

Competition law and regional trade agreements: EU emergency state aid policies as a model for future provisions in RTAs

Danijel Bajt

Current/Former Affiliation: United Nations ESCAP Consultant

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Abstract

Competition law has always been a steppingstone in trade agreements negotiations, as the inclusion of it in the multilateral trading system has always been difficult. However, competition law and especially state aid policies have always been an important part of the international trade system, also considering the rise and importance of bilateral and regional trade agreements. In line with the UN 'building back better' after COVID-19 initiative, this policy brief aims at exploring the possibility of improving state aid policies in regional trade agreements, especially in times of emergency. In order to do so, the brief takes as example the EU state aid policy and the emergency state aid framework that the EU has adopted in response to the current pandemic, underlining the strategic importance of state aid for economic resilience and recovery. The brief reveals that an emergency state aid framework in regional trade agreements is missing, making thus difficult for states which are bound by a trade agreement to control it, be it beneficial or not. Furthermore, the brief provides for a potential solution for regulating state aid in times of emergency through trade agreements, also proposing the establishment of an 'Emergency state aid committee', which should be composed by representatives of the parties signatories of the trade agreement.

1. Introduction

The Covid-19 pandemic represents a violent shock for the global and European Union (EU) economy with heavy socioeconomic consequences across all the sectors. The EU Commission (hereafter Commission) estimates that the EU economy will contract by almost 8 % in 2020. The forecast continues with the overview of a difficult recovery and with the needs of a tough and well-coordinated response by the EU and its Member States.¹

The UN warned that the Covid-19 pandemic is “far more than a health crisis: it is affecting societies and economies at their core. While the impact of the pandemic will vary from country to country, it will most likely increase poverty and inequality at a global scale, making achievement of SDGs more urgent.”²

As any other sector, also EU competition policy got affected by the pandemic. The EU Competition authority and those of the Member States have been very active in the response to the pandemic.³ Considering the global nature of this crisis, not only the EU needed to adapt their competition policies, but most of the countries world-wide.⁴

The Commission proposed a timely and prompt response, with Commissioner Vestager, in charge of Competition policy, clarifying during an online discussion that DG COMP⁵ will not interrupt its vigilance during this emergency, as there exists a real risk that certain undertakings will take advantage of the situation, or that Member States will intervene too heavily into national economies. However, the Commissioner underlined the importance of ensuring the smooth and efficient flow of certain strategic goods such as foodstuffs and medical supplies, hinting that an enhanced cooperation in order to assure the undisturbed flow would be considered permitted for the time given.⁶

Furthermore, specific competition literature has been underlining that competition policies need to be adapted and tailored to the needs of the current crisis situation since the very beginning of the pandemic. Various authors argued for the need to support the economies in difficulties and

¹ Spring 2020 Economic Forecast: A deep and uneven recession, an uncertain recovery, May 2020, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_799

² United Nations Framework for the immediate socio-economic response to COVID-19, April 2020, Available at <https://unsdg.un.org/sites/default/files/2020-04/UN-framework-for-the-immediate-socio-economic-response-to-COVID-19.pdf>

³ The EU Commission, DG COMP, set up a dedicated page on the website named ‘Antitrust rules and coronavirus’ with all the legislation and *ad hoc* decisions published. Available at <https://ec.europa.eu/competition/antitrust/coronavirus.html>

⁴ See for instance actions of the US competition authority (DOJ and FTC), Hong Kong, Brazil (*et al.*), available at <https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19> and https://www.compcomm.hk/en/about/public_notices/files/20200327_Statement_by_CC_regarding_the_COVID19_outbreak_Eng.pdf and <http://en.cade.gov.br/topics/about-us/cade-approves-resolution-authorizing-virtual-judgment-session>

⁵ EU Commission Directorate General in charge of Competition policy

⁶ Shaping Europe’s digital future, A European approach to digital transformation means empowering and including every citizen, strengthening the potential of every business and meeting global challenges with our core values, available at <https://ec.europa.eu/digital-single-market/en>

combat the violation of competition rules, focusing more specifically on those illicit activities which try to take advantage of the pandemic. The suggestion made was the lifting of certain competition law provisions or their enforcement could be beneficial to the struggling economies.⁷

One of the main and most important aspects of EU competition law is regulating ‘state aid’, which can be defined as the use of public resources in order to intervene in Member states economies by assisting companies or industries.⁸ State aid is therefore prohibited under EU law as it can distort trade and competition between firms, discourage investment and create additional costs for consumers.

