“EU State aid control: A conflicted system”

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1. Introduction

This chapter looks at EU State aid control, one of the most unique features of European integration. In particular, it looks at EU State aid control through the heuristic offered by the concept of ‘conflict’. The chapter thus explores whether and to what extent conflicts characterise EU State aid law and policy and, if so, what we should be doing about it.

Since it ultimately deals with the respective powers of the European Commission and the Member States, as they are originally designed in the Treaty of Rome and as they have evolved through the decades, and especially since the financial and economic crisis of 2008, the analysis is constitutional.

The chapter is organised as follows. Section 2 briefly explores the concept of conflict and its relevance for State aid and State aid control. Section 3 deals with few initial remarks about how the system could and has evolved. This analysis paves the way to the specific consideration of the evolution of State aid during our protracted times of crisis. (Section 4). Section 5 starts the constitutional analysis of State aid exploring the key tenets of the original constitution of the 1950s as it emerges from the ECSC and EEC Treaties, and Section 6 analyses the interplay between the State aid competence and other competences in EU law. In the following Section 7, the attention shifts to the core of the analysis which concerns the recent evolution of the “living” constitution of State aid since 2008 up to recent times. While

Section 8 addresses the key question of the legality of the current trend, Section 9 focuses on its political acceptability. Section 10 attempts to offer solutions.

2. Conflict is at the core of State aid

We consider conflict to arise when different entitlements or requirements, or indeed scenarios, clash with each other, and pursuing one almost inevitably encroaches on the other.[1]

Conflict is at the core of State aid and its regulation, from three different perspectives.

First, State aid measures are in themselves ambivalent and conflictual. State aid can be motivated by different policy rationales and may produce ambivalent effects. From a welfare perspective, it may be beneficial for the jurisdiction adopting it and at the same time cause across-the-border negative spillovers for other jurisdictions.

Secondly, State aid control and regulation is also conflictual inasmuch as they need to "balance" out negatives with positives. The main difficulty, from the EU viewpoint, is exactly how to arbitrate between these different objectives and effects and regulate it. To be sure, this balancing is common to other areas (e.g. free movement, antitrust) but it is far more difficult and controversial for subsidies which are a core expression of the governmental prerogative of tax and expenditure.

Thirdly, and most importantly, within the specific constitutional setting of the EU, State aid assessment is almost inevitably conflictual since it easily interacts with several other policy areas which may feature a different settlement and division of powers between the EU and the Member States.

3. The evolution of State aid control

Importantly, there is no single way to balance negatives and positives in an hypothetical system of subsidy control.

For example, the General Agreement on Tariffs and Trade ("GATT") and then the World Trade Organization ("WTO") largely adopt a *laissez-faire* approach to government subsidies and only chastise the most egregious forms of trade distortion.[2] Subsidies contingent on export or on the use of local products are explicitly prohibited. All other subsidies are essentially permitted unless a Member State manages to prove they cause adverse effects to its interests, in one of the specific scenarios and satisfying the fairly high legal standards provided by law. If GATT/WTO subsidy disciplines offer policy space to governments, they do so *indirectly* since

[1] See Erich Vranes, "The Definition of 'Norm Conflict' in International Law and Legal Theory" (2006) European Journal of International Law, 395–418. Not only does this broad definition of conflict apply to incompatibilities between prescriptive norms as well as permissive norms but also to a conflict of competences.
[2] While this is a fairly accurate characterization of the WTO subsidy system as it is in force in 2026, international trade subsidy disciplines have featured a significant evolution since the 1947 GATT. For more details see Petros Mavroidis, *Trade in Goods*, 2012, Oxford University Press.

there is no express discipline on the 'positives' of subsidies, i.e. their ability to target market failures and pursue positive policy objectives.[3]

Virtually since the beginning, European integration has followed a different route which can largely be explained by the higher degree of economic and social integration pursued, which is duly reflected in the Treaty text.

