 1990s, justified by the public interest objectives being pursued at that time. In practice, however, these specific rights have to date only been used to a limited extent.

General principles

The Court of Justice of the EU (CJEU) has found in a number of instances that golden shares issued to governments in energy sector companies may be contrary to the right of freedom of establishment and the free movement of capital, two fundamental rights under the TFEU (discussed above in 'Government-held "golden shares"'). Although golden shares are not illegal per se, the decisional practice of the Commission, as endorsed by the European courts, has induced Member States to limit their use. Thus, the CJEU has held that the following rights attached to golden shares are in breach of these fundamental freedoms under the Treaty, as they are liable to dissuade foreign investment from other Member States, thereby rendering the free movement of capital illusory:

- the pre-approval of share acquisitions;

- the ability to veto asset disposals;
- the requirement to approve a company's winding-up;[25] and
- control over the appointment of directors.[26]

In order to comply with the EU law, a Member State's 'golden share' in an undertaking must therefore be justifiable on the ground that it is in furtherance of public security, public policy or other requirements related to the pursuit of the general interest. The fulfilment of these criteria is interpreted in a strict manner by the European courts, requiring that the 'golden share' must be a necessary, appropriate and proportionate measure in order to attain an objective of general interest.[27]

Security of supply concerns

One of the few occasions where the conferral of golden shares was permissible concerned the Belgian Government's shares in Société National de Transport and Distrigaz,[28] which were justified by the need to protect national interests in the event of a disruption to the gas supply in Belgium. In the circumstances, the golden share in question was considered not to exceed what was necessary to attain the legitimate public security objective, because the rights were structured as follows:

- there was no automatic right of approval for the government, which actively had to intervene, subject to strict time limits, when examining a third-party investment in the company;
- the regime was limited to certain decisions concerning the strategic assets of the companies in question; and
- the investor could appeal to the Belgian Council of State for the annulment or suspension of the government's decision.

The above considerations demonstrate that, in order for the grant of a golden share to be considered proportionate, the golden share must confer strictly limited rights upon its holder.

In a more recent Preliminary Ruling in 2013, the CJEU held in the *Essent* case[29] that the Dutch requirement of public ownership of energy transmission system operators was also justified on the basis of the legitimate interest in maintaining the security of energy supply. On this occasion, the requirements of the Dutch law were more intrusive than in the *Distrigaz* case, insofar as:

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25 See C-212/09 *Commission v Portuguese Republic* [2011] ECR I-10889.

26 See C-171/08 *Commission v Portuguese Republic* [2010] ECR I-6817.

27 *Ibid*.

28 See C-503/99 *Commission v Belgium* [2002] ECR I-04809.

29 See C-105/12–C-107/12 *Essent* [2013] ECLI:EU:C:2013:677.

- the prohibition of privatisation meant that shares held in an electricity or gas distribution system operator had to be held, directly or indirectly, by public authorities;
- the same group prohibition applied to distribution system operators, to the effect that they had to form part of the same corporate group as those companies that generate, supply or trade in electricity; and
- activities were prohibited to the extent that might adversely affect system operators, thereby prohibiting them from engaging in activities that would lead to them being burdened with guarantees of debts of other companies within their corporate group.

The Court, after having determined that the measures constituted restrictions on the free movement of capital, nevertheless concluded that, in the circumstances, they served the legitimate interest of achieving security in energy supply, and were therefore justifiable on overriding public interest grounds.

The response to Covid-19

Most recently, the Commission has opened up the possibility, in the context of the economic shock provoked by the Covid-19 pandemic, of Member States acquiring 'golden shares' in order to prevent the predatory buying of strategic assets by foreign investors. On 25 March 2020, the Commission published its guidance concerning the screening of foreign direct investments from third countries in the context of the recent economic upheaval.[30] The guidance is consistent with the terms of the FDI Regulation, which will apply from October 2020.[31] In that guidance, the Commission opens up the possibility for Member States to mobilise their FDI screening mechanisms, especially resorting to the use of a golden share mechanism, in order to tackle the risk of loss of critical assets and technology both at EU and national level.[32]

While investments in health-related sectors (a clear response to the Covid-19 crisis) provide the focal point of the Commission's guidance, it is also made clear that the goal is to protect *all* strategic industries. Turning to the FDI Regulation, it can be inferred that 'critical' sectors and issues

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30 Communication from the Commission – Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf accessed 27 November 2020.

31 Refer to the discussion above.

32 See Commissioner Vestager's comments at the ABA (virtual) spring meeting of 2020 (on 24 April) https://ourcuriousamalgam.com/livestream-enforcers-roundtable accessed 27 November 2020.

relate primarily to sectors such as energy, transport, water, health, food security, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure and sensitive facilities, as well as land and real estate crucial for the exploitation of such infrastructure. The Commission recalls that, while restrictions on the free movement of capital must be limited to what is necessary and proportionate to achieve a legitimate public policy objective, the permissible grounds of justification may be interpreted more broadly with regard to the movement of capital from third countries when compared to intra-EU capital movements.[33]

The Commission's readiness to accept the existence of golden shares in the current context is also confirmed by Vice-President Vestager, who has stated that the Commission does not 'have any issues of states acting as market participants if they provide shares in a company or prevent a takeover'.[34]

Member States have already quickly moved to strengthen their control over FDI in this respect. For instance, Spain adopted a law on 17 March 2020 addressing the Covid-19 crisis (Royal Decree 8 supplemented by Royal Decree 11 on 1 April), which provides that acquisitions in Spanish companies operating in certain strategic sectors are subject to prior approval, if the acquisition concern more than ten per cent of the shares of the company.[35] France has also adapted its FDI screening scheme, reducing for a limited amount of time the threshold shares percentage above which a foreign (non-EU) acquisition must be approved by the government. This percentage is now only ten per cent, down from 25 per cent, until 31 December 2020.[36]

Conclusions

The Commission's traditional position has been that EU Member States' rights to hold 'golden shares' will be strictly circumscribed both in terms of the scope of those rights in operational terms and the public policy rationale, which justifies the exercise of such rights. The rationale of

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33 Refer to a series of articles written in the *Financial Times* by Javier Espinoza and Sam Fleming on 4 and 16 December 2019 and 12 April 2020.

34 See www.competitionpolicyinternational.com/eus-vestager-warns-pandemic-has-made-companies-vulnerable-to-chinese-takeover accessed 27 November 2020.

35 See www.covcompetition.com/2020/04/no-issues-with-member-state-participations-state-backed-eu-companies-as-the-new-normal accessed 27 November 2020.

36 See www.tresor.economie.gouv.fr/Articles/2020/04/30/covid-19-adaptation-du-controle-des-investissements-etrangers-en-france-ief-pendant-la-crise-sanitaire accessed 27 November 2020.

preserving the security of supply in energy markets[37] has, for example, met with the least resistance historically from the Commission and, more importantly, from the European courts. Having said that, the Covid-19 pandemic has given greater impetus to the use of such powers, as acknowledged recently by the Commission.

This arguably more relaxed attitude on the part of the Commission should, however, be seen in its proper context. Member States are being allowed greater freedom to exercise such rights on the understanding that they are acting against a 'genuine and sufficiently serious' threat to a fundamental interest of society (eg, the security of supply), or because they choose to intervene to ensure an overriding public policy objective that is not purely economic in nature (eg, the preservation of the equilibrium of the social security system, achieving social policy objectives) and within the limits of what is strictly necessary to achieve that legitimate purpose.

These preconditions mean that recent recommendations of the Commission must not be seen, therefore, as a veritable 'free pass' to restrict capital movements in the pursuit of economic objectives. Clearly, one can safely assume that the health sector will be one of those that is prioritised in the wake of the Covid-19 pandemic as a sector worthy of protection through the 'golden share' regime. By the same token, one can readily foresee that the promise of a Member State to bail out a struggling company might also become increasingly predicated upon the satisfaction of a new wave of public interest obligations concerned with the pursuit of environmental and sustainability goals. The particularly proactive statements by France's President Macron[38] in the context of state aid grants by the French state to support ailing companies in the airline and motor vehicle sectors provides a preview to such potential obligations.[39] Even more recent pronouncements

37 See also the Commission's Final Report – Review of national rules for the protection of infrastructure relevant for security of supply, February 2018 https://ec.europa.eu/energy/sites/ener/files/documents/final_report_on_study_on_national_rules_for_protection_of_infrastructure_relevant_for_security_of_supply.pdf; Adam Smith Institute, Golden goal: Protecting vital interests at privatization, 2002 https://web.archive.org/web/20130203091548/https://www.adamsmith.org/80ideas/idea/62.htm.

