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How have state aid rules been used to counter crises?

Author(s): Paukku, Eelis; Siikavirta, Kristian

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Abstract

When a state runs into a crisis, public authorities are called for help. European State Aid rules generally prohibit the Member States from using subsidies. However, the European Commission has the power to decide which subsidies to allow in the Member States. This paper makes an analytical examination of how the Commission has used that power in six crises during the last four decades. They are the Chernobyl disaster in 1986, the mad cow disease crisis in 1996, the global financial crisis in 2007–2008, the European debt crisis in 2010–2014, the eruptions of Eyjafjallajökull in 2010, and the COVID-19 crisis 2020-ongoing. The Commission cannot demand the Member States to use state aid in crises, but our paper concludes that the Commission has increased its activity and has taken different real-life circumstances into consideration.

1. Introduction

The current pandemic has had several negative impacts on the economy. Due to this, state aid rules have been relaxed to address the pandemic's economic consequences. The basic goals of state aid regulation are threatened unprecedentedly.¹ State aid rules faced significant changes and revitalization after previous significant crises, euro, and financial crises.² Due to these changes, one can argue that state aid rules are not the same as they were before. The contents and interpretation of state aid rules have been under constant change since they were created,³ but as stated above, the rules have swiftly changed during crises. In this study, we aim to create an overall picture of state aid regulation's relation to crises. This relation is partly political and partly juridical as state aid regulation includes reference to some types of crises, which are interpreted in ECJ's case law. Still, in many cases, the regulation has been adjusted by a political or administrative decision made by the European Commission, The Council of the European Union & The European Parliament.

¹ C. Maczkovics, 'How Flexible Should State Aid Control Be in Times of Crisis?', (2020) 19(3) *European state aid law quarterly*, 271–283.

² A. Sanchez-Graells, 'Digging itself out of the hole? A critical assessment of the European Commission's attempt to revitalize State aid enforcement after the crisis', (2016) 4(1) *Journal of antitrust enforcement*, 157–187.

³ E. Pauku, 'Euroopan unionin politiikan ja tukikilpailun vaikutus valtioneuvoston päätöksentekoon', (2020) *Acta Electronica Universitatis Lapponiensis*, 280–283.

This study aims to investigate and analyze how state aid rules and their interpretation have been used to react to different crises.

Although several studies about state aid and crises, especially about the 2020 COVID-19 pandemic and 2008 financial crisis, there is a research gap related to comparative studies about state aid rules from different crises over a longer period. We aim to fill that research gap by creating a comparative analysis of how state aid rules and their interpretation have changed in different crises. Our main methods are the legal doctrinal method and the legal historical method. The legal doctrinal method is used to find out the contents of state aid legislation and how they were interpreted in times analyzed and in general.⁴ Our legal history method is based on an approach where we use predetermined source material to see what kind of answers they can provide and what is left for further research or to be speculated.⁵ These predetermined materials include, in our case: legislation and its reasoning, annual Commission reports on competition policy, peer-reviewed articles and academic books about crises we discuss, and publicly available statistics.

This paper's main contribution is mainly theoretical: understanding state aid regulation's relation to crises increases understanding of regulation and how it is used by decision-makers. This has some practical outcomes as it makes it easier to predict how state aid regulation will be used to counter future crises, but this contribution is uncertain considering how the interpretation and usage of state aid regulation have changed in the past. Our analysis will cover crises only from the 1980s as state aid regulation faced major changes in that decade, and earlier aids and crises might not be comparable for several reasons.⁶ In chapter two of this study, we will explain the relevant EU state aid rules and how they are interpreted. In chapter three, we will analyze how and why the rules and their interpretation have changed in different crises. Chapter four includes conclusions and a discussion.

2. State aid rules, exceptions, and interpretation

The current state aid rules relevant here are in the Treaty on the Functioning of the European Union (TFEU) Article 107. Article 107(1) includes a general ban on state aid that distorts competition and affects trade between the Member States. Articles 107(2) and 107(3) include exceptions to the general ban on state aids. The European Commission has a certain margin of discretion when determining

⁴ J. M. Smits, 'What is legal doctrine? On the Aims and Methods of Legal-Dogmatic Research', in R. van Gestel and H-W. Micklitz and E. L. Rubin (eds.), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017), 207–228.

⁵ A. Musson and C. Stebbings, 'Making legal history: Approaches and methodology' (Cambridge University Press, 2012).

⁶ E. Pauku, op. cit. *supra* note 3, 289. On earlier crisis, it is worth mentioning the oil crisis in 1970'es.

whether the aid is compatible with the internal market.⁷ The Commission has a significantly higher margin in the case of Article 107(3)(c).⁸ There are several exceptions and three tools in Articles 107(2) and 107(3) that can be used to counter the crisis faced in the Union. The first one is Article 107(2)(b): "*The following shall be compatible with the internal market: aid to make good the damage caused by natural disasters or exceptional occurrences*";. This exception is not quite effective for proactively countering crises and mitigating their effects as it can only be used to compensate for damages already suffered, not even covering means to prevent further deterioration.⁹ Using aids based on this article requires the Commission's prior approval, and it can mainly be used to support companies particularly hit by exceptional occurrences.¹⁰ Natural disasters are defined in Article 50 of the general block exemption regulation.¹¹ Exceptional occurrences are not clearly defined in any official document but based on decisional practice, occurrences need to fulfil three criteria to be exceptional: 1) unforeseeable, 2) out of bounds of normality, and 3) having a large or significant impact.¹² In the case law, it is defined that only direct damages can be compensated based on this article; indirect losses cannot be compensated.¹³

Article 107(3)(b) is the second one that can be used to counter crises: "*The following may be considered to be compatible with the internal market: aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State*";. This article can be used to remedy the actual effects of a serious disturbance and to prevent the worsening of the disturbance.¹⁴ All exceptions in Article 107(3) TFEU are mostly used based on Commission's guidance, but in exceptional circumstances, it is possible to grant aid based on this article without the Commission's guidance.¹⁵ TFEU Article 107(3)(b) is the second most common

⁷ Case T-388/02 *Kronoply and Kronotex v. Commission*, ECLI:EU:T:2008:556, paragraph 92.

⁸ G. Tosato and L. Bellodi, 'EU competition law: Volume I, Procedure: antitrust, mergers, state aid' 2nd ed. (Claeys & Casteels, 2015), 407–408.

⁹ P. Nicolaidis, 'Application of Article 107(2)(b) TFEU to Covid-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence', (2020) 11(5–6) *Journal of European Competition Law & Practice*, 238–243.

¹⁰ J. L. Buendía and A. Dovalo, 'State Aid Versus COVID-19: The Commission Adopts a Temporary Framework', (2020) 19(1):3–7 *European State Aid Law Quarterly*.

¹¹ 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 [2014] OJ L187/1.

¹² P. Nicolaidis op. cit. *supra* note 9.

¹³ Case C-346/03, *Atzeni and Others*, ECLI:EU:C:2006:130, paragraph 79.

¹⁴ P. Nicolaidis op. cit. *supra* note 9.

¹⁵ M. Iakovenko, 'Article 106(2) or Article 107(3) TFEU? The Compatibility of State Aid for Security of Supply Projects with the EU's *acquis*: A Vision from Energy Community Contracting Party', (2019) 10(6) *Journal of European Competition Law & Practice*, 337–348.

article that aids are based on.¹⁶ TFEU Article 107(3)(b) is generally seen as more suitable for addressing crises than TFEU Article 107(2)(b) due to its broader scope.¹⁷

A serious disturbance in the economy of a Member State means that the disturbance affects the entire country. An economic disturbance may emerge, for example, from a sharp rise in oil prices, the reunification of Germany, or even the international financial crisis affecting the banking sector.¹⁸ It is enough that problems in one important sector are estimated to affect the whole economy in a Member State. Under the COVID-19 crisis, the Commission has adopted many positive decisions on national measures under Article 107(3)(b), and the temporary COVID-19 state aid framework started under this legal base, later widening to include measures under Article 107(3)(c).¹⁹

Member States may resist crisis by developing certain economic activities that are adversely affected using state aid admitted under Article 107(3)(c), the third tool for reacting against a crisis. This is the most important and widely used exception in state aid rules, and it has an industrial policy disposition. Under crisis, this is usually a question of rescue and restructuring aid and research and development aid.