But, as with many other Constitutions,[4] the text of the 1957 Treaty of Rome, which still regulates State aid and its control to this day, is also vague and open-ended. This can largely be explained by the fact that EU State aid control was a uniquely new idea in the 1950s. One example suffices to fully appreciate this political and legal novelty. In *Steenkolenmijnen,*[5] the very first State aid case before the Court of Justice, the clarification of the language or Article 4(c) of the ECSC Treaty was at issue. What did the strict prohibition of 'aid' refer to in that provision so fundamental for the creation of a common market in coal and steel? After noting that the provision was "brief and almost laconic", the High Authority observed

> [i]n none of the six treaty countries has a clear and generally accepted concept of subsidy been developed yet. Nor, for that matter, in Community law has a clear and generally accepted concept of subsidy been developed yet.[6]

To be sure, that case focused on the expression "subsidies or aids" of the ECSC and not to the concept of "State aid" of Article 107(1) of the Treaty of Rome. But this does not detract from the fact that even in 1957 the notions State aid and its control were still a novelty. The Treaty of Rome, with its distinction between "in principle incompatibility" and "compatibility", mostly as a result of a discretionary assessment of the European Commission, was simply sketched in its main contours were awaiting details and shading to be added in the future.

Writing in 1994, Claus-Dieter Ehlermann was noting

> State aid control in the EU had to be established progressively from scratch. Neither the authors of the Treaties nor the High Authority of the European Coal and Steel Community ("ECSC") and the Commission of the European Economic Community ("EEC") could have recourse to earlier international or national practice. Even today, the understanding of state aid control is underdeveloped; compare the wealth of writing on antitrust questions to the dearth of publications on state aid issues.[7]

It has thus been for the High Authority, soon turned into the European Commission, under the increasing scrutiny of the European Court of Justice, to shape the system. Member States

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[3] See Luca Rubini 'ASCM disciplines and recent WTO case law developments: what space for "green" subsidies?' in Thomas Cottier and Ilaria Espa (eds) *International Trade in Electricity and the Decarbonisation of the Economy. The World Trade Forum 2014* (2017: Cambridge: Cambridge University Press), 311-355

[4] The Treaty of Rome is nothing short of a Constitution. When dealing with State aid, the King is naked: the relevant Treaty provisions are nothing else than constitutional provisions and we have to call them this way.

[5] Case 30/59, *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority of the European Coal and Steel Community*, ECLI:EU:C:1961:2

[6] Defence brief, page 19, in Dossier Case 30/59 (CJEU-661), HAEU (translation of the author). For a legal-historical analysis of the case, and its significance for the development of EU State aid law, see Luca Rubini, "Déjà-(pre)vu?
Alle radici della nozione di «aiuto di stato»: la sentenza Steenkolenmijnen" (2024) Eurojus, 280-299.

[7] Claus-Dieter Ehlermann, "State Aid Control in the European Union: Success or Failure?" (1994) Fordham International Law Journal, 1212-1229, at 1214.

largely shied away from the direct design of system, either because they could not agree or because, when they did, they largely delegated the duty to put flesh to the bones to the European Commission. In doing so, the Commission has continuously shaped and re-shaped the system, and the inner balance between the negatives and the positives, between ‘incompatibility’ and ‘compatibility’, between ‘prohibition’ and the ‘justifications’.[8]

On their part, discounting largely sporadic complaints,[9] Member States have largely acquiesced to the policy choices of the Commission. Readers should remember this acquiescence since it may become relevant when we make a legal and political assessment of the current scenario of EU State aid policy.

Drawing from public choice theory, the economist William Bishop has written a memorable paper to explain the Commission – Member States relationship.[10] Member States would often shift the blame for politically unpalatable decisions (from a domestic perspective) to the Commission (or, more generally, to the EU) but, all in all, they generally accept the latter’s tutelage, which takes shape in a very significant leeway in interpreting the State aid constitution, especially with respect to the exemptions. Writing in 2011 (but with words that are still largely relevant today) Bishop noted that the Commission’s power is virtually subject to “no control” at all with the exception of “unreasonableness”.[11]

4. Evolving in times of crisis: hard questions

In times of crisis, which have incessantly engulfed the EU and the world since 2008, the criticism of the direction taken by EU State aid control has got stronger (and the need for analysis has become all the more warranted). The gist of the criticisms is that the EU Commission has exercised powers and competences which are not its own (but Member States’), that it has dramatically changed the prevailing interpretation of the law, especially with respect to the administration of justifications, that the main focus has shifted from “prohibiting” distorting State aid to “justifying” State aid that is in line with horizontal, EU-defined policy objectives.[12]

In general, constitutional terms, the key questions are thus as follows. What happens when the two terms to balance with each other (in the State aid case, prohibition and justification) face a dramatic change? What if the pendulum decisively move towards one of the two, making it largely prevalent in the balancing act? How does this significant re-balancing fare against the Constitution?