38 Statement by the President Emmanuel Macron, 12 March 2020 www.vie-publique.fr/discours/273869-emmanuel-macron-12032020-coronavirus accessed 27 November 2020.

39 Refer to commentary in *France 24*, 'France Pledges 15 Billion Euros in Aid for Aviation Sector', 19 June 2020; Kim Willsher, 'Emmanuel Macron Pledges €15bn to Tackle Climate Crisis', *The Guardian* (London, 29 June 2020). The difficulty in a 'golden share' context will be how to couch these sorts of obligations as veto rights, rather than as positive obligations to pursue such policies proactively.

by the Commission itself about the importance of supporting sustainability goals will only add to that impetus.[40]

Excluded sectors

Aside from the exception from the reach of competition rules afforded to those undertakings providing services of general economic interest (SGEI, which benefits from the exception in Article 106(2) TFEU – refer to the discussion below), EU competition law applies across all economic sectors, with very few exceptions. Accordingly, unless one of those narrow exceptions can be relied upon, the full weight of Articles 101 and 102[41] TFEU will be capable of being relied upon to prevent the anti-competitive actions of an undertaking whose shareholders include the state.

NATURE OF THE ECONOMIC ACTIVITY

The key exception relates to those types of sectors where services are not offered on a given market with regard to the profit motive. The provision of these types of services will often be based on the principle of 'national solidarity', and will involve services such as social security, pension services or public national health services.[42] In addition, activities that are fundamentally based on the exercise of public authority fall outside the scope of application of the competition rules. Each activity benefiting from this exception must be subject to its own separate analysis in terms of its nature, aim and its operational rules.[43] Finally, collective labour agreements also fall outside the scope of EU competition rules.[44]

Parties can, in theory, also escape the reach of EU competition rules where they can invoke the 'State compulsion' doctrine. Within the EU legal system,

40 Refer to Leigh Phillips, 'Airlines Brace for Climate Strings Attached to Coronavirus Bailouts', *Politico*, 17 April 2020; Sam Morgan, 'Air France, KLM get Aid Bailout, Green Conditions Still Pending', *Euractiv*, 27 April 2020.

41 Art 101 prohibits all agreements or concerted practice having an anti-competitive design or effect, whereas Art 102 prohibits abuses of a dominant position by an undertaking of group of undertakings acting collectively.

42 See Case C-35/96 *Commission v Italy*, 18 June 1998, ECLI:EU:C:1998:303. See also Case C-159/91 *Poucet et Pistre*, 17 February 1993; *cf* Case C-205/03 *FENIN*, 11 July 2006, ECLI:EU:C:2006:453.

43 Case C-364/92 *SAT Fluggesellschaft 'Eurocontrol'*, 19 January 1994, ECLI:EU:C:1994:7; *cf* Case C-113/07, *Selex Sistemi Integrati SpA v Commission of the European Communities, European Organisation for the Safety of Air Navigation*, 26 March 2009; see also Case C-343/95 *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)*, 18 March 1997, ECLI:EU:C:1997:160.

44 See Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, 21 September 1999, ECLI:EU:C:1999:430; *cf* Case C413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden*, 4 December 2014.

however, recourse to that doctrine is very difficult to sustain. The doctrine cannot be invoked where it would breach a principle of EU law and, in any event, cannot be invoked unless the actions of the state render it practically impossible for undertakings or individuals to diverge their market behaviour from what has been prescribed by the state.[45]

Specific sectors

There are very few sectoral exceptions to the application of EU competition rules, and these few exceptions largely reflect the political and geographical growth of the EU over time.

Thus, although nuclear energy has been based historically on the Euratom Treaty's provisions, which govern various aspects of joint venture formation, equitable supply guarantees and the pricing of nuclear material, the Commission has not hesitated to invoke its competition powers in the nuclear sector where appropriate.[46]

In the agricultural sector, Article 42 of the TFEU provides that the competition rules apply only to the extent required under the Common Agricultural Policy (CAP) (Article 42 of the TFEU). Thus, under Regulation 1184/2006 certain types of practices adopted by farmers' associations are exempted from competition rules where they are restricted to the territory of one Member State. Similarly, Regulation 1308/2013 exempts certain types of agreements 'necessary for the attainment of the objectives' of the CAP and strengthens the bargaining power of farmers involved in joint selling arrangements (including during times of food crisis). Finally, Regulation 1379/2013 specifies particular principles that apply in relation to the fisheries and the aquaculture sector. The existence of these specific legal instruments, however, has not resulted in a significant downturn in Commission competition law investigations into commercial practices in the agricultural sector, with the Commission having conducted 167 investigations in the sector in the period 2012–2017.[47]

Although competition rules apply with regard to the various transport sectors, specific 'block exemption' regulations apply to a range of maritime, aviation, rail and road transport,[48] with only a limited number of modes of

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45 The classic exposition of the limits of the doctrine can be seen in all the cases investigated by the Commission under Art 102 of the TFEU involving alleged margin squeezes.

46 See, eg, Case AT/39.736 *Siemens/Areva*, 18 June 2012; *cf* Case M.7850 *EDF/CGN/NNB Group of companies*, 10 March 2016.

47 Refer to *Report from the Commission on the Application of the Union competition rules to the agricultural sector*, 2018.

48 See Reg 697/2014 (maritime cargo); Reg 169/2009 (technical improvements in rail, road and waterway transport); and Reg 487/2009 (air transport).

transport being deemed to fall outside the Commission competition law investigation powers specified in Regulation 1/2003.[49] In addition, a specific vertical block exemption regime applies to the distribution of motor vehicles.[50] Finally, even though the respective energy and telecommunications sectors are subject to comprehensive regulatory obligations,[51] they have nevertheless been very fertile sources of competition law investigation over the years.

Consequently, while it might be true to say that certain sectors might be subject to a range of very nuanced approaches in the application of competition rules, no sector is exempt from the application of such rules and there is nothing to suggest that the involvement of the state in any company in those sectors should influence the manner in which those rules are applied in practice.

Addressing distortions created by foreign subsidies

In what might ultimately prove to be a radical departure from the themes of state 'restraint' canvassed in this article, the Commission has very recently sought to respond to pressures from European industries and Member States that the commercial interests of the EU need to be more firmly defended against those foreign states that are not considered to 'play by the rules' when insulating their own home-grown businesses from the pressures of international commerce. In June 2020, the Commission foreshadowed the introduction of a far-reaching legal instrument that bestows upon the EU and the Member States a wide arsenal of investigative and remedial powers where it finds that foreign subsidies have had negative effects on EU markets. In its released White Paper,[52] the Commission explains how it intends to tackle such foreign state subsidies, essentially levelling the playing field by closing the regulatory gap that is not covered by EU state aid controls (discussed below) and trade defence instruments.

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49 See Reg 4056/86 (international tramp vessel services and maritime transport services), and Reg (EC) 847/2004 (air transport between Community airports and third countries).

50 See Reg 461/2010 (motor vehicle sector).

51 Some of these regulatory obligations extend well beyond traditional forms of economic regulation and extend to the pursuit of non-competition policies such as the security of supply and the promotion of clean energy sources.

52 White Paper on levelling the playing field as regards foreign subsidies, European Commission, 17 June 2020.

Outline of proposals

According to the Commission, the anti-competitive effects of foreign subsidies would be tackled through three interrelated instruments or 'modules':

- *Module I* would address the distortions caused by foreign subsidies provided to an economic operator active in the EU market. Module I is meant to close an existing regulatory gap, given that EU state aid control only covers subsidies provided by EU Member States, while the WTO anti-subsidy instrument[53] only covers the import of subsidised goods into the EU, and neither covers services nor production within the EU that has been subsidised by foreign states. In addition, Module I would provide the Commission (or the relevant authorities of the EU Member States) with the possibility to review acquisitions of EU targets that have been facilitated by foreign subsidies after they have already undergone a traditional merger review.
- *Module II* would address the issues around foreign state-subsidised acquisitions of EU target undertakings, as well as the potentially distortive effects of foreign subsidies in the context of acquisitions of EU targets. This power of review has a narrower scope than that undergone in Module I, as it is intended specifically to address distortions caused by foreign subsidies that facilitate the acquisition of EU targets, either: (1) directly, by explicitly linking the subsidy to a particular acquisition; or (2) indirectly, by de facto increasing the financial strength of the acquirer, which would in turn facilitate the acquisition. The Commission would review ex officio the merger as to whether possible foreign subsidies are involved, under a compulsory notification mechanism, either in advance, during or after the merger review. The review could ultimately result in the prohibition of the acquisition or, if it has been already completed, in its being unwound.
- *Module III* envisages the introduction of a compulsory notification system to be filed before the relevant contracting authority in relation to any foreign subsidies granted over the past three years in the context of individual public tender procedures, at the point when they submit their bids (including to any of their consortium members or subcontractors and suppliers), and to specify whether such a financial contribution is expected to be received during the period of execution of the contract.