Commission has used legal bases in Article 107(3)(b) and (c) to tackle the same crisis but in a different phase and in a different circumstance. The first aid cases in the financial crisis in 2008 were admitted based on Article 107(3)(c) (development of economic activities), but from October 2008 to February 2009 and even partially to August 2013, the Commission used Article 107(3)(b) (serious disturbance in economy) as a legal basis. From August 2013, the Commission moved its policy back towards the general application of Article 107(3)(c) and the Rescue and Restructuring Guidelines based on that.²⁰ This was seen as a revert to normal.²¹

It is also important to note that all public measures that can be used to counter crises are not state aid. General legislative and economic measures, as well as public spending, do not constitute state aid as they do not favour certain economic sectors or operators.²² The key concept in this evaluation is

¹⁶ E. Paukku, op. cit. *supra* note 3, p. 128.

¹⁷ Nicolaidis op. cit. *supra* note 9.

¹⁸ E. Stuart and I. Roginska-Green, 'Sixty Years of EU State Aid Policy. Analysis and Assessment' (Kluwer Law International BV, 2018), 66–67, 196. On banking sector aid and Article 107(3)(b) in the UK see for example Commission decision N 507/2008, paras 42–44.

¹⁹ R. Luja, 'EU Fiscal State Aid Rules and Covid-19', (2020) 4 *EC Tax Review*, 147–157. See European Commission, *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), paras 6, 17–18 and European Commission, *Communication from the Commission, Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*, (2020/C 164/03).

²⁰ E. Stuart & I. Roginska-Green, op cit *supra* note 18, 297–298.

²¹ *State Aid Law of the European Union*, H. C. H. Hofmann and C. Micheau (Oxford University Press, 2016), 287.

²² K. Bacon, 'State Aids and General Measures', (1997) 17(1) *Yearbook of European Law*, 269–321.

selectivity: if the measure is not selective, i.e., lowering the corporate tax rate in all sectors, the measure is considered general and does not constitute state aid.²³ Under general economic measures, it is possible to suspend the payment of taxes and social contributions as well as grant wage subsidies.²⁴ The only requirement for this is that these benefits are granted uniformly and do not favour certain undertakings over others.²⁵ It is also possible to subsidize consumers directly in order to boost consumption.²⁶

There are also several possibilities to grant aid without the risk that the Commission finds the aid incompatible with the internal market. The Commission has stated that several aids are compatible with the internal market, and aids fulfilling certain criteria need not be notified to the Commission. These aids can be used to counter different crises.²⁷ One possibility is to grant aids that are included in the block exemption regulation, which sets criteria for aids that are compatible with the internal market.²⁸ It is also possible to use opportunities to grant aids based on the Commission's guidelines about aids that are compatible with the internal market based on Article 107(3)(c) of TFEU.²⁹ Although these guidelines are, in principle, soft law, they have binding legal effects on the Commission and on the Member States.³⁰

The Commission has wider discretion for using Article 107(3) than Article 107(2).³¹ Article 107(3) TFEU is a useful tool for the Commission as the general rule is that this article can only be used for aids approved in the Commission's guidance.³² On the other hand, de jure exceptions mentioned in Article 107(2), especially Article 107(2)(b), are usable in quite rare situations, and the Commission has not approved many aids based on that article.³³ The last major court cases concerning Article 107(2) TFEU were given at the end of the 20th century, and after that, there had been no major court

²³ P. Nicolaidis op. cit. *supra* note 9.

²⁴ J. L. Buendía and A. Dovalo, op. cit. *supra* note 10.

²⁵ K. Bacon, op. cit. *supra* note 22.

²⁶ J. L. Buendía and A. Dovalo, op. cit. *supra* note 10.

²⁷ European Commission, '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), 1–9 paragraphs 13 and 21.

²⁸ 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 2014 L 187/1, 26 June 2014.

²⁹ See i.e. European Commission, 'Communication from the Commission, Guidelines on State aid for environmental protection and energy 2014–2020', (2014/C 200/01), which is used to authorise several types of aid.

³⁰ C. Banet, 'Legal Status and Legal Effects of the Commission's State Aid Guidelines: The Case of the Guidelines on State Aid for Environmental Protection and Energy (EEAG) (2014–2020)', (2020) 19(2) *European State Aid Law Quarterly*, 172–184.

³¹ P. Nicolaidis, 'Application of Article 107(2)(b) TFEU to Covid-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence', (2020) 11:5–6 *Journal of European Competition Law & Practice*, 238–243.

³² M. Iakovenko, 'Article 106(2) or Article 107(3) TFEU? The Compatibility of State Aid for Security of Supply Projects with the EU's Acquis: A Vision from Energy Community Contracting Party', (2019) 10:6 *Journal of European Competition Law & Practice*, 337–348.

³³ P. Nicolaidis, op. cit. *supra* note 31.

cases.³⁴ The Commission approved some aids based on this article after that, and the article has not been used extensively at the beginning of the COVID-19 crisis.³⁵ In total, the Commission has approved, according to Article 107(2)(b), 84 aid measures during the COVID-19 crisis until October 2021.³⁶ Articles 108(1) and (2) of TFEU give the Commission clear jurisdiction and power to decide what is permissible under Articles 107(2) and (3). For our study, it is therefore important to go through Commission views and action on crisis state aid. Article 108(2) TFEU gives the Council power acting unanimously to decide that an aid that a Member State is granting or intends to grant shall be considered compatible with the internal market, in derogation from the provisions of Article 107, if such a decision is justified by exceptional circumstances. That power has been mainly unused.³⁷

The supervisory role of the Commission is acknowledged by *Hancher & Nicolaidis*, saying the role is to ensure that a national state aid measure does not unduly distort competition in the internal market, and Commission cannot force a Member State to pay state aid, not even in a pursue of a common objective.³⁸ During a crisis, it is still the duty and opportunity of a Member State to use state aid instruments that the Commission has determined as compatible. However, it is the Commission's task to balance the public benefit of avoiding bankruptcies and other adverse economic effects with increasing distortions of competition.³⁹ This is done by defining the general or case-specific terms of compatible state aid.

It has been widely known that on crises deepen European integration.⁴⁰ However, in the time of crises, the role of member states often becomes more important and they significantly affect the decision-making in the EU-level.⁴¹ One major flaw in state aid decision policy is the administrative burden. Almost all state aid in the EU is forbidden and the Commission needs to approve all aids. As this is virtually impossible in practice, the Commission had to issue wide exceptions that can be applied in

³⁴ Case C-156/98 *Germany v Commission*, ECLI:EU:C:2000:467; Case C-301/96 *Germany v Commission*, ECLI:EU:C:2003:509; Case C-278/00 *Greece v. Commission*, ECLI:EU:C:2004:239.

³⁵ P. Nicolaidis, op. cit. *supra* note 31.

³⁶ European Commission, 'Commission Factsheet - List of Member State Measures approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework', 18.10.2021. https://ec.europa.eu/competition-policy/document/download/fd113a0a-9c99-4405-aa4c-4ed52134f657_fi, last visited 16th of November 2021.

³⁷ T. M. Rusche, 'General theory on Compatibility of State Aid', in H. C. H. Hofmann and C. Micheau (eds), *State Aid Law of the European Union*, (Oxford University Press, 2016), 223–224.

³⁸ L. Hancher and P. Nicolaidis, 'Compatibility of Aid – General Introduction', in P. Werner and V. Verouden (eds), *EU State Aid Control. Law and Economics*, (Kluwer Law International BV, 2017), 194.

³⁹ P. Riedel, R. Wilson and S. Cranley, 'Learnings from the Commission's Initial State Aid Response to the COVID-19 Outbreak' (2020) 20(2) *European State Aid Law Quarterly*, 115–126.

⁴⁰ da Conceição-Heldt, Eugénia. Why the European Commission Is Not the "Unexpected Winner" of the Euro Crisis: A Comment on Bauer and Becker. *Journal of European Integration* (2016) 38(1), 95-100.

⁴¹ Peterson, John, Juncker's Political European Commission and an EU in Crisis. *Journal of Common Market Studies* (2017) 55(2), 349-367

several grant types that the member states want to use.⁴² In the 2010s one trend in Commission's decision-making has been balancing member state need for economic recovery with EU-level goals.⁴³ During crises Commission has previously adopted new goals and policies due to strong pressure from the Member states.⁴⁴ In the post-crisis time in 2010s there has been a trend that commission has been shy for enforcing strict EU-policies.⁴⁵

3. State aid and crises

Our analysis will cover crises that had significant impacts on whole economies, as well as crises in which impacts were restricted to one or more sectors of economic activity. We will not include crises that impacted only single companies or affected only a few countries, but the magnitude of the crises must be European-wide and impact at least one sector of economic activity to a significant extent. Our analysis covers the following six crises:

- Chernobyl disaster 1986
- Mad cow disease crisis, "beef war" 1996
- Global financial crisis 2007–2008
- European debt crisis 2010–2014
- Eruptions of Eyjafjallajökull 2010
- COVID-19 crisis 2020-ongoing

The Chernobyl disaster

The Chernobyl disaster occurred in Ukraine on the 26th of April, 1986.⁴⁶ The disaster caused the loss of several lives due to exposure to nuclear waste.⁴⁷ Due to the reactor's explosion, the reactor core

⁴² Heimler, A., ja F. Jenny, The Limitations of European Union Control of State Aid. *Oxford Review of Economic Policy* 28, (2012) 2, 347-367.