It is a fact that the Constitution on State aid control has evolved dramatically since the 1950s – it bears almost no resemblance to the original set-up. State aid law and policy may well be

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[8] On this topic see Juan-Jorge Perez’s chapter.

[9] See Aoife White and Aude van den Hove, “Finland says EU’s state subsidy bonanza has ‘gone too far’”, *The Politico*, 27th September 2024, available at https://www.politico.eu/article/finland-says-eus-state-subsidy-bonanza-has-gone-too-far/

[10] William Bishop, “From trade to tutelage: State aid and public choice in the European Union” in Inge Govaere, Reinhard Quick and Marco Bronckers (eds) *Trade and Competition Law in the EU and Beyond* (2011: Edward Elgar Publishing), 421-434.

[11] Ibid., at 426. This assessment has to be read in the light of the subsequent *Hinckley Point* decision of the ECJ. See Case C-594/18 P *Austria* v. *Commission* EU:C:2020:742.

[12] See Juan-Jorge Perez’s chapter.

represented by the image of geological stratification. One can easily identify its evolution, layer after layer. And these changes have qualitative, not only quantitative, nature.

These dramatic changes indicate various types of real or potential conflicts, at various levels: within the system of State aid control itself, with the internal market, with other EU policies, with third countries. Most importantly, given the inextricable link of State aid and State aid policy on the one hand with several EU and Member States policies on the other, the analysis of these conflicts of the system is consequential for EU law and policy at large.

Two key, hard questions that need to asked are whether these dramatic changes are constitutionally legitimate and politically justified and tenable. In particular, we could and should ask ourselves the following questions: What did the Constitution originally provide as State aid control? How has this Constitution evolved, especially in recent years (esp. since 2008)? Are these changes legitimate and tenable? What shall we do?

5. The original Constitution of the 1950s: still valid

Before analysing the main content of the original State aid Constitution of the 1950s, we should ask why it does matter to know what the Constitution originally provided in the first place.

Many other areas of EU law have changed, and first of all the Constitution has changed through successive treaty amendments and refinements. Importantly, State aid control is still regulated under those terms initially negotiated and drafted in the 1950s. There is thus a presumption that the key features of the system are still those originally negotiated.[13] That said, however, State aid control does not operate in isolation but has to be set within the broader context of EU law and policy. Particularly relevant are on the one hand the various Treaty provisions that outline the respective competences and powers of EU institutions and Member States and on the other hand the rules that develop other EU policies that should be taken into account in State aid compatibility assessment.

As hinted at, since its early days the European Constitution on State aid featured the two key concepts of prohibition and potential justification. Quite intuitively, given the equivalence of different government interventions in the market, and the potential for policy substitution, not only did the creation of a common market require dealing with traditional trade barriers like duties and quotas but also with beyond-the-border interventions like subsidies and aids. *State aid control is thus existential for the common market.* From this perspective, it is clear that the first and foremost focus of the enforcement of State aid in the early days was on prohibiting it. The most extreme example of this attitude can be found in the European Coal and Steel Community (ECSC) Treaty which prominently featured an unqualified prohibition of aids and subsidies right at the beginning in Article 4. No apparent possibility for exceptions was provided for. It is only with time that Article 95 ECSC emerged as the appropriate basis for considering the positives of aids and their potential justification.

The Treaty of Rome is, by contrast, more explicit and clearly empowers the European Commission to declare State aid compatible with the Common Market. Crucially for the whole evolution of the system, distortions *may* be justified by the presence of the public policy goals

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[13] Incidentally, this circumstances especially justifies the use of legal historical analysis to better comprehend the main tenets of EU State aid control.

of Article 107(3) TFEU. What is key here is the use of the conditional tense. The European Commission *may* declare State aid compatible. The Commission bears the power and responsibility for this assessment which, as the ECJ soon clarified, is discretionary because it involves difficult economic and social considerations but above all it is discretionary because it is *political*.[14] In other words, whether a given State aid measure is all in all positive for the common market is not the outcome of a quantitative assessment only but rather of a qualitative evaluation of all factors at play.