Given the current emergency situation, with the pandemic that hit hard Europe as a whole, the EU has identified in state aid a useful tool for combating the negative effects of the pandemic on the economy. If normally certain practices are considered unlawful in the internal market, the EU has now published a set of rules that may be considered as a waiver to the general legal framework and is aiming at the gradual recovery of EU economy.⁹

State aid provisions and competition law provisions are also an important part in Regional Trade Agreements (RTAs). For the purpose of this paper, twenty-three EU RTAs have been reviewed and all of them contain competition related provisions, either in whole chapters or separate articles.¹⁰ RTAs are in fact one of, if not the only way of regulating foreign state aid in the EU internal market. For instance, the newest EU trade agreements have detailed provisions in terms of state aid and regulate several aspects of it.¹¹

In the given situation, we could argue that the Commission has identified certain types of state aid as beneficial and permitted under certain conditions, which we could classify as positive state aid. On the other hand, traditional state aid practices are still considered illegal under EU law.

Considering the strategic importance of state aid in such international emergencies as the current pandemic is, how can the EU ensure that foreign state aid in times of emergency is not harmful to the internal market and that the beneficial foreign state aid can be permitted? The assumption made in this brief is that RTAs are lacking an emergency mechanism regarding their competition provisions. Therefore the paper wants to explore if the emergency framework published by the EU Commission could be somehow applicable to RTAs or if policymakers and trade negotiators could learn useful lessons for drafting future state aid related provisions in RTAs for times of emergency.

This policy brief at first gives a short overview of the main traits of EU state aid policy. Furthermore, it explores the Commission responses to the pandemic and the emergency framework

⁷ Paul Henty, *Cooperation & COVID-19: The EU Temporary Framework and national cooperation exemptions*, e-Competitions Special Issue Competition Law & Covid-19, June 2020.

⁸ Abbott, Alden and Singham, Shanker, *Competition Policy and International Trade Distortions*, European Yearbook of International Economic Law, Vol. 4, 34.

⁹ See EU Commission DG COMP available at https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html

¹⁰ See Annex 1.

¹¹ See for instance EU-Singapore Free Trade Agreement, Chapter 11.

published in order to mitigate its competition policy. The brief then defines the important link between competition policies and RTAs, with an overview of state aid provisions in twenty-three EU trade agreements. The last part of this brief proposes the application of EU emergency response state aid provisions for negotiations of future RTAs. The scope is to further develop an emergency framework for state aid related provisions in RTAs.

Overall, this brief wants to underline the importance on the one hand of a free and open trade during emergencies, on the other hand, the respect of competition rules as they ensure a fair and competitive market. Openness to trade needs to be considered as part of the economy's resilience, but it must be accompanied by fair, transparent and predictable rules with the objective of seeking mutually benefitting trade relations. Therefor, balance between these two principles is needed, and is should be reflected also in RTAs.

2. EU State aid policy in a nutshell

The Treaty on the functioning of the European Union (TFEU) defines state aid¹² as “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”.¹³ In other words, state aid can be defined as the use of public resources to intervene in national economies by providing assistance to companies or industries. It can be provided by governments in different ways, from tax relief to subsidies given by a local authority to a local undertaking.