⁴³ Knill, C., Steinebach, Y. & Fernández-i-Marín, X. 2020. Hypocrisy as a crisis response? Assessing changes in talk, decisions, and actions of the European Commission in EU environmental policy. *Public administration* (London), 98(2), s. 363-377.

⁴⁴ Botta, M., Competition policy: Safeguarding the Commission's competences in State aid control. *Journal of European Integration*, (2016) 38(3), s. 265-278.

⁴⁵ Knill, C., Steinebach, Y. & Fernández-i-Marín, X., Hypocrisy as a crisis response? Assessing changes in talk, decisions, and actions of the European Commission in EU environmental policy. (2020) 98(2), *Public administration* (London), s. 363-377.

⁴⁶ B. Faybishenko, T. J. Nicholson, V. Shestopalov, A. Bohuslavsky and V. Bublías (eds), *Groundwater vulnerability: Chernobyl nuclear disaster*, (John Wiley & Sons p. v, 2015).

⁴⁷ P. Breeze. *Nuclear Power*, 1st ed. (Academic Press, 2017).

remained on fire for ten days, and radioactive particles spread all over Europe.⁴⁸ The disaster occurred at the worst possible time for agriculture as cattle were taken to pastures, major spring crops and vegetables were sown, and winter crops were well developed.⁴⁹ Contamination of agricultural products posed a risk of radioactive exposure for humans.⁵⁰ Although the most direct impact of the disaster remained within USSR (today Russia) borders, agriculture was severely damaged in a wide area.⁵¹ Due to accidents' effect on agricultural products and soil, immediate countermeasures were taken to decrease risks imposed by radioactive particles.⁵²

EC countries reacted to this crisis quite swiftly to protect their agriculture. The first to give aid to agriculture was the Federal Republic of Germany in 1986. This aid was a general subsidy to agriculture, as well as special subsidies to vegetable growers.⁵³ The Commission did not raise objections to these aids. In 1987 the Commission reacted to the crisis by not raising objections on aids given to agriculture. The several Member States granted aid to the agricultural sector in that year: Greece, Italy, The Netherlands, and the United Kingdom.⁵⁴ New subsidies were not granted in 1989.⁵⁵ In this crisis, no guidelines for aids compatible with the internal market were given, and the case law decisions were about whether aids were compatible with Article 87(2)(b)⁵⁶ EC or not.⁵⁷

It can be summarized that in the Chernobyl disaster, the Commission acted reactively by approving immediate aid for sectors that were suffering from the disaster. These sectors included vegetable growing,⁵⁸ stock farming, sheep farming, and agriculture in general.⁵⁹ The general requirement was that aid was linked directly to the Chernobyl disaster. Due to this, similar aids granted in the '90s were

⁴⁸ J. Ylipietti, K. Rissanen, E. Kostianen, R. Salminen, O. Tomilina, K. Täht, A. Gilucis, and V. Gregorauskiene, 'Chernobyl fallout in the uppermost (0–3 cm) humus layer of forest soil in Finland, North East Russia and the Baltic countries in 2000–2003', (2008) 407(1) *The Science of the Total Environment*, 315–323.

⁴⁹ R. M. Alexakhin, S. V. Fesenko and N. I. Sanzharov, 'Serious radiation accidents and the radiological impact on agriculture: Environmental contamination, radiation doses and health consequences after the Chernobyl accident', (1996) 64(1–2) *Radiation Protection Dosimetry*, 37–42.

⁵⁰ S. V. Fesenko, R. M. Alexakhin, M. I. Balonov, I. M. Bogdevitch, B. J. Howard, V. A. Kashparov, N. I. Sanzharova, A. V. Panov, G. Voigt and Y. M. Zhuchenka, 'An extended critical review of twenty years of countermeasures used in agriculture after the Chernobyl accident', (2007) 383(1) *The Science of the Total Environment*, 1–24.

⁵¹ International Atomic Energy Agency, 'Chernobyl's legacy: Health, environmental and socio-economic impacts and recommendations to the Governments of Belarus, the Russian Federation and Ukraine, *The Chernobyl Forum*' (International Atomic Energy Agency, 2005).

⁵² H. Radziuk and T. Shapsheeva, 'Application of Agronomical Approaches to Rehabilitating Territories of the Republic of Belarus Affected By the Chernobyl Disaster', (2020) 27(8) *Environmental Science and Pollution Research International*, 8003–8015.

⁵³ European Commission, *Sixteenth Report on competition policy (1986)*, (Brussels Luxembourg, 1987), 273–274.

⁵⁴ European Commission, *Seventeenth Report on competition policy (1987)*, (Brussels Luxembourg 1988), 309–313.

⁵⁵ European Commission, *Nineteenth Report on competition policy (1989)*, (Brussels Luxembourg 1990).

⁵⁶ Current Article 107(2)(b) TFEU.

⁵⁷ See for example Case C-278/00 *Greece v. Commission*, ECLI:EU:C:2004:239, paras 80–85.

⁵⁸ European Commission, *Sixteenth Report on competition policy (1986)*, (Brussels Luxembourg, 1987), p. 274.

⁵⁹ European Commission, *Seventeenth Report on competition policy (1987)*, (Brussels Luxembourg 1988), p. 309–313.

not approved by the Commission because it was not possible to establish a direct link between aid and the Chernobyl nuclear disaster.⁶⁰ In this case, there is no clear point to state how the Commission reacted to the crisis and actively tried to prevent or mitigate the disaster's economic impact.

The Mad cow disease crisis 1996

Bovine Spongiform Encephalopathy (BSE) is often referred to as mad cow disease.⁶¹ The name is a description of a cow that becomes nervous, hypersensitive, and fearful that has trouble moving due to infection by a misfolded protein, a prion.⁶² The disease caught enormous public awareness in the 90s due to BSE's association with a lethal variant of Creutzfeldt-Jacob disease.⁶³ In the 90s, it was discovered that BSE could infect humans and cause similar diseases to them.⁶⁴ This variant (vCJD) is a lethal disease that is infected due to exposure to BSE-contaminated products.⁶⁵ This variant of vCJD cannot be cured, it is lethal quite quickly, and it is fatal in all cases.⁶⁶

The disease began to spread in the UK as early as 1985, although cases were recorded much later.⁶⁷ In 1996 a scientific committee confirmed a possible link between BSE and vCJD, which caused a panic in Britain and other countries.⁶⁸ This led to significant losses and structural crises for the UK's beef and dairy producers.⁶⁹ Most countries worldwide banned UK beef imports, which almost collapsed the industry completely.⁷⁰ The situation developed so far that all exports of living bovine animals and all products from bovine animals that are liable to enter the animal and human food chains were banned.⁷¹ Some countries still do not allow the import of UK beef, and even one occurrence of the disease would have dire consequences for a whole industry in one country.⁷²

⁶⁰ Case C-278/00 *Greece v. Commission*, ECLI:EU:C:2004:239, para 88.

⁶¹ L. Weiss, E. Thurbon and J. Mathews, 'Free Trade in Mad Cows: How to Kill a Beef Industry', (2006) 60(3) *Australian Journal of International Affairs*, 376–399.

⁶² M. Schwartz, *How the Cows Turned Mad: Unlocking the Mysteries of Mad Cow Disease*, (University of California Press, 2004), 142–150.

⁶³ L. Fishbein, 'Transmissible Spongiform Encephalopathies, Hypotheses and Food Safety: An Overview', (1998) 217(1) *The Science of the Total Environment*, 71–82.

⁶⁴ M. Schwartz, op. cit. *supra* note 62.

⁶⁵ L. Fishbein, op. cit. *supra* note 63.

⁶⁶ E. D. Belay and L. B. Schonberger, 'Variant Creutzfeldt-Jakob Disease and Bovine Spongiform Encephalopathy', (2002) 22 *Clin Lab Med*, 849–862.

⁶⁷ M. Schwartz, op. cit. *supra* note 62.

⁶⁸ J. D'Arcy, 'A Disturbing Link to the 'mad Cow' Disease (eating Diseased Neat Linked to Creutzfeldt-Jacob Disease)', (Maclean's, 1996).