In a thought-provoking paper published in 2010, an American economist and lawyer, Alan Sykes, carried out a comparative examination of the rules on subsidies in the GATT/WTO, EU and US.[15] When analysing EU State aid provisions, he noted:

> Plainly, almost any manner of aid can be authorized under these broad and vague standards.[16]

The story of State aid control is largely the story of how the Commission has exercised this discretionary power and, step-by-step, developed a fundamental European policy.[17] The EU State aid regime is "unique" at the international level for various reasons. But, perhaps, the most notable is exactly this possibility of justification which, since the beginning, has been a "natural monopoly of the Commission".[18] If we draw a comparison with the multilateral regulation of subsidies, i.e. GATT/WTO system, for a moment, explicit justification opportunities have virtually been non-existent since the beginning, while focus has always been on the presence/absence of distortions.[19]

6. The inevitable interplay of EU State aid with other policies and competences: dangerous liaisons

Now, crucially, it is in this discretionary power of interpretation of exemptions that we find the seeds of the most salient conflict in the field of EU State aid.

There are two aspects to this.

The first is how the Commission naturally exercises its action. The Commission acts in individual cases but, inevitably, through experience, it develops a policy. Devising a common

[14] Case 730/79, *Philip Morris Holland BV* v *Commission of the European Communities* ECLI:EU:C:1980:209. See Karel Mortelmans, "The Compensatory Justification Criterion in the Practice of the Commission in Decisions on State Aids" (1984) CMLRev 21.

[15] Alan O. Sykes, "The Questionable Case for Subsidies Regulation: A Comparative Perspective" (2010) Journal of Legal Analysis, 473–523.
[16] Ibid., 490.
[17] See Thomas J. Doleys, "Fifty Years of Molding Article 87: The European Commission and the Development of EU State Aid Policy (1958-2008)" Paper prepared for presentation at the 11th Biennial International Conference of the European Union Studies Association, to be held April 23-25, 2009 in Marina Del Ray, California.
[18] See Claus-Dieter Ehlermann, "State Aid Control in the European Union: Success or Failure?" (1994) Fordham International Law Journal, 1212-1229, at 1216.
[19] To be sure the initial version of the WTO Agreement on Subsidies and Countervailing Measures ("ASCM") included a category of non-actionable subsidies which was largely modelled on EU State aid law. Going beyond the WTO, it is interesting that the only trade agreements that include meaningful State aid or subsidy disciplines are those negotiated by the EU.

and transparent approach to its investigative and decision powers is dictated by the need to ensure the proper exercise of administrative powers.

That being said, one thing is the need to ensure consistency in decisions, quite another is the definition of the criteria of assessment of national measures and, more specifically, of the terms and conditions that are required in order to give the green light. There is indeed a thin line between simply ensuring that State aid is in line with one of the policy objectives provided for in the TFEU and substantially developing these policy objectives into a common European policy. It is the same line that distinguishes negative and positive integration, a very important line as both the Advocate General Hogan and the Court of Justice have recently highlighted in the *Hinkley Point* case.

The second aspect is that not only is State aid one of the most powerful instruments in the hands of governments but it is also one of the most neutral and pervasive inasmuch as it can apply in any sector of the economy or policy field. This leads to an inevitable overlap between the State aid field and endless other fields regulated throughout EU law. But, the share of competence, and the respective powers of the EU vis-à-vis the Member States, change significantly from one policy area to another. The Commission may well not have the same powers in each of these areas. From another perspective, the EU power to harmonise national laws into common laws is not universal and, importantly, is not left completely in the hands of the Commission.

This practically means that the exercise of the compatibility assessment in State aid *may* easily enter into conflict with the prerogatives (and, especially, the limits of the prerogatives) of the EU, and more specifically the Commission, in other relevant policy fields. This danger is all the more present if the Commission's action in State aid can be characterised as *de facto* harmonisation of national tax and spending policies. Fundamentally, this is a rule of law point.