The starting point for the EU state aid policy is that aid given by individual Member States is normally forbidden, as it can distort trade and fair competition between undertakings and finally increase costs for consumers.¹⁴ The EU state aid legal framework provides for four key questions to determine whether an aid measure can be considered state aid or not. It is important to note that the presence of state aid does not automatically mean that the specific measure is prohibited. The EU competition authority needs at first to ensure that the measure is lawful. In order to do so, the following questions need to be answered:

- Is the aid favoring a specific undertaking or a specific category of undertakings?
- Is the aid provided through state resources?
- Is the aid distorting or threatening to distort competition?
- Can the aid affect trade between Member States?¹⁵

If the answer to all the above questions is ‘yes’, this means that the measure represents state aid and it should seek approval by the EU commission, otherwise it is considered unlawful. However, as state aid can also represent an important and effective policy tool, the EU state aid framework entails a certain number of exemptions that derogate the general rule. There are three categories of them:

- General exemptions for aid that serves certain policy aims such as regional development, environmental protection and innovation;
- Exemptions for aid under schemes that have already been approved by the European Commission;

¹² State aid as defined in the Treaty on the Functioning of the European Union (TFEU). The definition of state aid broadly corresponds to the definition of subsidy in the WTO Agreement on Subsidies and Countervailing Measures (SCM).

¹³ Article 107(1) TFEU.

¹⁴ Andrea Biondi, Piet Eeckhout, and James Flynn, *The Law of State Aid in the European Union*, Oxford Scholarship Online, March 2012.

¹⁵ EU State aid legislation, EU Commission Current rules in force, available at https://ec.europa.eu/competition/state_aid/legislation/legislation.html

- *De minimis rule*, under which assistance that is worth less than € 200,000 per undertaking over three years is permitted.¹⁶

If none of the above-mentioned exemptions apply and therefor the measure could be considered state aid, then the Commission must be notified of the proposal. Article 108(3) TFEU states that “the Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid.”¹⁷ Subsequently, if the Commission considers that the proposed plan is not compatible with state aid rules, then it shall without delay notify to the Member State or in needed initiate the infringement procedure.¹⁸

Only the Commission, subject to the supervision of the Court of Justice of the European Union (CJEU), can determine when and if unlawful state aid is compatible with the internal market. When the Commission does so, it can impose to the Member State a requirement that the state recovers the aid in question. The Commission has the exclusive competence in terms of compatibility of the aid with internal market, whereas national courts can determine questions of liability arising from the unlawful aid that has been granted.¹⁹

For the purpose of this brief, at the end of a short overview of EU’s state aid policies, it is important to note that the described framework has been significantly waived in order to combat the consequences of the current crisis. Therefore, the next part will present an overview of the Commission response to the current pandemic and more specifically the Temporary Framework that has been timely adopted.²⁰

¹⁶ ‘*De minimis regulation*’, Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid. ‘*General Block Exemption Regulation*’ (GBER), Commission Regulation (EU) no 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in the application of Articles 107 and 108 of the Treaty.

¹⁷ Article 108(3) TFEU.

¹⁸ Article 103(2) TFEU.

¹⁹ Yo Sop Choi, *EU Competition Policy via Controlling State Aid*, International Area Studies Review, June 2010.

²⁰ EU Commission, Communication from the Commission, Temporary Framework for state aid measures to support the economy in the current COVID-19 outbreak, March 2020, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0320\(03\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0320(03)&from=EN)

3. EU state aid policies in times of emergency and Commission responses

The COVID-19 pandemic and its economic consequences have required a swift and strong reaction on national and supranational level in order to keep markets and the economy functioning. As the OECD stated, “government intervention in markets affected by the crisis is necessary and legitimate, but to ensure a robust recovery effective competition in markets will need to be restored in the longer term”.²¹

The Commission has in fact faced similar emergencies in its history. During the oil crisis, in its Annual Report of the year 1981, the Commission focused on its state aid policy, the formation of the so-called crisis cartels and the behavior of national undertakings, underlining the existing growing tendency in various Member States for the public authorities to make use of aid to protect or foster their industries. However, the Commission stressed that its policy on aid “must strike a realistic balance by ensuring that assistance in no way, because of its scale or the terms, on which it is granted, jeopardizes the unity of the market but without preventing the use of those aids which, as transitional measures, make an effective, lasting contribution to the Community's economic and social recovery.”²²