If adopted, these reforms could have far-reaching consequences on how non-EU-owned businesses are run and can invest in the EU. In the Commission's view, subsidies provided by foreign states are liable to distort competition within the EU, either through the financing of acquisitions of EU targets or through the subsidisation of undertakings that are already active in the

53 The WTO Agreement on Subsidies and Countervailing Measures (the 'SCM Agreement').

EU, thereby providing them with an unfair competitive advantage vis-à-vis their European peers.

In being expressed to be designed to address a regulatory 'gap' that currently exists, these new tools will complement existing legal instruments such as merger control, foreign investment controls in strategic sectors and anti-subsidy investigations brought directly at WTO level against foreign states. However, the White Paper can also be seen to be introducing measures with a clear political flavour that are designed to shield EU merger control rules (discussed below) from potential reforms that might include public interest considerations being integrated into the merger review process. Calls along such lines have come from a number of Member States that have expressed their desire to give greater weight to public interest considerations vis-à-vis competition concerns, thereby indirectly supporting the creation of 'European champions' to compete with foreign rivals.[54]

Open issues

The Commission's proposals set forth in its White Paper were the subject of a stakeholder consultation process, which concluded at the end of October 2020, with a view to legislation being tabled in Q2 of 2021. Some of the key elements of the proposals that have been subject to the most stakeholder scrutiny thus far are as follows:[55]

- The breadth of the definition of what constitutes a 'foreign subsidy', the cut-off point for de minimis effects and the public policy trade-offs that will be taken into account when assessing the potential negative impact of such foreign subsidies. Although it sets very concrete goals in terms of the results it seeks to achieve, there are a number of questions that the White Paper leaves unanswered, not the least of which is the open-ended definition of the concept of a 'subsidy'. The respective references in the White Paper to the notion of 'aid' under state aid rules and a 'subsidy' under the WTO SCM Agreement on subsidies are also not particularly helpful, as the scope of these two legal instruments is very distinctive. Moreover, it might not be stretching the imagination of foreign states to subsidise their potential acquirors of EU targets by delivering the subsidies in question through a different channel (or through payments 'in kind').

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54 The political clamour for such policies to be adopted came in the wake of the Commission's merger veto decision in the proposed *Siemens/Alstom* merger (Case M.8677) in 2019. For example, refer to Jorge Valero, '19 EU Countries Call For How Antitrust Rules To Create European Champions', *Euractiv*, 19 December 2018.

55 Eg, refer to the comments of the European Competition Lawyers' Forum, Response to the European Commission's White Paper on levelling the playing field as regards foreign subsidies, 23 September 2020.

- At the heart of any regime designed to attack foreign subsidies is the idea that a 'distortion of the internal market' will occur. However, that concept remains as yet undefined, and it is unlikely that the notion of a 'distortion of competition' can or should be transposed directly from state aid rules, given that the state aid concept is overly wide in its scope, which would mean that a disproportionate number of foreign subsidies might be characterised as being distortive of competition.
- The nature of the intervention that can take place under the anti-subsidy regime, which envisages that certain trade-offs be made with the affected undertakings to redress any competitive imbalances brought about by the foreign subsidies (varying from divestitures to fair, reasonable and non-discriminatory (FRAND) licensing obligations, access obligations and the prohibition of certain investments).
- The reasonableness of any quantitative and qualitative thresholds (measured in terms of volume, value and timeframe) that might trigger a pre-notification obligation, especially given that an intervention under the anti-subsidy regime would be able to address a much wider range of target transactions than currently occurs under merger practice (eg, it would potentially extend to the acquisition of minority shareholdings conferring 'material influence' on the buyer, rather than being limited to the acquisition of some form of 'control').
- The proposal that mergers will be subject to a 'standstill' provision (ie, non-enforceability of the transaction until clearance has been received) while the anti-subsidy review is taking place.
- The formulation of a sufficiently robust test that can identify whether the foreign subsidies in question actually facilitated the EU acquisition under review and whether or not that acquisition would result in a distortion of the internal market (measured in terms of the size of the beneficiary and the acquiror, the size of the subsidy, the economic situation prevailing in the affected markets and the level of activity in the common market of the parties concerned).
- The procedures and the assessment techniques to be adopted by the various public procurement authorities where a bid has been shown to be subsidised by foreign subsidies, including the exclusion form the tender and from subsequent tenders for a number of years.

Conclusions

While the policy drivers behind the Commission's initiative are clearly not ill-founded, especially when couched in terms of the need to create a 'level playing field', the Module I proposals as they currently stand mark

a stark departure from the usual checks and balances afforded under the EU legal order. The unusually wide margin of discretion proposed to be accorded to the Commission in foreign subsidy investigations, coupled with the lack of any legal standing for stakeholders and the fact that the Commission can launch an investigation ex officio, added to the fact that the Commission might close an investigation without recourse to an appeal,[56] may render decision-making under the new regime highly politicised, reflecting the policy priorities of a particular commissioner at a given point in time. This may in turn have the effect of undermining the legal credibility of the new instruments.

The proposals also tend to rely in large measure on the assumption that third countries will accept the extraterritorial application of the proposed new legal regime in much the same way as they accept the extraterritorial long arm of EU merger rules. However, this tends to ignore the fact that almost all countries around the world with competition law regimes also operate merger rules that apply to foreign entities to varying degrees. That is not the case as regards foreign subsidies; the proposed new tools are unprecedented in the global legal order, as the EU's trading partners have no similar legal instruments designed to hinder inward investment. More generally, the idea of controlling state subsidies, other than in the rather limited context of the WTO SCM Agreement, is unknown outside the EU other than in those sovereign states that have bilateral agreements with the EU.[57] Seen in this broader context, it may be wishful thinking to anticipate that foreign states will cooperate with the EU in determining the precise scope and scale of subsidised assistance to potential acquirers of EU targets.

In addition, one could argue that the Module II proposals go well beyond the closing of any perceived regulatory gap between state aid policy and foreign trade law instruments. The powers that exist under the Module II proposals have the potential to lead to discrimination against direct foreign investment in the EU and, as such, might have far-reaching consequences for Europe's economy through the discouragement of inward investment. In this regard, one must not lose sight of the fact that EU state aid policy is neutral as regards state or private ownership. There is nothing to prevent a Member State or publicly owned company from investing in the economy of any given EU Member State through an acquisition, as long as the publicly owned acquirer has paid the

56 Legal precedent for the discretion to close down investigations can also be found in the Commission's practice under Art 106 of the TFEU.

57 Currently, the EU is involved in a number of bilateral trade agreements containing provisions that require the respect of state aid rules, including those with Canada, Morocco and Jordan (but no state aid provisions in the bilateral agreements between the EU and Mexico, Algeria and Lebanon). Further, see 'How State Aid Became a Brexit Deal-Breaker' *The Economist* (London, 19 September 2020).

market price for the target company. Indeed, the very mechanism foreseen in the White Paper as leading to public mischief – the use of a bidding process – would under state aid rules be considered to be the ideal mechanism through which to determine the real value of an asset. By contrast, the adoption of an overly broad definition of what constitutes a 'foreign subsidy' that can trigger a notification obligation could undermine the effectiveness of new regulatory regime and might discourage direct foreign investment into the EU.

As regards the Module III proposals dealing with the introduction of a compulsory notification scheme before national authorities in public procurement situations, one can envisage that such a system could be open to widespread protectionist actions taken by Member States designed to ensure that local suppliers are best placed to win public contracts, at least where the major source of competition is likely to be from a third country supplier. This threatens to fragment the EU, as one can imagine that the disposition of each Member State towards foreign entities will vary widely as between Member State and as between industrial sectors within those Member States. Accordingly, the central role accorded to the Commission under the proposals is critical in terms of maintaining the consistency in approach towards companies from third countries supported by state subsidies.