Arguably, as a general interpretative approach, while the exercise of the State aid competence should obviously consider the broader context of EU law and policy,[20] its generality should give way to the specificity of other specific policy areas when these are implicated. In other words, the *specificity* of State aid is the control of the *distortions of competition within the internal market*. The specific regulation of the key tenets of for example tax or industrial policy should, by contrast, be found elsewhere and be subject to their different constitutional, institutional and procedural paraphernalia. The State aid assessment can that has to take into account of policy objectives regulated elsewhere should simply consider them to the extent that it is necessary to acknowledge the redeeming feature of distorting subsidies and not to positively shape that subsidy as tool of a common industrial policy.

7. The State aid Constitution dealing with crisis-times: a revolution?

The main point of the previous section was that the main responsibility of the European Commission within State aid control is to assess State aid measures, especially from the perspectives of the possible negative interferences with the Internal Market, and not to harmonise national policies by the back door. Using a different jargon, State aid control is about negative, not positive integration.

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[20] A recent reminder to this point came in Case C-59/23 P, *Austria v Commission* ("Paks II nuclear power station") ECLI:EU:C:2025:686.

Now, the actual administration of State aid control in crisis-times has witnessed a significant shift in EU State aid control, with a progressive loss of focus with respect to the distortions in the Internal Market in favour of an increasingly closer attention to the pursuit – through national State aid – of common European policy objectives. The very latest iteration of Commission's soft law pits these European policy objectives against the increasingly complex geopolitical scenario and the need to ensure that the Internal Market is both competitive and secure.

The general context of the various soft law instruments introduced by the Commission to tackle crisis-aid is already one scenario where the large majority of State aid is considered compatible with the Internal Market. The most recent State Aid Scoreboard[21] shows that in 2024 the new block exempted measures account for 95% of total new non-crisis measures. "While Member States are progressively using more block-exempted measures, notified measures show a remarkable decreasing trend."[22] This is the best example of Europeanisation in action.[23]

Since, however, block-exempted aid cannot exceed provided ceilings, GBER ("Global Block Exemption Regulation") measures involve only 36% of total expenditure. Though fewer, notified measures involve significant amounts of financial resources.

Against this scenario, what, however, is more interesting is the status of State aid measures under the various crisis-aid frameworks. What emerges from an analysis of the various frameworks is a substantial lessening of EU State aid control, meaning that only one concept seems to emerge – that of justification.[24]

Two types of aid have been regulated through frameworks, the "crisis aid" proper and so-called "transition measures" which "focus on sectoral development aimed at fostering long-term economic growth and resilience within affected sectors."[25] The practical result of these frameworks is that the large majority of aid is eventually justified. Numerous are the examples of the rules and cases where the possible distortions to the working of the Internal Market have been downplayed and the pursuit of a positive policy objective has been centred-piece.

How has this relaxation of State aid control taken place? The Temporary Frameworks often provide higher ceilings, no conditions, no obligations of notifications, use of presumptions, and an increasing generalisation of matching aid.[26]

The use of presumptions signals a paradox and an irony.

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[21] State Aid Scoreboard 2025, published on 16 January 2026.
[22] Ibid, page 28.
[23] Michael Blauberger, "From negative to positive integration? European state aid control through soft and hard law", MPIfG Discussion Paper, No. 08/4, Max Planck Institute for the Study of Societies, Cologne.
[24] See Juan-Jorge Piernaz-Lopez's chapter.
[25] Ibid., page 72.
[26] See, e.g., Andrea Biondi, "Governing the Interregnum: State Aid Rules and the Covid-19 Crisis" (2020) Market & Competition Law Review 4 (2): 17-40; Irene Agnolucci, "Will Covid-19 Make or Break EU State Aid Control? An Analysis of Commission Decisions Authorising Pandemic State Aid Measures" (2022) Journal of European Competition Law & Practice 13 (1): 3-16; Andrea Biondi and Oana Stefan, "Regulating EU Permanent Crises: the Case of State Aid" in Catherine Barnard, Adam Lazowski and Daniel Sarmiento (eds) *In Pursuit of Legal Harmony in a Changing World: Essays in Honour of Eleanor Sharpston* (2024: Hart Publishing). See also Andrew Hodge, Roberto Piazza, Fuad Hasanov, Xun Li, Maryam Vaziri, Atticus Weller, and Yu Ching Wong, *Industrial Policy in Europe: A Single Market Perspective*, WP/24/249, IMF Working Paper, December 2024.