After a short consultation with the Member States, the Commission adopted the first Communication on 13 March 2020 with the aim to provide a coordinated economic response by the EU and its Member States, in order to mitigate the economic damages caused by the pandemic.²³ In terms of state aid, the Communication differentiates between the immediately applicable measures by the Member States and measures that request a preventive intervention of the Commission. This second category entails in fact the exceptions provided by Article 107 (2) and (3) TFEU.²⁴

²¹ OECD, Tackling Coronavirus (COVID-19), Contributing to a global effort. COVID-19: Competition policy actions for governments and competition authorities, March 2020, available at <https://www.oecd.org/daf/competition/COVID-19-competition-policy-actions-for-governments-and-competition-authorities.pdf>

²² Commission of the European Communities, Eleventh report on Competition Policy, 1981, available at https://ec.europa.eu/competition/publications/annual_report/ar_1981_en.pdf

²³ Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup, Coordinated economic response to the COVID-19 Outbreak, March 2020, available at https://ec.europa.eu/info/sites/info/files/communication-coordinated-economic-response-covid19-march-2020_en.pdf

²⁴ Article 107(2) TFEU: “The following shall be compatible with the internal market: a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; b) aid to make good the damage caused by natural disasters or exceptional occurrences; c) [...]”. Article 107(3) TFEU: “The following may be considered to be compatible with the internal market: a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; e) [...]”.

In parallel, the European Competition Network (ECN) published a statement underlining the importance of competition rules but stressing on the needs of cooperation between undertakings in the emergency, and the intervention of national governments, especially to ensure the supply and distribution of scarce products to all consumers.²⁵

Straight after the first Communication, the Commission adopted on 19 March 2020 a second Communication laying down a ‘Temporary Framework for state aid measures to support the economy in the current COVID-19 outbreak’ (Temporary Framework).²⁶ The Temporary framework builds upon the exceptions of article 107(2), b) TFEU, which states that “aid to make good the damage caused by natural disasters or exceptional occurrences” is allowed. In addition, article 107(3), b) TFEU, provides for another exception stating that “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” is compatible with the internal market.²⁷

The Temporary Framework acknowledges that the pandemic has created exceptional circumstances and “undertakings of all kinds may face a severe lack of liquidity”.²⁸ Member States therefor, through the Temporary Framework can ensure under EU rules liquidity and access to finance for undertakings and especially for SMEs, which may face a sudden shortage.

The Temporary Framework sets out also principles guiding Member States in granting state aid stating that the measures communicated to the Commission need to be “*necessary, appropriate and proportionate* to remedy a serious disturbance in the economy of the Member State concerned.”²⁹ Following the general principles, the Framework lists a series of measures which are compatible with the internal market:

- Aid not exceeding 800,000 € per undertaking in the form of direct grants, repayable advances, tax or payment advantages;
- Aid granted on the basis of a scheme with an estimated budget;
- Aid may be granted to undertakings that were not in difficulty on 31 December 2019; it may be also granted to undertakings that are not in difficulty and/or to undertakings that were not in difficulty on 31 December 2019, but that faced difficulties or entered in difficulty thereafter as a result of the COVID-19 outbreak;
- Aid is granted no later than 31 December 2020;
- Aid granted to undertakings active in the processing and marketing of agricultural products is conditional on not being partly or entirely passed on to primary producers and is not

²⁵ European Competition Network, Antitrust: Joint statement by the ECN on application of competition law during the Corona crisis, March 2020, available at https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf

²⁶ Temporary Framework see note n. 20.

²⁷ See note n.24.

²⁸ Temporary Framework see note n. 20.