⁶⁹ S. Henson and M. Mazzocchi, 'Impact of Bovine Spongiform Encephalopathy on Agribusiness in the United Kingdom: Results of an Event Study of Equity Prices', (2002) 84(2) *American Journal of Agricultural Economics*, 370–386.

⁷⁰ I. C. Shaw, *Food safety: The science of keeping food safe*, (Wiley-Blackwell, 2012), 153.

⁷¹ European Commission, *XXVth Report on Competition Policy (1996)*, Brussels Luxembourg 1997, 233.

⁷² L. Weiss, E. Thurbon and J. Mathews, op. cit. *supra* note 61.

In this crisis, the EU reacted differently. All Member States decided to ban all beef imports from the UK as a safety measure when additional information on the connection between vCJD and BSE was researched.⁷³ Less than two months after this decision, the Commission decided to allow exceptional support measures for the UK's beef market. These measures included authorizing the UK to purchase all animals that fulfilled certain criteria for a fixed price of one ECU per kg, and EC was compensating the UK's efforts for 392 ECU per animal.⁷⁴ A week after this, the Commission authorized the UK to pay supplementary compensation to compensate for the difference between market value and value of 1 ECU per kilogram.⁷⁵ In addition to this, the Commission approved several aids based on Article 92(2)(b)⁷⁶ of the EC treaty⁷⁷:

- Aid for slaughterers for adjusting to changed market circumstances.⁷⁸
- Additional aid for beef producers due to loss of market.⁷⁹
- Aid for renderers ensuring safe disposal and collection of animal waste.⁸⁰
- Publicity aid for a campaign seeking to restore consumer confidence in British beef.⁸¹

In addition to this, the EC adopted other measures. Consumers lost confidence in the beef market, which caused heavy losses for all beef producers in the Community. EC agricultural aids for the beef producers were increased, and the Member States were granted permission to grant additional aids to compensate for BSE-related income losses. The amount of aid per Member State was limited, the total sum for all Member States being 261 million ECU.⁸² This aid sum was not exceptionally high as about half of this was authorized to grant due to reductions in agricultural conversion rates of certain national currencies.⁸³ In addition to this, one country, the Netherlands, granted additional aid as the calf breeders were required to empty their stables to eradicate BSE.⁸⁴ Additional aid was granted according to the Council and the Commission regulation. However, in the coming years, the

⁷³ *Commission Decision of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy*, OJ L 78, 28.3.1996, 47–48.

⁷⁴ *Commission Regulation (EC) No 716/96 of 19 April 1996 adopting exceptional support measures for the beef market in the United Kingdom*, OJ L 99, 20.4.1996, 14–15.

⁷⁵ *Commission Regulation (EC) No 774/96 of 26 April 1996 amending Commission Regulation (EC) No 716/96 adopting exceptional measures for the beef market in the United Kingdom*, OJ L 104, 27.4.1996, p. 21–21.

⁷⁶ Current Article 107(2)(b) TFEU.

⁷⁷ European Commission, *XXVIth Report on Competition Policy (1996)*, Brussels Luxembourg 1997, p. 233–234.

⁷⁸ Case N 278/96.

⁷⁹ Case N 289/96.

⁸⁰ Case N 290/9.

⁸¹ Case N 299/96.

⁸² *Council Regulation (EC) No 1357/96 of 8 July 1996 providing for additional payments to be made in 1996 with the premiums referred to in Regulation (EEC) No 805/68 on the common organization of the market in beef and veal and amending that Regulation*, OJ L 175, 13.7.1996, p. 9–11.

⁸³ *Council Regulation (EC) No 1527/95 of 29 June 1995 regulating compensation for reductions in the agricultural conversion rates of certain national currencies*, OJ L 148, 30.6.1995, 1–2.

⁸⁴ Case N 482/96.

Commission approved some aid measures based on Article 92(2)(b) (currently Article 107(2)(b) TFEU), as there was evidence that the crisis caused damage to beef markets in other countries than the UK.⁸⁵ These measures seemed to be sufficient as no new aids were approved in 1997. However, some aids notified in 1996 were approved in 1998.⁸⁶ No new aids were granted after this.

After this crisis, the Court of Justice of the European Communities (CJEU) gave several judgments about the application of Article 92(2).⁸⁷ In these judgments, the CJEU stated that Article 92(2) is an exception and should be treated as one. The Commission did too adopt this approach and started to require that aid should be only granted to "extraordinary events," which are outside normal market conditions and are not a recurring phenomenon or otherwise foreseeable risk.⁸⁸ This was the turning point for the application of Article 107(2) TFEU in crises, as the application has become more restricted.

Financial and economic crisis 2007

The fall for the 2007 economic crisis started in December 2007⁸⁹ in the United States when the economy fell into recession, resulting in declining housing prices and financial stress, ultimately leading to extreme market movements in the fall of 2008.⁹⁰ The main reason for the financial crisis was the business of securitizing subprime mortgages, which were highly speculative assets.⁹¹ When defaults on the mortgages in the US markets started to rise, many of these assets lost a significant part of their value, which led to a panic that prevented companies from raising funding for mortgages, leading to a liquidity crisis and making the situation even worse.⁹² This initial phase of the crisis only led to a mild recession until the investment bank Lehman Brothers entered bankruptcy on the 15th of

⁸⁵ European Commission, *XXVIIIth Report on Competition Policy 1998*, Brussels Luxembourg, 1999, 237.

⁸⁶ European Commission, *XXVIth Report on Competition Policy (1996)*, Brussels Luxembourg 1997, 233–234; European Commission, *XXVIIIth Report on Competition Policy 1998*, Brussels Luxembourg, 1999, 237.

⁸⁷ Case C-156/98 *Germany v Commission*, ECLI:EU:C:2000:467; Case C-301/96 *Germany v Commission*, ECLI:EU:C:2003:509; Case C-278/00 *Greece v. Commission* ECLI:EU:C:2004:239.

⁸⁸ P. Nicolaidis, 'Application of Article 107(2)(b) TFEU to Covid-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence', *Journal of European Competition Law & Practice*, (2020) vol. 11, no. 5–6, 238–243.

⁸⁹ It can be discussed on how the crisis should be named; after all the most significant effects on real economy started at 2008, when most significant market moves occurred. However, some financial institutions started to accumulate significant losses as early as 2006. We choose to call the crisis as 2007 crisis as the US entered recession then.

⁹⁰ A. S. Blinder, A. W. Lo and R. M. Solow (eds), *Rethinking the Financial Crisis* (New York: Russell Sage Foundation, 2012), 8–9.

⁹¹ W-L. Song and H. Wang, 'Do Institutional Investors Know Banks Better? Evidence From Institutional Trading Surrounding the 2008 Financial Crisis', (2020) 35(4) *Journal of Accounting, Auditing & Finance*, 777–802.

⁹² W. A. Allen, *International liquidity and the financial crisis* (Cambridge: Cambridge University Press, 2013), 2–3.

September 2008, which caused a national US crisis to transform into a global financial crisis.⁹³ As interbank lending and wholesale funding dried up, several biggest financial institutions in the world were on the brink of collapse.⁹⁴

This eventually led to write-downs of mortgage assets in the EU and US that did equal 1 % of the world's GDP.⁹⁵ The crisis was not limited to the financial system, but it was followed by a significant reduction in real economic activities.⁹⁶ This was due to significantly increased interest in existing loans and simultaneously decreased bank lending.⁹⁷ The reduction led to a loss of several percentages of worldwide GDP in the following years and the accumulation of even more losses in the financial system.⁹⁸

The following financial turmoil was unprecedented in modern history and might only be rivalled by the great depression of the 1930s.⁹⁹ The crisis was the first one to threaten the international monetary system as it threatened the continued existence of many of the world's largest financial companies.¹⁰⁰ The crisis even led to a situation where several national economies were severely threatened. Several European countries were faced with such financial stress that although they did not default on their debts, they did stretch payments of several instruments, like public workers' salaries.¹⁰¹ There were several other risk factors in the EU countries: inflated real estate prices, troubled financial sectors, increased lending costs, and increased taxes to cover up governmental deficits.¹⁰² Due to these reasons, nonperforming loans skyrocketed, causing a crisis that threatened several financial institutions in the EU.¹⁰³

⁹³ F. S. Mishkin, 'Over the Cliff: From the Subprime to the Global Financial Crisis', (2011) 25(1) *Journal of Economic Perspectives*, 49–70.

⁹⁴ T. Doleys, 'Managing State Aid in a Time of Crisis: Commission Crisis Communications and the Financial Sector Bailout', (2012) 34(6) *Journal of European Integration: EU Competition Policy in the 21st Century*, 549–565.