In conclusion, the proposed regulatory framework presented in the White Paper is undeniably a very ambitious project to pursue appropriate levels of regulatory oversight of the role played by foreign subsidies in the EU economy. Having said that, both the details of the substantive scope and the procedural rules of the proposed new legal instruments will determine ultimately how effective these tools are likely to be in the Commission's regulatory toolkit for improving the internal market. In its pursuit of this strategy, the reaction of the EU's major economic partners will also be likely to influence heavily how far the Commission will seek to push the boundaries of this new regulatory regime and how effectively it can implement it in practice. While introducing new legal tools to level the playing field in the internal market will indeed be seen by many to be both a necessary and a welcome development in numerous European capitals,[58] it will be important for the Commission and the Member States not to lose sight of the fact that existing established legal instruments are already in place, which simply require the Commission to act more boldly with trade defence measures to achieve the same objectives. It may be the case that companies from foreign states will only be willing to give the Commission the benefit of the doubt that the new foreign subsidy regime will not be abused if the final measures enacted over the course of 2021 have appropriate checks and balances found elsewhere under EU law.

58 The response of Chinese lobby groups has been less enthusiastic about the proposals; refer to Foo Yun Chee, 'Chinese Lobby Group Slams EU Plan Against State-Backed Foreign Buyers' *Reuters* (London, 24 September 2020).

EU legal order constraints on Member State action

The European socio-economic tradition is one where the role of the state has always been considered to be important, even in those Member States that are fully committed to the principles of a free market. Unlike the United States, for example, the historical role of the EU Member States at the heart of every utility sector or other strategic sector of the economy has been prevalent. Thus, even though it is an overriding goal of EU policy to forge a common market and to block national obstacles to trade, the various European treaties are, in effect, 'agnostic' on the issue of whether or not a Member State can play a role in the private sector economy. This agnosticism captures the varied traditions of Member States, such as Sweden and Greece, in terms of both their political and institutional traditions, with both those Member States having long traditions of state involvement in key aspects of their economies, whether to preserve health and safety, ensure the security of supply of key services, or in order to provide services widely perceived to rest in the domain of 'natural monopolies'.

However, whereas from a strictly legal point of view, the state's interests can continue to be represented in commercial markets despite sweeping generations of market liberalisation across most sectors in the EU, the *exercise* of these interests is subject to compliance with a series of important and relatively unique legal principles, which ensure that the ability of an EU Member State to distort competitive markets will be limited. The key aspects of this overriding policy momentum are discussed below.

State aid practice

Arguably the most unique aspect of EU competition policy is the prohibition of state aid measures, which is not found in other competition law regimes around the world other than a number of third countries that have entered into bilateral cooperation agreements with the EU. State aid is defined as an advantage in any form whatsoever that is conferred on a selective basis to private or public undertakings by national public authorities. These subsidy measures are generally prohibited because their selective quality threatens to distort competition insofar as it affects trade between Member States (Article 107(1) of the TFEU).

This general prohibition on state aid is subject to a series of exceptions in terms of general economic development goals, regional development policies or specific industry characteristics (including coal, agriculture and broadband) (Article 107(3) of the TFEU). To ensure that the prohibition on state aid and the exceptions that apply to the principle are applied

consistently across the EU, the Commission has had conferred upon it exclusive jurisdiction to ensure that grants of state aid comply with EU rules (Article 108 TFEU). State aid found to be inadmissible shall be returned to the granting Member State in order to redress the competitive imbalances created, along with interest accrued over the period until its repayment.[59]

The response to Covid-19

The Commission's usual tough stance on state aid has, in the very exceptional circumstances of economic downturn created by the Covid-19 pandemic, been significantly relaxed in those situations where the aid grants are designed to address specific concerns generated by the pandemic. Thus, on 19 March 2020, in order to address the both the long-term and the short-term economic impacts of Covid-19, the Commission adopted its Temporary Framework[60] for state aid measures to support the European economy. Based on Article 107(3)(b) TFEU, the purpose of the Temporary Framework is to remedy 'serious disturbances' in the economies of the Member States by authorising the grant of liquidity support to undertakings that have faced financial difficulties since 31 December 2019 owing to the effects of the pandemic. Such support can be granted in one of five ways:

1. aid up to €800,000 may be granted to a single undertaking as a lump sum, a repayable advance or tax advantages;
2. state guarantees with below-market interest rates for loans taken by companies from banks, in order to ensure credit access;
3. subsidised interest rates for a limited period and loan amount (loan guarantees must not be cumulative in nature);[61]
4. liquidity support in the form of loan guarantees with below-market interest rates and loans with subsidised interest rates via credit institutions, such as banks;[62] and
5. aid for marketable risks through credit-export insurance, provided there is evidence of the unavailability of private insurance coverage.

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59 For a detailed discussion of EU state aid practice, refer, inter alia, to the following: Leigh Hancher, Tom Ottervanger and Piet Jan Slot (eds), *EU State Aids* (5th edn, Sweet & Maxwell 2016); Franz Jürgen Säcker and Frank Montag (eds), *European State Aids: A Commentary* (CH Rese/Hart/Nomos 2016); Kelyn Bacon, *European Community Law of State Aid* (Oxford University Press 2009); Herwig C H Hoffman and Claire Micheau, *State Aid Law of the European Union* (Oxford University Press 2016).

60 Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (2020/C 91 I/01) C/2020/1863 OJ C 91I , 20 March 2020, pp 1–9.

61 *Ibid*, para 26.

62 The aid element is present only for the final beneficiary and therefore, Member States must introduce safeguards in order to avoid possible indirect aid to the financial institution, which is to act as a mere financial intermediary.

The Temporary Framework is structured in such a way that it will only remain applicable until 31 December 2020. Those undertakings that are eligible to receive aid will only be those undertakings that were not in financial difficulties, for the purposes of the General Block Exemption Regulation (GBER),[63] as of 31 December 2019, having only encountered financial difficulties as a result of the Covid-19 outbreak.

The Temporary Framework also confers upon Member States the possibility of granting support to affected undertakings through the mechanism afforded under Article 107(2)(b) TFEU. According to that Treaty provision, aid to compensate for the damage caused by natural disasters or exceptional occurrences must be considered to be compatible with the internal market. On 12 March 2020, only days prior to the enactment of the Temporary Framework, the Commission concluded that it would consider Covid-19 to be a 'serious occurrence' for which aid could be authorised to cover significant damage that had been incurred by large event-organising undertakings to compensate for the lack of spectators or attendees at Danish events owing to the Covid-19 outbreak.[64] The main condition for approving such aid is the presence of a causal link between the damages suffered by the undertaking in question and the Covid-19 pandemic.

According to the Temporary Framework, aid granted on the basis of Article 107(2)(b) TFEU must only compensate undertakings for damage that has been directly caused by the Covid-19 outbreak (eg, damage directly caused by quarantine measures precluding the beneficiary from operating its usual economic activity). By contrast, those aid measures that address the economic downturn generated from the outbreak in a more general way need to be assessed under the terms of Article 107(3)(b) TFEU.

Revisions to the Temporary Framework (1)

Shortly after its entry into force, the Temporary Framework was amended[65] to include aid given for R&D measures related to tackling Covid-19, testing facilities and Covid-19 medical products. The amendment also allowed aid in the form of deferrals of tax or social security contributions for undertakings that are particularly affected by the pandemic, such as those in particular sectors of the economy, regions or undertakings of a certain size. This aid

63 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Arts 107 and 108 of the Treaty, OJ L 187.

64 State Aid SA.56685 (2020/N) – Compensation scheme for cancellation of events related to COVID-19 (Denmark), C(2020) 1698 final.

65 Amendment to the Temporary Framework for state aid measures to support the economy in the current COVID-19 outbreak (2020/C 112 I/01), OJ C 112I, 4 April 2020, pp 1–9.

must also be granted before 31 December 2020, with anticipated deferrals not being able to be extended beyond 31 December 2022.[66] The undertakings in question can also benefit from government wage benefit schemes for employees that would have otherwise be laid off as a consequence of the suspension or reduction of business activities due to the pandemic. The monthly wage subsidy cannot exceed 80 per cent of the monthly gross salary of the personnel that benefit from such a scheme.[67]

Further Revisions to the Temporary Framework (2)

On 8 May 2020, the Commission further amended the state aid Temporary Framework.[68] It did so by extending the scope of the Framework by authorising state recapitalisations in the form of equity instruments (the issuance of new common or preferred shares) and/or hybrid capital instruments, such as profit participation rights, silent participations and convertible secured or unsecured bonds to undertakings facing financial difficulties due to the Covid-19 pandemic.