The initial use of a presumption talk in State aid can be traced back in the fundamental *Philip Morris* case where the Court of Justice laid down the famous standard whereby any State aid that strengthens the financial position of the recipient has to be taken to affect trade within the Internal Market. While qualifying the suggestion of Advocate General Capotorti in the case – any subsidy by definition distorts – the Court of Justice comes close to a presumption of distortion. The significance of this finding is clear. It goes a long way to strengthen EU State aid control and the power of the Commission.

Fast forward to the use of presumptions in the crisis frameworks and the use of presumptions is now going in the opposite directions. When distortions in the Internal Market are not the real focus of the regime anymore, they are simply considered insignificant, or their existence is simply posited to trigger EU control. The first decision under the most recent iteration of the frameworks, the CISAF, signals an interesting application of the presumptions of *positive* effects of the aid measure under investigation.[27]

In sum, the end result is that, under the temporary crisis frameworks, the large majority of aid is eventually justified. Distortions are not important, and the redeeming feature of interventions far more important. Significantly, through this emphasis on common policy goals, we witness to a creeping Europeanisation of national industrial policy which is essentially harmonisation by the back-door.

8. Thoughts on the legality of the changing Constitution: doubts

Let's now assess the legality and political viability of these changes in turn.

First, are these systemic changes legal? Probably not. The current features of the system are too far away from what the Constitution provides for. Following the image of the geological stratifications used above, the 'material' or 'living' Constitution is too much detached from the 'original' Constitution.[28]

The legal assessment of both prohibition and justification is arguably very different from the 1957-constitutional legal criteria. This for various reasons. First, the distortion on competition and effect on the Internal Market are legal requirements and presumptive approaches cannot go as far as emptying them. At the same time, though broadly-phrased, exemptions need to be construed and applied *within* the context of the main goal of EU State aid control which is to control distortions of competition within the Internal Market.

In this respect, the distancing from the Internal Market goal has led to the increasing materialisation of the risk of its fragmentation as a consequence of national State aid policies. Since State aid can replace other domestic policies and essentially operate as an obstacle to trade, there is a conflict between the system of State aid control as originally designed and the internal market imperative. One of the main concerns following the 2005 State Aid Action Plan

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[27] Phedon Nicolaides, "The First State Aid Measure Approved under CISAF: Lots of Presumptions", State aid uncovered, 10th November 2025, at https://www.lexxion.eu/stateaidpost/the-first-state-aid-measure-approved-under-cisaf-lots-of-presumptions/

[28] On the evolution of EU State aid law and policy see Juan-Jorge Piernaz-Lopez, *The Concept of State Aid Under EU Law*: From internal market to competition and beyond (2015: Oxford University Press); Andrea Biondi and Elisabetta Righini, "An Evolutionary Theory of EU State Aid Control" in Anthony Arnull and Damian Chalmers (eds) *The Oxford Handbook of European Union Law* (2014: Oxford University Press).

("SAAP"), i.e. that State aid might become a tool of competition between States, between the 'haves' and 'haves-not', has become a reality.[29] Official data show how three countries, i.e. Germany, France and Italy, account for the large majority of State aid granted in the EU.[30]

If an orthodoxy in the interpretation of EU State aid law has to be found, this means that State aid control is warranted only because State subsidies (very much like duties, quantitative restrictions and the like) may distort the internal market. This has led Andrea Biondi to recently conclude:

> In other words, were the Commission to return to an orthodox approach, with no substantial changes to the Treaty or secondary legislation, the rationale for state aid control would continue to be the maintenance of the internal market".[31]

More generally, we have increasingly seen a shift from subsidy control to subsidy *governance* of public spending. The system's original concern to control distorting aid has mutated into a system governing good aid. As noted, through the use of its power of assessment, the Commission has essentially positively legislated and harmonised. The body of 'secondary' law on justifications has developed into the shape of EU industrial policy-but-without-competence.[32] Soft law has been over-used and perhaps abused. Exceptions which, given the emergency situations which justified their introduction, should have become temporary have dangerously become permanent. The current system is fundamentally and qualitatively different from the original one.