⁹⁵ International Monetary Fund, *Global Financial Stability Report (April 2010): Meeting New Challenges to Stability and Building a Safer System* (IMF, 2010).

⁹⁶ F. G. Ozkan and D. F. Unsal, *Global financial crisis, financial contagion and emerging markets* (Washington, D.C.: International Monetary Fund, IMF Working Paper WP/12/293, 2012), 4.

⁹⁷ F. S. Mishkin op. cit. *supra* note 93.

⁹⁸ W. A. Allen, op. cit. *supra* note 92, 2–3.

⁹⁹ F. G. Ozkan and D. F. Unsal, op. cit. *supra* note 96, 4.

¹⁰⁰ W. A. Allen, op. cit. *supra* note 92, 1–2.

¹⁰¹ J. Villar Burke, *Weathering the Storm: The Financial Crisis and the EU Response. Volume I, Background and Origins of the Crisis, 1st edition* (Business Expert Press, 2017), 54–55.

¹⁰² L. J. Eliasson, 'Why The Euro Willa Survive: the Institutionalization of Accepted Policies through Key Actors', 93–94, in B. M. Stefanova (ed), *The European Union Beyond the Crisis: Evolving Governance, Contested Policies, and Disenchanted Publics* (Lexington Books, 2015), 85–104.

¹⁰³ J. Villar Burke, op. cit. *supra* note 101.

This financial crisis was eventually made through by bolstering the faith investors had in sovereign debt: states used a significant number of resources to save economic actors and boost consumption.¹⁰⁴ The first ones on the line were banks and other financial institutions, which needed new capital and guarantees to avoid collapsing for a bank run.¹⁰⁵ The amount of state aid was quite extensive, over 4,5 trillion euros, an amount equivalent to 39 % of EU-27 GDP.¹⁰⁶ However, this aid was used in quite a targeted way, meaning that there were no major spillover aids to other sectors, at least in the crisis's initial phase.¹⁰⁷ The crisis was contained rather effectively as most of the subsidies, 3,5 trillion euros, were guarantees, which were enough to stabilize the financial sector, which eventually needed only 546 billion euro recapitalization and 400 billion euro impaired assets intervention.¹⁰⁸

The legal basis for these aids was Article 87(3)(b)¹⁰⁹ TEC, which makes it possible for the Commission to authorize aids for remedying serious disturbances in the economy of a Member State.¹¹⁰ This was partly a political necessity as it was uncertain whether the unanimity necessary to use Article 88(2)¹¹¹ would have been achieved.¹¹² Commissions issued communication about the application of these rules for financial institutions quite swiftly after the crisis emerged, only a month after the bankruptcy of Lehman Brothers.¹¹³ The first communication allowed guaranteeing the liabilities of the financial institutions in order to calm down financial markets.¹¹⁴ The other aim was to allow recapitalization of financial institutions in order to prevent liquidity crises in otherwise healthy banks.¹¹⁵

¹⁰⁴ R. Godby, *The European Financial Crisis: Debt, Growth, and Economic Policy*. 1st edition. (New York, Business Expert Press, 2014), 4–5.

¹⁰⁵ Doleys, op. cit. *supra* note 94.

¹⁰⁶ European Commission, *EU state aid scoreboard: report on state aid in the EU Member States, Autumn update*, COM(2011) 848 final, 1st of December 2011, 47.

¹⁰⁷ K. Rutkiewicz, 'State Aid in the European Union Competition Policy in the Context of the Financial Crisis' *Equilibrium (Toruń)*, (2011) 6(3), 43–58. doi:10.12775/EQUIL2011.019.

¹⁰⁸ European Commission, *EU state aid scoreboard: report on state aid in the EU Member States, Autumn update*, COM(2011) 848 final, 1st of December, 47.

¹⁰⁹ Article 107(3)(b) TFEU.

¹¹⁰ R. D'Sa, "'Instant' State Aid Law in a Financial Crisis - A U-Turn?", (2009) 8(2) *European State Aid Law Quarterly*, 6.

¹¹¹ Article 107(2) TFEU.

¹¹² R. Luja, 'State Aid and the Financial Crisis: Overview of the Crisis Framework', (2009) 8(2) *European state aid law quarterly*, 145–160.

¹¹³ C. Koenig, "'Instant State Aid Law' in a Financial Crisis, State of Emergency or Turmoil: Five Essential and Reasonable Requirements under the Rule of Law", (2008) 7(4) *European State Aid Law Quarterly*, 627–630.

¹¹⁴ European Commission, *Communication from the Commission - The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis*, OJ C 270, 25.10.2008, 8 paragraphs 17–23.

¹¹⁵ European Commission, op. cit. *supra* note 114, paragraphs 34–42.

Two months after this, the state aid rules were broadened for the real economy, as the Commission encouraged the Member States to increase public spending to counter the crisis in the real economy.¹¹⁶ The guidelines were given on 22.1.2009.¹¹⁷ Major parts of increased public spending were viewed as general economic policy measures, which meant they were not constituted as state aid.¹¹⁸ However, the Commission did also approve the Member States to grant up to 500 000 euros per undertaking in order to provide access to finance. Only 20 billion euro of this aid was eventually used, even if the Commission approved using 81 euros billion worth of state aid.¹¹⁹ These amounts were relatively small compared to aid given to banks. These aids were directly linked to financial institutions' crisis: the aids were targeted for undertakings facing a sudden shortage or even unavailability of credit.¹²⁰ Although the aid volume remained relatively small, it gave a signal to the market that calmed them down and therefore relieved the crisis.¹²¹ In addition to this, the Commission gave a new guideline about recapitalization of the banks in order to encourage capitalization and therefore prevent liquidity crisis in the real economy.¹²²

After the crisis prolonged, the Commission gave a new guideline in order to solve the reason behind the crisis, a significant amount of impaired assets. The Commission gave new guidelines in March 2009 that gave a legal basis on how the Member States could help banks with these assets and losses derived from them.¹²³ This could not solve all structural problems in the financial sector, which prolonged the crisis and forced the Commission to give new guidelines on the restructuring measures in the financial sector, which covered several state aid means that could be used in order to enable structural changes.¹²⁴

One key principle in the Commission's temporary frameworks was the need to distinguish between sound and unsound banks in order to limit undue distortion of competition in the financial sector.¹²⁵

¹¹⁶ P. Nicolaidis and I. E. Rusu, 'The Financial Crisis and State Aid', (2010) 55(4) *Antitrust bulletin*, 759–782.

¹¹⁷ European Commission, *Communication from the Commission - Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis*, OJ C 16, 22.1.2009, 1–9.

¹¹⁸ European Commission, *op. cit. supra note 118*, chapter 2.

¹¹⁹ C. Quigley, 'Review of the Temporary State Aid Rules Adopted in the Context of the Financial and Economic Crisis', (2012) 3(3) *Journal of European Competition Law & Practice*, 237–247.

¹²⁰ European Commission, *op. cit. supra note 118*, chapter 4.2.2.

¹²¹ C. Quigley, *op. cit. supra note 119*.

¹²² European Commission, *Communication from the Commission - The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition*, OJ C 10, 15.1.2009, 2–10.

¹²³ European Commission, *Communication from the Commission on the treatment of impaired assets in the Community banking sector*, OJ C 72, 26.3.2009, 1–22.

¹²⁴ European Commission, *Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules*, OJ C 195, 19.8.2009, 9–20.

¹²⁵ M. Ianus and R. Orzan, 'Aid Subject to a Discretionary Assessment under Article 107(3) TFEU', in H. C. H. Hofmann and C. Micheau (eds), *State Aid Law of the European Union*, (Oxford University Press, 2016), 240–307.

The other principle was an effort to cope with the moral hazard problem.¹²⁶ The Commission's approach seems to be successful as there were no major distortions of competition taken into account the amounts of state aid given.¹²⁷ State aids used to bail out banks effectively affect economic recovery, even without aid to the real economy.¹²⁸ *Stuart & Roginska-Green* have argued that the Commission was prepared for this crisis because of the Commission's experience with financial sector crisis aid from the end of the 1990s and the Credit Lyonnais case. The Commission understood well the need for a speedy and flexible reaction to large financial problems.¹²⁹

This might be the case why this was the first case where the Commissions adopted a proactive approach instead of a reactive approach. The Commission did publish several soft law guidelines in order to promote state aid for solving the crisis. The other reason might be that the financial crisis was mostly a faith crisis, and a proactive and communicative approach to the crisis was essential for returning the market's faith in the financial system. However, this proactive approach was also adopted in future crises.