Recapitalisation measures are generally considered to be highly distortive of competition. Therefore, a number of strict conditions must be satisfied before a Member State can authorise these forms of aid under the Temporary Framework. First, the beneficiary must prove that, in the absence of the intervention, it would go out of business or would face serious difficulties to maintain its operations. This can be reflected in the beneficiary's debt-to-equity ratio or similar financial indicators. Second, an intervention by the state must be in the common interest. A common interest can take the form of avoidance of social hardship or market failure owing to a significant loss in employment, the exit of an innovative or systemically important company or the risk of disruption of an important service. Third, the beneficiary must not be able to attract financing on the market at affordable terms and must prove that the measures to cover its liquidity needs, adopted by the Member State in which it is based, are insufficient to cover its viability. Finally, the beneficiary must be shown not to have been an undertaking that was already in difficulty prior to 31 December 2019.[69]

As a return on its investment, the Member State in question must be remunerated at a rate that is as close as possible to the level that would be generated on market terms. In turn, a capital injection by the state must be

66 *Ibid*, at para 21.
67 *Ibid*, at para 22.
68 Amendment to the Temporary Framework for state aid measures to support the economy in the current COVID-19 outbreak (2020/C 164/03), OJ C 164, 13 May 2020, pp 3–15.
69 *Ibid*, pp 3–15, para 37.

conducted at a price that does not exceed the average share price of the beneficiary over the 15 days preceding the request for that capital injection. Where beneficiaries are not publicly listed companies, an independent expert must estimate the market value of the company.

Conditions incentivising state disengagement

The recapitalisation measures provided by the Member States must include a step-up mechanism, which will gradually increase the remuneration received by the state, thereby incentivising the beneficiary to buy back the state capital injections. This mechanism will correspond to at least a ten per cent increase in state remuneration and will be activated four years after the equity injection occurs where the state has not sold at least 40 per cent of its equity participation or, after six years, if the state has not sold its full equity participation by that time.

The Commission has included additional criteria in order to ensure that the distortion of competition will be minimised. Thus, beneficiaries under the Temporary Framework cannot:

1. engage in aggressive commercial expansions;
2. advertise that they are receiving state recapitalisation grants for commercial purposes;
3. acquire more than ten per cent stake in competitors while at least 75 per cent of the recapitalisation measures have not been redeemed; and
4. make dividend payments, as long as the recapitalisation measures have not been fully redeemed.

Furthermore, for those recapitalisation measures above €250m made to beneficiaries with significant market power, Member States must propose additional measures to preserve effective competition.

The need for clear exit strategies

Finally, in order to benefit from such recapitalisation measures, beneficiaries must be able to present an exit strategy. Thus, except for small and medium-sized enterprises (SMEs), all beneficiaries that have benefited from recapitalisation that is greater than 25 per cent of their equity at the time of the intervention must demonstrate that they have an exit strategy from the state participation, unless the participation is reduced below 25 per cent of their equity within the first 12 months from the date on which the aid was granted. The exit strategy must include the plan by the beneficiary for the continuation of its activity, an explanation of the use to which state funding will be put, a payment schedule for the remuneration and the redemption

of the state investment and an overview of the measures that the beneficiary and the state will take in order to abide by that schedule. The exit strategy must be presented and approved by the Member State within 12 months of the grant of the aid. If, six years after the recapitalisation has taken place, the level of state participation exceeds more than 15 per cent of the beneficiary's equity, a restructuring plan in accordance with the Rescue and Restructuring Guidelines[70] must be notified to the Commission for approval.

Thus, it is clear that, even though the Commission has opted to allow partial state ownership in order to tackle the economic consequences of the Covid-19 pandemic, the numerous detailed working conditions and mandatory exit strategies that need to be satisfied in order for the state to play an ownership role make it clear that state participation is unambiguously seen as a temporary solution rather than as a long-term strategy goal for EU undertakings.

THIRD AMENDMENT TO THE TEMPORARY FRAMEWORK (3)

On 29 June 2020, the Commission adopted a third amendment[71] to the Temporary Framework, in order to facilitate the grant of aid to micro and small companies, as defined in Annex I of the GBER, in the wake of the Covid-19 pandemic. Thus, undertakings with either fewer than 50 employees or less than €10m of annual turnover and/or an annual balance sheet total that were already in difficulty on 31 December 2019 can nevertheless benefit from state aid measures via one of the avenues available under the Temporary Framework, provided that they are not subject to a collective insolvency procedure under national law and that they have not received any rescue or restructuring aid.[72]

The third amendment also further encourages private investors to participate in recapitalisation measures. In the case of Covid-19-related recapitalisations of undertakings for which the state is already a shareholder, where a private investment is made on an equal footing with the state and amounts to at least 30 per cent of the new equity injected in the company, at least some of the strict criteria imposed in the second amendment of the Temporary Framework (see above) are relaxed. In these cases, Member

70 Guidelines on state aid for rescuing and restructuring non-financial undertakings in difficulty OJ C 249.

71 Communication from the Commission Third amendment to the Temporary Framework for state aid measures to support the economy in the current COVID-19 outbreak (2020/C 218/03), OJ C 218, 2 July 2020, pp 3–8.

72 Undertakings that have received rescue aid are eligible if they have reimbursed the loan or terminated the guarantee at the moment of granting of the aid. Undertakings that have received restructuring aid are eligible if they are no longer subject to a restructuring plan at the moment of granting of the aid.

States would not need to present an exit strategy, or a step-up mechanism in case they do not sell their participating stake after six years, with the ban on acquisitions being limited to only three years and dividends being capable of being paid to certain shareholders, especially the holders of new shares. This change clearly presents a great commercial incentive for private participation.

Finally, the amendment forbids any aid granted under the Temporary Framework on the basis of Article 107(3)(b) or (c) TFEU being conditioned on the relocation of a production facility or any other activity of the beneficiary from another country within the European Economic Area (EEA) to the territory of the Member State granting the aid. This provision aims to protect the internal market, since such conditions would have an adverse effect to its proper functioning.

Fourth amendment to the Temporary Framework (4)

On 13 October 2020, the Commission adopted its fourth series of amendments to its Temporary Framework. These amendments extend the operation of the Framework by a further six months until 30 June 2021. Moreover, recapitalisation measures, which could have already been granted in exceptional circumstances until 30 June 2021, will now be extended for a further three months until 30 September 2021.

In addition, national governments would be able to cover part of undertakings' fixed costs in order to prevent deterioration of their capital and will provide Member States with additional possibilities to exit its equity support, but only upon the satisfaction of certain criteria.[73] As the existing Temporary Framework stood after the third series of amendments, an undertaking that received equity support from a Member State was obliged

73 These criteria are as follows: (1) the aid is granted no later than 30 June 2021 and covers uncovered fixed costs incurred during the period between 1 March 2020 and 30 June 2021; (2) the aid is granted on the basis of a scheme to undertakings that suffer a decline in turnover during the eligible period of at least 30 per cent compared to the same period in 2019; (3) uncovered fixed costs are the only costs incurred by undertakings during the eligible period that are not covered by the profit contribution during the same period (ie, revenue minus variable costs), and which are not covered by other sources, such as insurance, temporary aid measures covered by this Communication or support from other sources; (4) the aid intensity shall not exceed 70 per cent of the uncovered fixed costs, other than micro and small companies, where the aid intensity shall not exceed 90 per cent of the uncovered fixed costs; (5) the overall aid shall not exceed €3m per undertaking and cannot be cumulated with other aid for the same eligible costs; and (6) such aid may not be granted to undertakings that were already in difficulty as of 31 December 2019, other than micro or small enterprises, provided that they are not subject to a collective insolvency procedure under national law, and that they have not received rescue or restructuring aid.

to buy back its stake from the Member State or to sell its shares on the stock market after a public consultation.

The latest amendments are designed to widen an undertaking's options, after an initial two-year period since the grant, to revert fully to the market where the state is the sole shareholder. Thus, an independent valuation process will replace the public consultation procedure preceding a share sale on the stock market; if a positive market price is established, the state will be deemed to have exited from the Covid-19 recapitalisation, even if it continues to remain as a shareholder in the subsidised undertaking. Where the injections of capital exceed €250m, the Member State in question will need to submit an independent valuation for review by the Commission.