²⁹ *Ibid.*

fixed on the basis of the price or quantity of products purchased from primary producers or put on the market by the undertakings concerned.³⁰

What clearly appears relevant from the above dispositions, are not only the clear limitations on how to deliver lawful state aid, but especially their clear provisional nature. Thus, the described framework is characterized by its emergency and circumscribed nature. Furthermore, Member States are also obliged to publish all the relevant information about the aid granted on the National state aid websites within 12 months from the moment of granting and must submit annual reports to the Commission.³¹

It is evident that the Commission timely responded to an emergency that has hit hard the European economy, also understanding on time the importance of clear and transparent emergency competition and state aid rules. It is important to note that the above described framework is temporary and therefor derogatory to the general framework for the time being. However, even though the pandemic has been very severe, the Commission did not renounce to its controlling authority and it underlined in several occasion that in an emergency, competition authorities need to be more vigilant than ever.

³⁰ *Ibid.*

³¹ *Ibid.*

4. Competition policies and RTAs: state aid/subsidies provisions

From the very beginning of the Havana Charter, to the Doha Round, competition policy has always been a steppingstone in the negotiations, as the inclusion of it in the multilateral trading system has rarely been successful.³² However, competition law and policy have always been an important part of the international trade system.³³ The rise and importance of bilateral and regional trade agreements have also brought and increased interest for nations to include competition related provisions in their agreements.³⁴

For the purpose of this paper, twenty-three EU RTAs have been reviewed. All of them contain in one way or another competition related provisions, meaning that an agreement may contain a general article related to competition policy or a whole dedicated chapter.³⁵ A good example of the most comprehensive agreements are the latest EU agreements that contain a whole chapter dedicated to competition, such as the EU-Singapore Free Trade Agreement (FTA).³⁶

For RTAs regulating state aid is a very important aspect as the problem of foreign aid can be efficiently regulated or even forbidden through a trade agreement. Besides the EU approach to state aid, RTAs can adopt the WTO approach contained in the WTO Agreement on Subsidies and Countervailing Measures (SCM).³⁷ In fact, the definition of state aid and subsidy is broadly equivalent. However, EU state aid rules are more stringent than the WTO rules, therefore often used as a model in non-EU trade agreements as well. One of the main differences is that in WTO rules subsidies are generally allowed, while EU rules consider subsidies (state aid) to be generally illegal. Moreover, WTO rules apply to goods, whereas EU rules include services as well. EU rules are applied prospectively, while WTO rules are only reactive, meaning that a member country lodges a complaint.³⁸

As a recent EU Commission White Paper pointed out “in today’s intertwined economy, foreign subsidies can distort the EU internal market and undermine the level playing field.”³⁹ The Paper continues that there is limited information on the actual amount of foreign subsidies being granted, pointing at the lack of transparency and exchange of information. Another issue is the low compliance with the obligation to notify subsidies under the SCM Agreement.⁴⁰

³² Francois-Charles Laprévotte, *Competition Policy within the Context of Free Trade Agreements*, OECD Global Forum on Competition, December 2019.

³³ Simon Evenett, *What Can We Really Learn From the Competition Provisions of Regional Trade Agreements?*, in P. Brusick, A. M. Alvarez and L. Cernat, *Competition Provisions in Regional Trade Agreements: How to assure Development Gains*, UN Publications, New York and Geneva 2005.

³⁴ Olivier Solano and Andreas Sennekamp, *Competition Provisions in Regional Trade Agreements*, OECD Trade Policy Paper Series, n. 31, 2006.

³⁵ See Annex 1.

³⁶ See EU-Singapore Free Trade Agreement, Chapter 11.

³⁷ WTO Agreement on Subsidies and Countervailing Measures, April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S 14.

³⁸ *Ibid.* n. 34.