In the analysis of the Commission's role in maintaining level competition and securing financial sector viability in the 2008 crisis, *Ianus & Orzan 2016* says that the Commission played a leading role in crisis management because of the lack of other tools. The Union banking system was created only after 2011.¹³⁰ During the financial and economic crisis in 2008, many Member States used great amounts of aid in order to bail out and help banks. *Chari* analyzed aid patterns in that crisis, finding out that different classifications of Member State's attitudes towards State aid did not explain the given amount of crisis aid.¹³¹ Crisis aid granted to the financial sector in 2011 was 5,4% of GDP in the form of guarantees and liquidity measures and 0,25% of GDP in the form of recapitalization and

¹²⁶ M. Ianus and R. Orzan op. cit. *supra note 125*, 274. Moral hazard in this case means that by easing the costs of the financial sector and laying that, perhaps, to taxpayers the state aid increases the motivation of the financial sector to take more risks.

¹²⁷ European Central Bank, *Financial integration in Europe: April 2010*, (ECB, 2010), 37–38.

¹²⁸ E. Barucci, T. Colozza and C. Milani, 'The effect of bank bail-outs in the EU', (2019) 95 *Journal of international money and finance*, 14–26.

¹²⁹ E. Stuart and I. Roginska-Green, *Sixty Years of EU State Aid Law and Policy. Analysis and Assessment*, (Kluwer Law International BV, 2018), 296–297.

¹³⁰ M. Ianus and R. Orzan op. cit. *supra note 125*, p. 280.

¹³¹ It is possible to find out different categories of Member States according to the values of aid given by a Member State compared to the EU-average. R. Chari, *Evolution of Aid in the EU: Classifying Different Types of Countries, and the Financial and Economic Crisis*, in H. C. H. Hofmann and C. Micheau (eds), *State Aid Law of the European Union*, (Oxford University Press, 2016), 12–17.

impaired assets.¹³² During the time from 2008 to 2014, the Commission made about 450 individual decisions authorizing State aid measures to the financial sector.¹³³

European debt crisis 2010–2014

This crisis is often spoken with the name "the Euro crisis" due to its linkages to the common currency and fears of countries leaving the currency or even the end of the currency.¹³⁴ We do, however, use the term "European debt crisis," which was commonly used among economists.¹³⁵ Several economists have stated that the foundations of the crisis were in a single monetary policy that left interest rates too low for some countries, notably Greece, Ireland, Portugal, and Spain.¹³⁶ Another foundation for the crisis was that these countries suffered from higher inflation than other euro countries, which rapidly decreased their competitiveness.¹³⁷ In the 2007–2009 financial crisis, the sovereign debt was the lifeline that kept the system from collapsing as it was seen as a safe asset that made it possible to keep financial flows going and save financial institutions.¹³⁸ Even before this, the Maastricht criteria about public debt and deficit had been neglected for several years by several EU countries.¹³⁹ Recapitalization and other subsidy measures for banks in financial crisis increased the debt burden of several European countries, which was a major factor in why the debt crisis began.¹⁴⁰

The acute phase of the European debt crisis is said to have begun in the Greek legislative election of October 2009, when a new party gained power and found out that the previous government had hidden massive debts and deficits.¹⁴¹ At this moment, three different deficits actualized to a debt crisis: budget deficit, current account deficit, and credibility deficit.¹⁴² This led to a situation where the cost

¹³² European Commission, *Commission Staff Working Document, Facts and figures on State aid in the Member States – 2012 Update*, Brussels, 21.12.2012 SWD(2012) 443 final, 8.

¹³³ M. Ianus and R. Orzan op. cit. *supra* note 125, p. 275.

¹³⁴ This expression is common in legal studies, see e.g., S. Fabbrini, 'Intergovernmentalism and Its Limits: Assessing the European Union's Answer to the Euro Crisis', (2013) 46(9) *Comparative Political Studies*, 1003–1029; M. Dawson and F. de Witte, 'Constitutional Balance in the EU After the Euro-Crisis', (2013) 76(5) *Modern Law Review*, 817–844.

¹³⁵ W. R. Cline and G. Wolff, *Resolving the European debt crisis* (Peterson Institute for International Economics, 2012), 1. Even the term "European financial crisis" has been used in some academic works, see. e.g. R. Godby, op. cit. *supra* note 98.

¹³⁶ D. J. Powell, *The Trader's Guide to the Euro Area: Economic Indicators, the ECB and the Euro Crisis*, 1st edition (John Wiley & Sons, 2013), 106–107.

¹³⁷ A. Ari, *The European debt crisis: Causes, consequences, measures and remedies* (Cambridge Scholars Publishing, 2014), 4–6.

¹³⁸ R. Godby, op. cit. *supra* note 104, 5–7.

¹³⁹ A. Ari, op. cit. *supra* note 125, 5–7.

¹⁴⁰ A. Ari, op. cit. *supra* note 125, 4–6.

¹⁴¹ R. Godby, op. cit. *supra* note 104, 3–4.

¹⁴² W. R. Cline and G. Wolff, cit. *supra* note 135, 21.

of Greeks debt multiplied in a few months, and in the spring of 2010, Greece had to admit defeat and ask the EU and IMF to bail them out, first with 110 billion euros, which was later revealed not to be even close for being enough as it was only the first from six bailouts.¹⁴³ As the market confidence for several EU countries fell, this became a self-fulfilling prophecy and a contagious effect where more risk-averse investors started to avoid financing sovereign debt, which made the interest rates higher and made more investors transfer their assets away to countries whose debt seemed safer.¹⁴⁴ This led to an unprecedented situation where several EU countries needed to be bailed out by their fellow countries.¹⁴⁵

As long as the crisis was within the financial sector, the primary function of preventing contagious problems was the ECB's actions as a lender of last resort through the financial stability fund.¹⁴⁶ Due to these reasons, ECB gave 489 billion euros worth of loans to the different banks with a 1 % interest rate in order to boost lending to companies and consumers.¹⁴⁷ State aid measures were also used, even if the main principle of banking regulation after the financial crisis was to avoid public bailouts.¹⁴⁸ The Commission's reaction to prevent bank failures related to this sovereign debt crisis was to extend bank aid communications that were given during the financial crisis.¹⁴⁹ The Commission had to back down from the approach it took on the 30th of April 2010 when it stated that it was time to phase out the bank guarantees and other support measures.¹⁵⁰ The Commission stated that the reason for the extension was higher tensions in sovereign debt markets.¹⁵¹ However, the state aid policy was not used any further, which might be due to increased pressure to tighten up the fiscal discipline in the

¹⁴³ R. Godby, op. cit. *supra note* 125, 6–8.

¹⁴⁴ P. Genschel and M. Jachtenfuchs, 'From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory', (2018) 56(1) *Journal of Common Market Studies*, 178–196.

¹⁴⁵ M. Moschella, 'When Some Are More Equal than Others: National Parliaments and Intergovernmental Bailout Negotiations in the Eurozone', (2017) 52(2) *Government and opposition (London)*, 239–265.

¹⁴⁶ European Commission, Directorate-General for Economic and Fiscal Affairs, *The Economic Adjustment Programme for Greece*, European Economy Occasional Papers 61, May 2010.

¹⁴⁷ T. Phillips (ed), *Europe on the brink: Debt crisis and dissent in the European periphery*. (Zed Books, 2014), 46–48.

¹⁴⁸ G. Lo Schiavo, 'Burden Sharing Arrangements vs. Shareholders and Creditors: Kotnik, Dowling and the Current State Aid Policy in the Banking Sector', (2018) 19(3) *European Business Organization Law Review*, 581–613.

¹⁴⁹ D. Garrod and A. Mackay, 'Extension of Crisis-Related State Aid Rules for Banks As Eurozone Economies Continue to Lurch', (2011) 2(2) *Journal of European Competition Law & Practice*, 135–137.

¹⁵⁰ European Commission, *DG Competition Staff Working Document, The application of State aid rules to government guarantee schemes covering bank debt to be issued after 30 June 2010*, 30 April 2010.

¹⁵¹ European Commission, *Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis*, OJ C 356, 6.12.2011, 7–10.

EU countries.¹⁵² State aid rules for banks were further developed as their financial position remained unstable due to the sovereign debt crisis.¹⁵³

In conclusion, it can be stated that in the European debt crisis, the Commission kept the state aid focused on sectors that suffered from the crisis. The state aid response was swift and focused, extending aids that were already recognized as effective. General fiscal policy measures were mainly conducted through ECB as low-interest loans that were given in order to boost consumption and lending. It has to be noted that this crisis cannot be directly compared to other crises as this harmed more sovereign states and less businesses and consumers, and one solution for the crisis was to cut down public spending.