The new amendments also introduce other options for the state to exit the aid-supported undertaking where the state is merely one of a number of shareholders. In such cases, the state will be able to benefit from the new available procedures only for a portion of the capital that corresponds to its pre-Covid holding in the undertaking. In order for the state to be able to dispose of the remainder of its stake, it will need to organise a competitive process of sale in which it cannot exercise priority rights.

The implications of these changes will be a significant expansion of the options available to the state to remove itself from the private sector, while at the same time providing very real incentives for private undertakings to reclaim their shareholdings and to shed their state-sponsored 'security blanket' at some point in the future. They do not appear to dilute the momentum of the state's departure from the private sector, which has been a consistent feature of the response to the Covid-19 pandemic, despite the easing of conditions that need to be satisfied for compliance with the temporary state aid regime.

Practical challenges for state-sponsored entities

Given the ever-increasing growth of state involvement in Covid-19 affected undertakings, the role of the state will pose challenges to the aid-supported undertakings when the assessment of compatibility with Article 107 TFEU is to take place. In this respect, two key doctrines are arguably critical to the functioning of such state-aided undertakings, namely, the extent to which they can: (1) legitimately claim that their commercial decision-making is in accordance with the 'Market Economy Operator' principle; and (2) benefit from being classified as an undertaking providing an SGEI if, as part of their mandate, they provide services for the benefit of the public that can otherwise not be provided by private undertakings operating in a free market setting. In each case, the practical workings of these doctrines are fundamental to the question of whether state-supported undertakings can act truly independently in the marketplace.

The Market Economy Operator principle

According to Article 345 TFEU, 'Treaties shall in no way prejudice the rules of Member States governing the system of property ownership'. Among other matters, the logical interpretation of this provision is that it enshrines a principle of equal treatment between public and private undertakings.[74] In the context of EU state aid rules, this principle necessarily means that, in granting direct or indirect financial benefits to an undertaking, the public authority in question is bound by the same rules, regardless of whether the beneficiary is a public or a private undertaking.

In order to ensure that government-supported undertakings do not depart from the principle of equal treatment in the state aid context, a doctrine has been developed over the years, which requires that any capital injection or similar selective measure to the benefit of a state-owned company would need to be in compliance with the 'Market Economy Operator' (MEO) principle.[75] In a nutshell, the MEO principle[76] requires the Commission to examine whether, in light of all the relevant circumstances, a private investor would be prepared to assume the sorts of risks required under the investment in question on the same commercial terms as have been accepted by the state.[77] In applying the principle, the European courts have accepted that the Commission has a significant degree of discretion, given the range of circumstances that it can legitimately take into account.

For the purpose of applying the MEO test, only the benefits and obligations linked to the role of the state as an economic operator shall be taken into account, without taking into consideration its obligations as a public authority.[78] This in itself presents a challenge for Member States, since they are not as free to reinject capital into an undertaking as private owners or investors would be. Instead, unless the capital contributions made by the state

74 Case C-214/12 P *Land Burgenland and Others v Commission* [2014] ECLI:EU:C:2013:682, para 89.

75 See, eg, Case C-39/94 *SFEI and Others* [1996] ECLI:EU:C:1996:285, paras 60–61.

76 Which can be broken down further, depending on the particular circumstances of the state subsidy in question, into a 'private creditor test' or a 'private purchaser test', as the case may be. Refer to discussion in n 59 above: Hancher, Ottervanger and Slot, at paras 3.163–3.222.

77 Commission Notice on the notion of state aid [2016] OJ C262/01, at para 76.

78 Case C-124/10 P *Commission v EDF* [2012] ECLI:EU:C:2012:318, paras 79–81; Case C-234/84 *Belgium v Commission* [1986] ECLI:EU:C:1986:302, para 14; Case C-334/99 *Germany v Commission* [2003] ECLI:EU:C:2003:55, para 134.

fall within the scope of either the De minimis Regulation[79] or the GBER,[80] Member States must notify such capital injections to the Commission, which will in turn assess the compliance of such measures to the Commission to be assessed against the MEO principle and the criteria set forth under Article 107(1) TFEU. If the measures in question constitute state aid under that provision, Member States will need to prove that the aid is compatible with the internal market. In a scenario where many undertakings are at least partially state-owned or state-subsidised, such lengthy administrative procedures could significantly affect the dynamic of the market.

A typical state aid challenge that state-owned entities face is acts of recapitalisation of their subsidiaries. When providing liquidity or assets to a subsidiary, a state-owned entity needs to prove that it is acting independently, and not under the direction of the state, in order to avoid the measure being deemed to be imputable to the state. It is important to note that, even if the state is in a position to exercise control over a public undertaking and to thereby exercise a dominant influence over its operations, the actual exercise of that control in a particular case cannot be automatically presumed.[81] Instead, 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.[82] Such circumstances might consist of the fact that the state-owned entity would be unlikely to have taken the decision in question without taking into consideration the instructions of the public authorities[83] or because it had to take into account directions issued by the public authorities.[84] On the other hand, the CJEU has held that when the sole director of a company acts improperly and deliberately keeps his actions a secret, the measure cannot be imputable to the state.[85]

Despite the fact that the MEO principle is always subject to the residual criticism that it is an unwieldy tool, the EU legal order has not been able to identify a more viable basis upon which to test whether the state is engaging in

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

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

81 Case C-482/99 *France v Commission (Stardust)* [2002] ECLI:EU:C:2002:294, para 52.

82 *Ibid*, para 55.

83 Joined Cases C-67, 68 and 70/85 *Van der Kooy v Commission* [1998] ECLI:EU:C:1988:38, para 37.

84 Case C-303/88 *Italy v Commission*, cited above, paras 11 and 12; Case C-305/89 *Italy v Commission*, cited above, paras 13 and 14.

85 Case C-242/13 *Commerz Nederland* [2014] ECLI:EU:C:2014:2224, para 37.

conduct that would not be considered to be appropriate for a private market actor. It is inevitably the case that a typical EU Member State government will have a better credit rating, better access to financing resources, the ability to engage in very large projects (usually infrastructure-related) and the ability to take a longer-term perspective on investment returns than would a typical private investor. Accordingly, it is important that the discretion afforded to the Commission in applying the MEO principle be circumscribed appropriately. In this regard, the EU requirements regarding the transparency of capital flows between the Member States and subsidised undertakings plays a significant role in the imposition of some limits on the Commission's discretion (see the discussion below).

SGEI

Aside from Member State action designed to protect local undertakings from being taken over (see earlier discussion), Member States' responses to Covid-19 might be to trade off capital injections or other forms of support by burdening the recipient undertaking with a raft of public service obligations. This will especially be the case where the state feels that the undertaking under financial threat is performing a critical public service whose provision should not be assessed by reference to normal market economics.

The delicate balancing act that needs to be performed in reconciling such public service obligations with the importance of ensuring that a free market functions as smoothly as possible is reflected in a unique Treaty provision, which regulates the circumstances under which so-called SGEI will be exempted from the usual reach of the competition law provisions under Articles 101 and 102 TFEU and from the state aid prohibition under Article 107 TFEU. According to Article 106(2) of the TFEU:[86]

> '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 this Treaty, in particular the rules on competition insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The developments of trade must not be affected to such an extent as would be contrary to the interests of the European Union.'

Article 106(2) TFEU thus restricts the scope of application of the competition rules, including state aid rules, in an attempt to strike a balance between the market-oriented objectives of EU competition law

86 Art 106(2) sits within a broader hybrid regulatory/competition law framework, which governs those undertakings that operate in a market under 'special or exclusive rights'. Refer to discussion below on Arts 106(1) and 106(3) TFEU.

and any given Member State's interest in providing quality, safe and affordable SGEI. The policy motivation is to ensure the ability of individual Member States to organise certain matters of public interest in their own territory in a manner that better fits the geographical, social or cultural realities of its citizens.[87] Seen in this context, the Article 106(2) TFEU exception reflects an important degree of tolerance in deference to national interests by allowing for a derogation from the competition rules where genuine public service goals are being pursued, as defined by each Member State to take account of particular socio-economic and demographic realities.

The scope of the SGEI concept

The concepts of an SGEI and a 'revenue-producing monopoly' are not defined in the TFEU. As regards those undertakings having the character of a revenue-producing monopoly, it is generally understood that this expression refers to monopolies that have been created solely for the purpose of raising revenues for the state.[88] As regards an SGEI, the Commission takes the view that the term refers to 'services of economic nature which the Member States or the [Union] subject to specific public service obligations by virtue of a general interest criterion'.[89] According to the relevant case law, the Member States enjoy a wide discretion in defining what they consider to be an SGEI.[90] The EU institutions, however, have outlined certain necessary characteristics that an SGEI must fulfil.