³⁹ European Commission, White Paper on levelling the playing field as regards foreign subsidies, Brussels, June 2020, available at https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf

⁴⁰ *Ibid.*

Subsidies can be given in different ways to foreign undertaking operating in the EU. Foreign states may provide grants or provide cheaper financing to an undertaking in the EU, alternatively they may give a subsidy to a parent company located outside the EU, which then can revert to the subsidiary operating in the EU through intragroup transactions. Foreign subsidies can also be granted with the objective of enabling companies to submit bids for public contracts, at prices that are below market price or even below cost.⁴¹ The examples clearly show the difficulty of tackling foreign subsidies and an effective way to control them is through trade policies and trade agreements. EU trade agreements deal with this issue by including subsidies provisions in their texts and in fact most of the modern trade agreements worldwide include them.

However, as mentioned in the introduction, during an emergency such as the current pandemic, state aid/subsidies can represent a key tool for economy's resilience and recovery, but the current trade agreements do not differentiate and provide for a framework for subsidies in times of emergency. This framework which should include the 'positive or beneficial' subsidies could take as example the current EU emergency framework and could represent a temporary waiver to the general state aid rules in trade agreements.

⁴¹ *Ibid.*

5. EU emergency policies and beyond: a model response for state aid provisions in RTAs in times of emergency

In times of emergency such as the current one, exceptional rules need to be drafted *ad hoc* or existing emergency frameworks need to be applied. In fact, some RTAs contain certain types of exemptions with a very limited scope. RTAs to which Asian countries are part contain often contain provisions such as “exempt specific measures or sectors from the competition policy chapter, provided that such exemptions are transparent and are undertaken on the grounds of public policy or public interest”⁴² or are “no broader than necessary to achieve legitimate policy objectives”⁴³ and “are implemented in a transparent way that minimizes distortions to free and fair competition”⁴⁴.

However, in the current state aid trade agreements order, there is no such framework or provisions that could regulate an emergency such as the COVID-19 pandemic. As we argued above, certain types of state aid/subsidies can be considered ‘positive aid’, as they can help boosting the economy and promote its recovery in a post-emergency situation. Therefore, an emergency framework for state aid in RTAs would be highly needed and welcome.

We believe that the core guiding principles for the drafting of model provisions for state aid in times of emergency should be transparency, timely response, and efficient and direct communication. Trade negotiators and policymakers could take as best practice the Temporary Framework published by the Commission which sets clear financial limits to the aid that is considered lawful for the given period. Having a clear definition of what and how much is permitted would guide national governments, connected by a trade agreement, in their response respecting the economic needs of the counterpart.

Some existing RTAs already contain specific cooperation and coordination provisions which normally emphasize the “importance of coordination and cooperation on matters of competition law enforcement”⁴⁵ and require the parties member of the agreement to cooperate through their respective competition authorities to tackle and eliminate anti-competitive practices affecting their trade.⁴⁶ Furthermore, another important existing provision is about notification requirements in case state aid is granted or in case of relevant enforcement activities.⁴⁷ Other important existing provisions entail mutual technical and legal assistance between the parties. This kind of assistance is can cover a wide range of issues such as training for personnel and help with drafting guidelines, manuals, and legislation if necessary.⁴⁸

⁴² See for instance Australia-Thailand Free Trade Agreement, Article 1204 or Australia-Republic of Korea, Article 8.20.

⁴³ See Canada-Republic of Korea free Trade Agreement, Article 15.1.

⁴⁴ See New Zealand-Chinese Taipei Free Trade Agreement, Chapter 8, Article 4.

⁴⁵ See Mexico-Uruguay Free Trade Agreement, Articles 14-16.

⁴⁶ See EFTA-Central America, Articles 8.2.1 and 4.13.

⁴⁷ See EFTA-Republic of Korea Free Trade Agreement, Article 5.1.4.

⁴⁸ See EU-CARIFORUM Trade Agreement, Article 130.