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[29] Jose-Luis Buendia-Sierra and Ben Smulders, "The Limited Role of the "Refined Economic Approach" in Achieving the Objectives of State Aid Control: Time for Some Realism" in Vittorio Di Bucci, Jose-Luis Buendia-Sierra and Ben Smulders and others (eds), Liber Amicorum Francisco Santaolalla Gadea (2008: Kluwer) 191. See also Marianne Dony, *La mutation de la politique des aides D'Etat*, 2024.

[30] One of the most dramatic examples refers to 2022 when €672bn State aid was approved of under the temporary crisis framework in force at a time, of which no less than 53 per cent has been notified by Germany. See *Competition State Aid Brief*, Issue 1/2023 – July 2023, p. 2. In this respect, it is crucial to properly assess the practical implications of the objective to increase the competitiveness of the Internal Market. Policies (like State aid) aimed at strengthening the global opportunities of the EU cannot in fact become the cause of internal fragmentation. See Donato Di Carlo, Andreas Eisl and Dimitri Zurstrassen, "Together we trade, divided we aid: Mapping the flexibilization of the EU state aid regime across GBER, IPCEIs and Temporary Frameworks", Policy Paper N°307, Jacques Delors Institute, November 2024; José Manuel Rueda-Cantuche | Luis Enrique Pedauga | Juan Carlos Ruiz-García | Daria Ciriaci, "Green transition, single market and EU's open strategic autonomy: the impact of state aid", Single Market Economics Briefs, 28 June 2024.

[31] Andrea Biondi, "Recalibrating the Single Market: State aid law", in Marta Andhov, Andrea Biondi and Luca Rubini, *Regulating for a sustainable and resilient single market Challenges and reforms in the areas of state aid, competition, and public procurement law* , 2023, Bruxelles: ETUI, at page 66.

[32] Granted the fuzziness of what "industrial policy" mean but accepting that State aid and subsidies are paramount tools of industrial policy (under whatever notion), EU law is clear in giving the EU only a limited role to play in this area. Article 6(b) TFEU only provides for a support competence in the field of "industry". Article 2(5) TFEU. Article 2(5) second sentence excludes "harmonisation of Member States' laws or regulations" for support competence areas. While reiterates that no harmonization is possible, Article 173(3) TFEU makes it clear that "This Title shall not provide a basis for the introduction by the Union of any measure which could lead to a distortion of competition or contains tax provisions or provisions relating to the rights and interests of employed persons." One tool, through which State aid is often granted, is taxation. Article 113 TFEU provides for unanimity in (indirect) tax harmonization. Importantly, even outside these areas, the Commission cannot proceed on its own to harmonise national laws or regulations. The standard procedure of Article 114 TFEU requires co-decision of the Council and the European Parliament. Even in the specific case of Article 106(3) TFEU, the EU jurisprudence has made it clear that Commission's directive in the field of public undertakings, undertakings with special or exclusive rights, undertakings entrusted with services of general economic interest or revenue-generating monopolies, cannot create new obligations but can only specific the duties of Article 106.

There is also a final legal aspect to consider, which pertains the 'external' side of EU State aid control and the internal market.

As known, the EU has recently adopted the Foreign Subsidy Regulation ("FSR"), a new regulatory tool to tackle so-called 'foreign subsidies', i.e. subsidies granted by third-countries to companies active in the EU internal market.[33] The FSR is one the recent initiatives adopted by the EU to address the competitiveness concerns of its industry.

> … this Regulation [does] in essence 'extend' the application of EU State aid laws to subsidies granted by foreign countries. More precisely, it [does] set up a regulatory mechanism - and remedies - that, mutatis mutandis, [does] reflect the key standards of control of EU State aid laws ….[34]

Now, this equivalence of legal standards between the new Regulation and State aid is crucial. To pass muster the legal requirements of WTO law, and disactivate any claim of discrimination of foreign governments and entities, it is of the essence to guarantee that the law actually applied to foreign undertakings is equivalent to that applied to EU undertakings under EU State aid law. The issue becomes particularly important with respect to the administration of the balancing test in Article 6 of the FSR. Inasmuch as the policy objective is relevant to the Internal Market or the EU, this has to be regulated in very much the same way as it would happen with an internal State aid measure.