Thus, such services must be made available continuously, transparently, be of a specified quality, at an affordable and uniform tariff, and must be made available to all consumers in the relevant territory of the Member State.[91] Examples where services have been held to satisfy such characteristics include:

- the operation of a universal postal service;[92]

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87 Protocol No 26 on Services of General Economic Interest annexed to OJ C115/308, Art 1.

88 Richard Whish and David Bailey, *Competition Law* (8th edn, OUP 2015), 250.

89 Commission, 'Green Paper on Services of General Interest', COM(2003) 270 final, at para 17. See Commission, 'A Quality Framework for Services of General Interest in Europe' COM(2011) 900 final, at p 3.

90 Case T-17/02 *Fred Olsen, SA v Commission* [2005] ECLI:EU:T:2005:218, paras 215–228.

91 Commission, 'Green Paper on Services of General Interest', COM(2003) 270 final, paras 50–64; Case T-289/03 *BUPA* [2008] ECLI:EU:T:2008:29, paras 10–12.

92 See Case C-320/91 *Criminal proceedings against Paul Corbeau* [1993] ECLI:EU:C:1993:198, para 15; Joined Cases C-147 and C-148/97 *Deutsche Post AG* [2000] ECLI:EU:C:2000:74, para 44.

- the provision in certain sectors of non-economically viable services (eg, mooring services in ports);[93]
- waste processing;[94]
- pension schemes fulfilling a social function;[95]
- ambulance services;[96] and
- the provision of private medical insurance.[97]

The above list of services that have benefited from the Article 106(2) TFEU exemption does not mean that undertakings entrusted with providing SGEI are per se exempted from the application of the competition rules. The provision provides for a derogation from the application of the competition rules for these undertakings, but *only to the extent that the application of competition law would obstruct the performance, in law or in fact, of the tasks assigned to them*. What this means in practice is that it is not possible to rely on this derogation if the development of trade would be affected to such an extent that it would be contrary to the interests of the EU. Indeed, given that it is a derogation from the application of Articles 101 and 102 TFEU, the CJEU has ruled that Article 106(2) TFEU must be construed narrowly and interpreted strictly.[98] Ultimately, the scope of the derogation depends on the CJEU's appreciation of the proper degree of discretion that should be afforded to Member States in the area in which the SGEI is being provided.

The limits of exclusion from competition rules

Most importantly, as the case law confirms, state-subsidised undertakings cannot use their SGEI status in such a way as to expand their privileged status into adjacent markets that do not underpin the SGEI role.

In *Corbeau*, for example, the CJEU acknowledged that the Belgian Post Office was entrusted with an SGEI, and that, pursuant to its universal postal service obligation, it might be necessary for it to benefit from a restriction of competition in order to be able to offset its less profitable activities against its more profitable ones.[99] Nevertheless, the Court applied Article 106(1) TFEU in conjunction with Article 102 without identifying a separate form of abusive conduct by the undertaking concerned, thus suggesting that the mere creation of dominance resulting from the conferral of exclusive rights

93 Case C-266/96 *Corsica Ferries France* [1998] ECLI:EU:C:1998:306, para 45.

94 Case C-203/96 *Chemische Afvalstoffen Dusseldorp* [1998] ECLI:EU:C:1998:316, para 67.

95 Case C-67/96 *Albany International* [1999] ECLI:EU:C:1999:430, para 105.

96 Case C-475/99 *Firma Ambulanz Glöckner* [2001] ECLI:EU:C:2001:577, para 55.

97 Case T-289/03 *BUPA* [2008] ECLI:EU:T:2008:29, paras 206–7; Case C-437/09 *AG2R Prévoyance* [2011] ECLI:EU:C:2011:112, paras 80–81.

98 Case C-157/94 *Commission v Netherlands* [1997] ECLI:EU:C:1997:499, para 37.

99 Case C-320/91, paras 15 and 17–18.

would lead to the infringement of Article 102.[100] In other words, the Court construed the Belgian Post office's SGEI mandate very narrowly. By contrast, in the *Corsica Ferries* case, the Court had to consider whether mooring operations constituted an SGEI. The Court pointed out that, for reasons of public safety in port waters, mooring groups were obliged to provide at any time and to any user universal mooring service.[101] Consequently, pursuant to Article 106(2) TFEU, the inclusion within the overall price of a component designed to cover the cost of maintaining the universal mooring service was not incompatible with Article 106(1) TFEU, when read together with Article 102.[102]

The widening of the protection provided by Article 106(2) TFEU to undertakings entrusted with SGEI is also evidenced in *Albany*.[103] There, the Court was faced directly with the question of whether the exclusive right conferred on a sectoral pension fund to manage a supplementary pension scheme could fall within Article 106(2) TFEU. The Court was quick to assert that, by exercising the exclusive rights granted to it, the dominant undertaking would be led to abusing its dominant position.[104] Thus, the focus, once again, was on the possible application of the SGEI derogation provided under Article 106(2) TFEU.[105] In this regard, the Court pointed out that the supplementary pension scheme fulfilled an essential social function within the Dutch pension system.[106] This allowed the Court to conclude that the removal of the exclusive right conferred on the sectoral pension fund might render impossible the performance of the SGEI entrusted to it under economically acceptable conditions.[107]

In a similar vein, in *Deutsche Post* the Court held that Article 106(2) TFEU justified the grant by a Member State to its postal operators of a statutory right to charge internal postage on international re-mail services.[108] According to the Court, if Deutsche Post were obliged additionally to deliver mail to German residents outside Germany without any provision allowing for financial compensation, the economically balanced performance of this task would be jeopardised.[109] Furthermore, in *Entreprenørforeningens Affalds*, it was accepted by the Court that the derogation provided in Article 106(2)

100 *Ibid*, at paras 13-21.
101 Case C-266/96, para 45.
102 *Ibid*, at paras 46-47.
103 Case C-67/96.
104 *Ibid*, at paras 94-97.
105 See n 103 above, at para 98.
106 *Ibid*, at para 105.
107 *Ibid*, at para 111.
108 Joined Cases C-147 and C-148/97, at paras 41–54.
109 *Ibid*, at para 50.

TFEU may successfully apply in order effectively to address environmental considerations.[110] Other cases where the core concern of the judgments was Article 106(2) TFEU include *Ambulanz Glöckner*[111] and *AG2R Prévoyance*.[112] In *Ambulanz Glöckner*, the Court accepted the proposition that a national law protecting providers of emergency ambulance services against competition from independent operators could be justified under Article 106(2) TFEU, insofar as this was necessary for the performance of their task under economically acceptable conditions.[113] More recently, the Court in *AG2R Prévoyance* held that the derogation from the competition rules could also apply to an exclusive right granted to a provident society in order to manage a scheme for the supplementary reimbursement of healthcare costs.[114]

The treatment of state aid in the SGEI context

To begin with, undertakings providing SGEI enjoy significant advantages compared to other undertakings received state assistance. For example, SGEI providers are subject to a higher threshold for the provision of de minimis aid. In addition, under Regulation 360/2012,[115] the total amount of de minimis aid granted to an undertaking providing SGEI can be up to €500,000 over any period of three fiscal years, which in itself is two-and-a-half times more than the normal threshold of €200,000.[116] These exceptions alone demonstrate the more lenient approach taken by the Commission in the application of state aid rules towards undertakings providing SGEIs.

However, beyond these exceptions, undertakings that provide SGEI can only fall outside the scope of Article 107(1) where they satisfy all four of the famous *Altmark*[117] criteria established by the CJEU, the satisfaction of which will mean that compensation for the provision of SGEI will not be deemed to confer an economic advantage on the undertaking providing the SGEI.[118]

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110 Case C-209/98, at para 83.

111 Case C-475/99.

112 Case C-437/09.

113 Case C-475/99, at paras 51–65.

114 Case C-437/09, at paras 66–81.

115 Commission Regulation (EU) No 360/2012 of 25 April 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, OJ L 114, Art 2(2).

116 Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, Art 3.