In this crisis, the Commission's response with state aid was also publishing soft law. These soft law instruments were not used extensively, but they existed so that they could be used to counter crises if needed. It could be argued whether this was the extension of the doctrine adopted from the Financial crisis or just a way to counter faith crises in financial markets. To answer that, we will explore the approach adopted in a crisis between these, the *Eyjafjallajökull eruption crisis*.

Eruptions of Eyjafjallajökull 2010

In April 2010, a volcano on Island named Eyjafjallajökull started erupting, and the explosive phase of the eruption continued to May 2010. The eruption was only moderate in scale, but the volcanic ash spread all over Central Europe and Scandinavia leading to the closure of most of the European airspace.¹⁵⁴ Airspace had to be shut as volcanic ash posed a considerable threat to modern high-bypass turbine aircraft.¹⁵⁵ The reason for this is that ash-containing sulfates accumulate in the jet engines and form deposits, which can lead to loss of engine power.¹⁵⁶ This shutdown was partly due to bad luck,

¹⁵² P. R. Lane, 'The European Sovereign Debt Crisis', (2012) 26(3) *The Journal of Economic Perspectives*, 49–67.

¹⁵³ European Commission, *Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication')*, OJ C 216, 30.7.2013, 1–15.

¹⁵⁴ B. Langmann, A. Folch, M. Hensch and V. Matthias, 'Volcanic ash over Europe during the eruption of Eyjafjallajökull on Iceland, April–May 2010', (2012) 48 *Atmospheric environment*, 1–8.

¹⁵⁵ A. Folch, A. Costa and S. Basart, 'Validation of the FALL3D ash dispersion model using observations of the 2010 Eyjafjallajökull volcanic ash cloud', (2012) 48 *Atmospheric environment*, 165–183.

¹⁵⁶ T. J. Casadevall, P. J. Delos Reyes and D. J. Schneider, 'The 1991 Pinatubo Eruptions and Their Effects on Aircraft Operations', in C. G. Newhall and R. Punongbayan (eds), *Fire and Mud: Eruptions and Lahars of Mount Pinatubo, Philippines* (University of Washington Press, 1996), available in <https://pubs.usgs.gov/pinatubo/contents.html>, last visited 17.11.2021.

as the direction of the wind caused the ash to spread in a direction that was catastrophic for the aviation business.¹⁵⁷

The closure of European airspace affected most European countries over the period of 15–21.4.2010 and continued in different countries in different time periods during April and May.¹⁵⁸ The eruption led to over 10 million cancelled flights and a loss of 1,5–2,5 billion euros for airlines in just a few days.¹⁵⁹ This time the organ that reacted swiftly was the Council, which adopted conclusions on the 4th of May 2010, less than a month after the eruption.¹⁶⁰ Although no direct guidelines or rules were adopted, this resolution recalled that the existing legal framework of TFEU 107(2)(b) allowed state aid for air transport. However, no Member State expressed intention to grant state aid to the transport industry.¹⁶¹

It is rather interesting that the Member States left unused a possibility to grant aid to the aviation industry. The aviation industry is a relatively high-profile state aid receiver with a lot of case law, commission decisions, and guidelines.¹⁶² The whole industry has been under transformation from a state-trade to a market-oriented approach, which has caused incentives to grant state aid and therefore distorts competition in the market.¹⁶³ However, in a situation where granting more state aid might have been possible, Member States did leave this opportunity unused. One reason might be the short duration of the crisis and thus limited damage potential. This might also be the reason why there were no other reactions to adjust state aid rules to help the industry to survive the crisis.

In this case, the Commission did not publish any soft law. The Member States did not grant any aid for a sector that had traditionally been quite a state aid-intensive. It might have been that this served as a lesson for the Commission for future crises. After the CJEU decisions at the end of the last century, the Member States were highly cautious about granting aid based on TFEU 107(2). This might have been the reason why the Commission reacted by publishing soft laws in future crises.

¹⁵⁷ B. Langmann, A. Folch, M. Hensch and V. Matthias, op. cit. *supra* note 154.

¹⁵⁸ D. C. Carslaw, M. Williams and B. Barratt, 'A short-term intervention study - Impact of airport closure due to the eruption of Eyjafjallajökull on near-field air quality', (2012) 54 *Atmospheric environment*, 328–336.

¹⁵⁹ A. R. Schmitt and A. Kuenz, 'A reanalysis of aviation effects from volcano eruption of Eyjafjallajökull in 2010', in *IEEE/AIAA 34th Digital Avionics Systems Conference (DASC)*, 2015.

¹⁶⁰ Council of the European Union, Brussels, 4 May 2010, 6269/10 *Aviation 12, Consequences of the volcanic ash cloud to the European air space and possible follow-up measures - Council conclusions*.

¹⁶¹ European Commission, *Report on Competition Policy 2010*, 58.

¹⁶² N. Robins, 'State aid assessments in the aviation and ports sectors: The role for economic and financial analysis', (2017) 18(1) *ERA-Forum*, 121–138.

¹⁶³ S. Stadlmeier, 'Comment: State Aid for Airlines?', (2010) *European State Aid Law Quarterly*, 659–660.

COVID-19 crisis

Writing this in autumn 2021, we cannot fully explain the extent and impact of the crisis as it is still ongoing, and the damages cannot be fully understood in the next few years. This crisis differs from the other crises as there are both demand and supply shocks that affect the whole economy negatively.¹⁶⁴ The crisis is a global one with global impacts, and the response and the required recovery period are still uncertain.

The crisis began in the city of Wuhan in southern China at the end of 2019. In March 2020, the disease spread into Europe and other parts of the world rapidly, leading to outbreaks that are still ongoing despite different responses. During March, April, and May 2020, most EU countries issued restrictive measures in order to prevent the virus from spreading, including lockdowns, shutting down several public services, and restricting cross-border travelling.

Major impacts of the crisis were related to the lockdowns, which cut household incomes down heavily in several countries.¹⁶⁵ The crisis led to an unprecedented decline in global activity during 2020.¹⁶⁶ The global trade plummeted, and the cost was at least trillions of euros globally.¹⁶⁷ Even some public actors faced the risk of bankruptcy or at least insolvency.¹⁶⁸ The exact impact of the crisis is hard to measure as it is quite a novel case from an economic perspective.¹⁶⁹ As the crisis was quite sudden, the initial crisis was related to liquidity as companies faced liquidity crises and banks and other financial institutions faced higher risks from lending.¹⁷⁰ As the crisis prolonged and the second wave of the virus led to more restrictive measures, there began to be other adverse economic impacts, which led to another cycle of decreased economic activity, liquidity, and lending.¹⁷¹

¹⁶⁴ European commission, *Communication from the commission. Temporary framework for state aid measures to support the economy in the current COVID-19 outbreak*, (Consolidated version, 23.2.2021).

¹⁶⁵ A. Gupta, H. Zhu, M. K. Doan, A. Michuda and B. Majumder, 'Economic Impacts of the COVID-19 Lockdown in a Remittance-Dependent Region', (2021) 103(2) *American journal of Agricultural Economics*, 466–485.

¹⁶⁶ International Monetary Fund, *World Economic Outlook Update, June 2020*, (IMF, 2020), 2.

¹⁶⁷ K. Hassani and S. Dost, 'Impact of COVID 19 on International Trade and China's Trade', (2020) 7(2) *Turkish Economic Review*, 103.

¹⁶⁸ I. L. Kallick, R. Keen and J. Itzkowitz, 'Municipal Bankruptcy in the Time of COVID-19. The pandemic's devastating economic impact may provide an option for local governments to restructure financial obligations', (2020) 102(8) *Public Management Magazine*, 33.

¹⁶⁹ J. McNally and K. Lavender, 'Best Practices for Measuring the Social, Behavioral, and Economic Impact of COVID 19 Using Secondary Data', (2020) 4(1) *Innovation in Aging*, 963–964.

¹⁷⁰ European Commission op. cit. *supra* note 33 paragraphs 4–5.

¹⁷¹ European Commission, *Communication from the Commission. Fifth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance*, OJ C 34, 1.2.2021, 6–15 paragraphs 5–7.