9. Thoughts on the political acceptability of the changing Constitution: unstable equilibrium

If these systemic changes are legally dubious, what is their political assessment? Are they political tenable?

Going back to the public choice explanation sketched in section 3, what should we make of the Member States' substantial acquiescence to the action of the Commission? In the highly regulated framework of the EU, it is highly unlikely this type of informal consent could make the scenario legal. If not legal, though, it can make it acceptable from a political standpoint. But, lacking clear constitutional references, this is an unstable political equilibrium.

Let me further explain this ambivalence. International organisations emerged from WWII (including the EU) created – and benefited from – a relatively and continuously stable environment. The world has been changing, and very fast, in the recent years. Fast action, and reaction, has become imperative. However, the old political and legal structures of the EU, and especially an enlarged-to-27 Members EU, are finding it difficult to adapt to the new reality.[35]

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[33] Council and European Parliament Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, 2022, L 330, Pages 1-45.

[34] Luca Rubini, "Transcending territoriality: Expanding EU State aid control through consensus and coercion" in Leigh Hancher, Juan-Jorge Piernaz-Lopez, Luca Rubini (eds.)*The future of EU State aid law – Consolidation and Expansion* (Madrid: EU Law Live Press) 119-134.

[35] On the accommodation of the NextGeneration EU ("NGEU") within the EU Constitution, see Päivi Leino-Sandberg, "The secret life of the EU treaties: NFEU and the politics of the EU's 'living constitution'" (2026) European Law Open, 1-23. This trend towards anti-formalism and constitutional innovations is not limited to the EU. At the multilateral level, it is quite telling that the WTO's recent 14th Ministerial Conference 14 ("MC14"), which took place between 26th to 30th March 2026, could not end with any meaningful decision.

This certainly applies to the spending power the Member States or the EU can devote to their industries.

Authoritative voices have called for action, and a fast one.[36] In his report Mario Draghi noted how current EU governance architecture is not fit to the job anymore, decision-making and legislative processes are too slow, and EU countries should upgrade their cooperation into what he called "pragmatic federalism". In areas where consensus is slow or impossible (such as defence, industrial policy, and foreign affairs), coalitions of willing EU member states should move forward with deeper integration, even if others do not join initially.[37] This would be variable geometry, something already well-known in the EU, but, given the ambition and the possible implications, it would be variable geometry on steroids. Quite interestingly, to ensure coherence and avoid market fragmentation, one of the suggestions is to move from national State aid to EU funding for large-scale, strategic projects.[38]

10. The conflict between original and changing Constitutions: What to do?

As Claus Ehlermann noted, State aid and its control cannot be - have never been - left, to "experts" only.[39] They are inherently political, and, in times of crisis, the political questions to answer are of the highest level. This political dimension has reached new heights in recent years with the significant transformation, through practice, of State aid control.

This transformation begs important questions which Member States and the EU should soon find answers to.

Why State aid control in the current geopolitical climate? Can the State aid constitution sustain the current re-orientation? What kind of industrial policy do we need and want?

What is for the Member States and what is for the EU?

Is variable geometry or "double-speed" Europe the path to follow? If so, considering that treaty-change may be difficult and long, w hat interim solutions can be thought of? Should these solutions be found within the EU framework or outside it? If the latter, how should these be coordinated with EU law?

It is the answers to these questions that will shape the future of EU State aid law and policy (indeed of the EU and large) and will contribute to solving some of the conflicts that characterise the field.

Among others, there were great expectations that the Membership could eventually incorporate an e-commerce agreement into the rule-book. With consensus being necessary, this was not possible. The only way out was for 66 Members to negotiate an interim agreement *outside* the WTO legal framework.

[36] See, e.g., Mario Draghi, *A Competitive Strategy for Europe*, 9th September 2024.

[37] Mario Draghi, speech at the KU Leuven University, 2nd February 2026, at https://www.kuleuven.be/english/about-kuleuven/patron-saints-day/2026/.

[38] This would represent an upgrade from the current the Important Projects of Common European Interest (IPCEI) regulated under State aid law. Similar proposals were made by Enrico Letta in his *Much More than A Market* report of April 2024.

[39] Claus-Dieter Ehlermann, "State Aid Control in the European Union: Success or Failure?" (1994) Fordham International Law Journal, 1212-1229, at 1218.