117 Case C-280/00 *Altmark* [2003] ECLI:EU:C:2003:415.

118 C-660/15 P *Viasat Broadcasting UK ('Viasat') Ltd v European Commission* [2017] ECLI:EU:C:2017:178, para 35.

First, the recipient undertaking must have an actual public service obligation to discharge and that obligation must be clearly defined.[119] While Member States enjoy wide discretion in defining the services that can be considered as an SGEI,[120] and while both the Commission and the courts have recognised that a significant range of services can be provided as SGEIs,[121] the rationale for classifying services in this way must be clear and unambiguous.

Second, the basis on which the compensation to the SGEI provider is to be calculated must be established in advance, and in an objective and transparent manner, in order to avoid it conferring an economic advantage that may favour the recipient undertaking over competing undertakings.[122] While Member States do not need to go as far as calculating the compensation level on the basis of a specific formula, they nevertheless need to make it clear from the outset how the level of compensation is to be determined.[123] Only costs directly associated with the provision of the SGEI can be taken into account in the calculation of the compensation.[124]

Third, the level of compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations with a reasonable profit for discharging those obligations.[125] In the Court's view, this criterion is essential in order to ensure that the recipient undertaking is not given an advantage that distorts competition by strengthening its competitive position vis-à-vis its competitors. A reasonable profit essentially translates into a rate of return on capital that would be required by an undertaking that is considering whether or not to provide the SGEI for the full duration of the assignment period, while also taking into account the risk associated with the provision of those services.[126] Where possible, the rate should be determined on the basis of a comparison between an undertaking operating in the same sector or a comparable sector.

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119 See n 117 above, at para 89.

120 Case T-17/02 *Fred Olsen, SA v Commission* [2005] ECLI:EU:T:2005:218, paras 215–228; see footnote 51.

121 See discussion above in the discussion on 'The scope of the SGEI concept' (eg, postal services, waste processing, pension schemes, ambulance services, private medical insurance, and so forth).

122 See n 117 above, at para 90.

123 Communication from the Commission on the application of the European Union state aid rules to compensation granted for the provision of services of general economic interest, Recital 55.

124 *Ibid*, at point 56.

125 See n 117 above, at para 92.

126 Communication from the Commission on the application of the European Union state aid rules to compensation granted for the provision of services of general economic interest, Recital 61.

Fourth, in the event that the undertaking providing the public service obligation is not chosen via competitive tender, the compensation must be determined on the basis of the costs that a typical, well-run undertaking would have incurred in discharging the same public service obligations, taking into account a reasonable profit for discharging those obligations.[127] By contrast, where the public service to be discharged is by an undertaking that has been selected via a public procurement process that requires the winner to provide the services in question at the lowest cost to the public, state aid practice considers that this criterion has been fulfilled automatically.[128]

Beyond the issue of whether the compensation offered to the SGEI providers constitutes state aid for the purposes of Article 107(1) TFEU, the question then arises as to the relevant standard by which the Commission will conduct its compatibility assessment. Under the SGEI decision,[129] state aid granted to an undertaking providing an SGEI is considered to be compatible with the internal market pursuant to Article 106(2), without the need for a prior notification to the Commission under Article 108(3) TFEU. However, in order for the compensation to be able to benefit from the decision, it must not exceed €15m in relation to sectors other than transport and transport infrastructure, and should in any event not exceed what is necessary to cover the net cost incurred in discharging the public service obligations and a reasonable profit.

Finally, where the compensation does not fall within the scope of the SGEI decision, the SGEI Framework[130] issued by the Commission spells out the conditions that the compensation needs to satisfy to be deemed compatible with the internal market under Article 106(2) TFEU. The aid must be granted for a genuine and correctly defined SGEI by a legal act that defines the content and the duration of the public service obligation being delegated, the parameters for calculating the level compensation to be paid and the arrangements for avoiding over-compensation. The Member States granting the compensation must also act in compliance with the Financial Transparency Directive[131] and the EU public procurement rules, while the

127 *Ibid.*

128 See n 117 above, at para 93.

129 Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7.

130 European Union framework for state aid in the form of public service compensation (2011) OJ C 8.

131 Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318.

amount of compensation must not exceed what is necessary to cover the net cost of discharging the public service obligations, including a reasonable profit.[132]

Conclusions

The tough line against undertakings benefiting from state involvement gives way to a significant exception available under Article 106(2) TFEU where the tasks being performed by the undertaking have the character of a public service and the performance of its public service is incompatible with the profit motive that one associates with a private sector operator. However, despite the number of undertakings that have been able to benefit from the SGEI derogation in relation to a wide range of services, there are many more that have not succeeded in harnessing the benefits of that exemption. This is because the conditions established by the Commission for the operation of the SGEI derogation, as supported by the European courts in the application of the *Altmark* conditions, are onerous.

Those wishing to avoid competition rules by shielding behind the state's public service goals will therefore often be disappointed. Ultimately, the Commission's greatest censure lies in the fact that even an SGEI cannot be provided where its operation would be deemed to have a distortive effect on EU trade.

Transparency measures

The effective application of the MEO and the SGEI principles requires the application of additional measures that allow the Commission to identify both the actual amount of that state funding, and the uses to which that funding shall be put, where the undertaking is dominated by the state. To this end, Community law provides a series of transparency mechanisms that shine a light on transferred funds where the state is interfering in the workings of the private sector. Such mechanisms ensure transparent relations between subsidy-assisted undertakings and the state, in the absence of which there remains a real risk that state aid measures will not be identified as such by the Commission, especially in cases where the Member State has failed to notify the aid measure.

132 European Union framework for state aid in the form of public service compensation (2011) OJ C 8, Recital 21.

Thus, the Financial Transparency Directive[133] imposes certain standards of transparency in the financial relations between Member States and public undertakings. Information on any public funds made available by the state to public undertakings, either directly or through the intermediary of another public undertaking or a financial institution, as well as the actual use of those public funds, must be transparent.[134] This requirement is, however, limited to public undertakings that generate annual net turnover of over €40m and to those public undertakings providing services whose supply is liable to affect trade between Member States to an appreciable extent.[135] In addition, public undertakings operating in the manufacturing sector with an annual turnover over €250m are obliged to make available to the Commission their annual reports and accounts, including any grants, loans and guarantees that the undertaking has received.[136]

Furthermore, any undertaking, irrespective of whether it is private or public, that enjoys a special or exclusive right conferred upon it under Article 106(1) TFEU or is entrusted with the operation of SGEI under Article 106(2) TFEU, is obliged to maintain separate accounts. These accounts must clearly differentiate between the costs and revenues associated with the different activities and the full details of the methods by which costs and revenues are allocated to those different activities.[137]

In addition to the Financial Transparency Directive, a number of Commission guidelines[138] and communications[139] impose transparency obligations upon Member States as a condition for a measure to be deemed compatible with the internal market. Transparency mechanisms are also put in place under the GBER,[140] which only applies to aid with respect to which

133 Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318.

134 *Ibid*, Art 1(1).

135 See n 133 above, Art 5(2).

136 *Ibid*, Art 8.

137 *Ibid*, Arts 1(2) and 2(d).

138 Eg, Guidelines on state aid for rescuing and restructuring non-financial undertakings in difficulty OJ C 249 and Community guidelines on state aid for environmental protection, OJ C 82, 1 April 2008, pp 1–33.

139 Eg, European Union framework for state aid in the form of public service compensation (2011) OJ C 8 and Communication from the Commission – Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ C 188, 20 June 2014, pp 4–12.

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

it is possible to calculate with precision the gross grant equivalent of the aid ex ante without any need to undertake a risk assessment.[141]

The presence of transparency mechanisms to determine the extent of involvement of the state in the private sector illustrates the Commission's willingness to eliminate as much as possible any opaque Member State behaviour in granting aid, which can be highly distortive for the internal market. It therefore comes as no surprise that the state aid Temporary Framework for Covid-19 measures also includes a number of transparency mechanisms, with respect to which Member States must strictly abide. Member States are obliged to publish relevant information on each individual grant of aid under the Temporary Framework within 12 months from the grant, must submit annual reports to the Commission and, by 31 December 2020, need to provide the Commission with a list of measures put in place on the basis of the approved schemes falling under it. Member States are in turn obliged to maintain records on the granted aid for at least ten years and must provide those records to the Commission upon request.

The combination of these measures should be effective in ensuring that Member States are not in a position to prop up public undertakings or to subsidise 'national champions' by allowing them to take advantage of the opaque relationships that would otherwise obfuscate the transfer of funds or benefits in kind between the various organs of government and undertakings benefiting from state support.

141 *Ibid*, Art 5.