In this crisis, the Commission again reacted swiftly and gave the first communication about a temporary framework for state aid measures to support the economy in the COVID-19 outbreak as early as 20.3.2020.¹⁷² The temporary framework enabled the following aid measures: direct grants, tax advantages, repayable advances, guarantees on loans, subsidized interest rates for loans, short-term export credit insurance, and aid in the form of guarantees and loans channelled through financial institutions. According to paragraph 39 of the communication, its applicability of it should have ended on 31.12.2020. However, it soon became quite obvious that these measures were not enough; it became necessary to preserve employment and contribute to relevant COVID-19 research, development, and products, which led to the first amendment of the temporary framework.¹⁷³ As the crisis prolonged, measures to contain the outbreak led to a larger demand shock and a longer-term solvency crisis for several undertakings that were commercially viable before the outbreak.¹⁷⁴ Due to this issue, the state aid framework was amended a second time in order to enable equity and hybrid-capital instruments for undertakings facing financial difficulties.¹⁷⁵

As the crisis prolonged, state aid measures adopted were an effective instrument to support the economy during the crisis.¹⁷⁶ The third amendment of the framework practically forgot major parts of the previously mentioned reasoning for state aid measures as it enabled state aid for small and medium-sized undertakings that had financial difficulties before the outbreak, which was based on the reasoning that otherwise, the crisis could lead to a large number of bankruptcies due to liquidity crisis, which would cause a serious disturbance in the whole Union economy.¹⁷⁷ At the end of November 2020, the Commission stated that as the crisis continued, it was necessary to prolong the temporary framework to 30.6.2021 and to 30.9.2021 for some measures.¹⁷⁸ As state aids enabled by the temporary framework were used quite heavily, disparities between the Member States emerged due to different budgets and sizes of Member States.¹⁷⁹

¹⁷² European Commission op. cit. *supra* note 33.

¹⁷³ European Commission, *Communication from the Commission 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 C1 112/1, 4.4.2020, 1–9 paragraphs 4–8.

¹⁷⁴ European Commission op. cit. *supra* note 165, paras 4–6.

¹⁷⁵ European Commission op. cit. *supra* note 164, paras 5–7.

¹⁷⁶ European Commission op. cit. *supra* note 27, para 7.

¹⁷⁷ European Commission, *Communication from the Commission Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*, OJ C 218, 2.7.2020, 3–8 paragraphs 5–7.

¹⁷⁸ European Commission, *Communication from the Commission 4th Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance*, OJ C1 340/1, 13.10.2020, 1–10.

¹⁷⁹ European Commission op. cit. *supra* note 178 paras 8–9.

The amendments continued during 2021, and while writing this in October 2021, the last amendment was fifth¹⁸⁰. In this amendment, the temporary framework was prolonged to 31.12.2021, and the maximum aid was increased as the second wave of the outbreak kept slowing economic activity and threatening businesses in several sectors.¹⁸¹ Communications have not made it unnecessary to inform the Commission about new state aid instruments. They have made it easier for the Commission to go through notifications and make decisions. During the time period of 19.3.2020–11.6.2021, the Commission has made nearly 600 decisions on state aid for COVID-19 measures.¹⁸²

The legal basis for these aids was mainly Articles 107(2)(b) and 107(3)(b), meaning aids making good the damage caused by natural disaster or exceptional circumstances or aid to remedy a serious disturbance in the economy of a Member State.¹⁸³ The Commission did also note in Article 21 of the framework that there are measures approved based on Article 107(3)(c), which can be used to subsidize undertakings without state aid compatibility issues. In this crisis, state aid measures were used to preserve economic activity by ensuring sufficient liquidity.¹⁸⁴ State aids were mostly used to boost demand, which increased public financial deficits.¹⁸⁵ One point to be noted is that in the financial crisis, different fiscal measures used countercyclically were considered general economic policy measures and not state aid.

4. Discussion and conclusions

Earlier commentators have noticed that state aid rules have been used to coordinate Member State action in the absence of other mechanisms.¹⁸⁶ In light of our inquiry, this is not the entire picture because, in addition to these financial measures, there are other regulatory mechanisms that can be used and have been used depending, of course, on the nature and other than economic aspects of the crises.¹⁸⁷ Perhaps, however, these other measures may be utilized only later, and state aid is the first and fastest reaction because the Commission has the power to rule state aid policy. In the future, it

¹⁸⁰ European Commission, op. cit. *supra* note 171.

¹⁸¹ European Commission, op. cit. *supra* note 171, paras 6–9.

¹⁸² European Commission, *Factsheet - List of Member State Measures approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework 16.6.2021*.

¹⁸³ European Commission op. cit. *supra* note 27, paragraph 6.

¹⁸⁴ European Commission op. cit. *supra* note 27, paragraph 9.

¹⁸⁵ M. Nový and Č. Jarý, ‘Economic and Social Impacts of COVID 19 on National Economies from the Point of View of Economic Theory’, (2021) *SHS Web of Conferences* 92, 1–10.

¹⁸⁶ M. Ianus and R. Orzan op. cit. *supra* note 125, p. 266.

¹⁸⁷ For example, the Commission introduced the EU Strategy for COVID-19 vaccines on 17th of June 2020 and there is pending a proposal for regulation on Digital Green Certificate for travelers (17.3.2021).

is important to study the whole toolkit and the interplay with state aid. State aid rules have been used to mitigate the effect of the crises as well as solve the crises. The Commission had a quite similar response to the 2007 financial crisis and COVID-19 crisis: a swift response in order to allow the usage of state aid to mitigate the socio-economic consequences of the crisis.¹⁸⁸

The Commission's approach to crises changed at the beginning of the 21st century. Before that, the Commission acted reactively by approving aids based on Article 107(2)(b) 's predecessors. This approach changed before the Financial crisis or at the beginning of it. During the Financial crisis and all major crises after that, the Commission did publish several soft law guidelines in order to promote state aid granting. In these crises, the Commission chose a more proactive approach to solving crises. We identified three possible reasons for this:

- 1) Limited usability of Article 107(2)(b). At the end of the 20th century, CJEU gave several judgments about the limited scope of Article 107(2)(b) 's predecessors.
- 2) Lessons learned from the Financial crisis. This crisis was about returning trust to the financial markets. This required clear communication and reduced uncertainty. Due to this, guidelines about state aids were useful tools.
- 3) Lessons learned from the Eyjafjallajökull crisis. In this crisis, the Member States were reluctant to grant aid based on TFEU 107(2)(b). This might have served as a warning for the Commission, which did not rely on this article in the COVID-19 crisis, even if the crisis would have most likely fulfilled the requirements for aid based on this article.

Some differences can be noted in these crises. As the financial crisis and debt crisis were mostly caused by certain economic actors, state aid was used mainly to counter the crisis. As COVID-19, Chernobyl, mad cow, and Eyjafjallajökull were external factors that damaged the economy, and state aid was used mostly to mitigate the socio-economic impacts of the crisis as other measures were used to counter the crisis, if possible. In the case of COVID-19, some parts of state aid were used to develop a cure (vaccination) for said disease, but the majority of aid was used for mitigation. Different approaches are presented in the table below.

Table 1. State aid approaches to different crises

¹⁸⁸ P. Riedel, R. Wilson and S. Cranley, op. cit. *supra* note 39.

<i>Crisis</i>	<i>Approach</i>	<i>The focus of the measures</i>	<i>Legal basis</i>
The Chernobyl disaster	Passive approval of state aid measures	Sectoral, agriculture	Article 87(2)(b) EC (Article 107(2)(b) TFEU)
The Mad cow disease crisis 1996	Reactive, allowing aids to compensate damages	Sectoral beef production	Article 92(2)(b) EC (Article 107(2)(b) TFEU)
Financial and economic crisis 2007	Active, approving measures to counter the crisis itself	Sectoral, financial markets & General economic measures	Article 87(3)(b) EC (Article 107(3)(b) TFEU)
European debt crisis 2010-2014	Active, approving measures to counter the crisis itself	Sectoral, financial markets	Article 107(3)(b) TFEU
Eruptions of Eyjafjallajökull 2010	Predictive, approving measures to compensate damages before they even occurred.	Sectoral, aviation	Article 107(2)(b) TFEU
COVID-19 crisis	Active, approving measures to counter the crisis itself, as well as countering the immediate economic consequences of the crisis	General	Articles 107(2)(b), 107(3)(b) and 107(3)(c) TFEU

Our material shows some differences in crisis management during this time period. At the same time, one must observe, however, that the real-life crises have been different. Earlier (Chernobyl, Mad cow, and volcano) situations were smaller in scope, and the EU used different state aid tools, and even Council was included. The current approach (financing and Covid) relies on many temporary commission communications to the Member States, guiding them to use state aid in a correct way.

The aim of communications is to identify temporary State aid measures that the Commission considers compatible under the TFEU in light of the current situation. Communications set out the criteria based on which the Member States may provide public support in different forms.

There might be some legal concerns about whether the Commissions should take this kind of role in how the state aid rules are interpreted. It could be argued that this was not in the Commission's jurisdiction according to the EU treaties. Our goal was, however, to answer how the Commission has acted, and not how it should have nor how it was allowed to act.