Building upon and further developing the above provisions could result in a regulated framework for state aid in times of emergency. At first, there is a need of defining an emergency where the common RTA approach can be taken as model.⁴⁹ Following are provisions about transparency, coordination and communication in times of emergency. On the top of all of this it is envisaged the possibility of establishing an ‘Emergency State Aid Committee’. The Committee, composed by members from all parties signatories of the agreement, should monitor the supply of state aid and should assure that state aid is granted according to the legal framework established by the agreement. The Committee would represent as well as a direct channel for consultations for the parties in order to facilitate the economic exchanges between the parties, as well as the respect of competition rules established by the agreement.

Another important and effective instrument that the Committee could take into consideration is the so called ‘comfort letter’, a communication that the Commission has been using prior to 2003, in order to waive certain competition rules for the applying undertakings. In its Temporary Framework the Commission explained that exceptionally and at its own discretion it will issue comfort letter in order to provide legal certainty and guidance.⁵⁰ Following this approach the Committee could issue *ad hoc* written communications in order to assess the legality of state aid granted by the applicant. The latter could help enhancing the legality of state aid given and coordinate the responses to an emergency in a transparent and efficient manner.

The above presented measures could help providing parties to an agreement with a well-defined and easily achievable framework which could shed light to the need of granting national and foreign state aid in an emergency situation.

⁴⁹ See for instance EU-Singapore Free Trade Agreement, General Exceptions which *mutatis mutandis* refer to Article XX GATT 1994.

⁵⁰ Temporary Framework see note n. 20.

6. Conclusion

Competition law in general and state aid policies in particular are often seen as trade restrictive. However, clear, transparent and non-discriminatory rules are beneficial to economies. Government interventions in the current economic crisis caused by the pandemic may be necessary and legitimate, but they definitely need to be accompanied by clear and transparent rules, especially in a field such as competition. As explained in this brief, the EU response to the crisis in terms of competition policy has been timely and effective. The Commission with its Communications provided for a framework and guidance with direct communication has been provided to undertakings.

Taken into consideration the importance that granting state aid can have in emergency situations, such as the current pandemic, the brief finds that there is a lack of attention given to state aid policies in times of emergency in regional trade agreements. Trade agreements can represent the right forum for an enhanced and effective regulation of state aid.

In line with the UN ‘building back better’ after COVID-19 initiative, this brief underline a lack of awareness for state aid emergency provisions and proposes a potential framework that could support a controlled and regulated supply of state aid in order to support the economic recovery. Furthermore, the brief wants to point out the importance on the one hand of a free and open trade during emergencies, on the other hand, the respect of competition rules as they ensure a fair and competitive market.

Even though EU competition policy is known for its bureaucratic strictness and rigidity, in the current emergency was able to show its flexibility and responsiveness. Therefore, there is hope that negotiators and policy makers will be able to adapt their regional trade agreements to the given situation. An important step forward in this direction would be the adoption of an emergency state aid framework, which is recommended by this policy brief.

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Annex I

EU – CARIFORUM (Bahamas, Barbados, Belize)	Economic Partnership Agreement
EU – Botswana	Economic Partnership Agreement
EU – Cameroon	Interim Economic Partnership Agreement
EU – Canada	Comprehensive Economic and Trade Agreement
EU – Colombia	Free Trade Agreement
EU – Ecuador	Free Trade Agreement
EU – Eswatini	Economic Partnership Agreement
EU – Japan	Free Trade Agreement
EU – Lesotho	Economic Partnership Agreement
EU – Madagascar	Economic Partnership Agreement
EU – Mauritius	Economic Partnership Agreement
EU – Mexico	Free Trade Agreement
EU – Mozambique	Economic Partnership Agreement
EU – Namibia	Economic Partnership Agreement
EU – Norway	Economic Area Agreement
EU – Madagascar	Economic Partnership Agreement
EU – Peru	Free Trade Agreement
EU – Samoa	Economic Partnership Agreement
EU – Singapore	Free Trade Agreement
EU – South Africa	Economic Partnership Agreement
EU – South Korea	Free Trade Agreement
EU – Ukraine	Deep and Comprehensive Free Trade Agreement
EU – Zimbabwe	Economic Partnership Agreement