HAMILTONIAN SHIFTS IN STATE AID AND THE COMING BREAKDOWN OF THE INTERNAL MARKET: CAN THE EUROPEAN UNION SURVIVE ITS COVID-19 RESPONSE?

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TABLE OF CONTENTS

I. INTRODUCTION

The COVID-19 pandemic has brought about turmoil and hardship across the world. For much of the West, COVID-19 represents the most substantial public health crisis in living memory.[1] Looking beyond immediate concerns of the health, safety, and wellbeing of citizens, much of the West's legislative agenda throughout the pandemic has focused on countries' economic health and maintenance, as well as the viability and sustainability of their businesses and industries going forward. The governing structures in the West play a key role in recovery as countries attempt to rebound economically and endure a generational public health crisis.[2]

The United States and the European Union ("EU") are two of the largest governing bodies working to respond adequately to the pandemic. The United States and the EU populations are approaching 330 million and 450 million, respectively.[3] Both governing bodies have sought to combat the fiscal realities of COVID-19 by leaning heavily into their state aid regimes to support struggling industries. Yet each economic response has been dictated by the limitations of the systems of governance in place. The EU's COVID-19 response could have been tempered by the stringent state aid regime intended to maintain competitive balance among the member states. Instead, the EU has adapted to the realities of the pandemic and upended its own state aid policies, with potentially far-reaching consequences.

This Note analyzes the consequences of the COVID-19 pandemic to the legal structure of the EU and its path forward. The EU's and the member states' actions to combat the pandemic have brought the political and economic union to the precipice of a breakdown of the Internal Market. Fiscal policies mirroring those of the United States will likely rise in its place. Recent tax court decisions, acquiescence to federal debt-sharing schemes, and deregulated state aid policies highlight the federalization of the EU as a unified economic structure,

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[1] Andrew Salmon, *Why East Beat West on COVID-19*, ASIA TIMES (May 15, 2020), https://asiatimes.com/2020/05/why-east-beat-west-on-COVID-19/.

[2] All Things Considered, *Experts Doubt the Strength of the Economy's Recovery as Coronavirus Rates Grow*, NPR (July 30, 2020), https://www.npr.org/2020/07/30/897345035/experts-doubt-the-strength-of-economys-recovery-as-coronavirus-rates-grow.

[3] *Population, Total – EU, US, China*, WORLD BANK, https://data.worldbank.org/indicator/SP.POP.TOTL?locations=EU-US-CN (last visited Sept. 3, 2020).

and also foreshadow its diminished influence over the member states' state aid policies. Structural reform to the EU's state aid regime may be inevitable. Without further economic federalization, however, the EU risks mirroring the United States system of interstate competition, but without the fiscal safety nets. As the EU moves further away from its codified state aid regime and as the resiliency of competitive balance among the member states is tested, the EU must decide whether continued structural reform toward a more unified fiscal entity is desired. Despite the economic risks and likely pushback from the member states, continued fiscal unity at the federal level will ensure the EU's survival and future geopolitical influence.

II. DEFINING STATE AID

Although similar in structure, the EU and the United States define "state aid" differently. The EU broadly defines state aid as "an advantage in any form whatsoever conferred on a selective basis by *national public authorities*."[4] There are a number of necessary factors: (1) There must be an intervention by the State or use of State resources, including but not limited to grants, tax relief, deferrals and government equity intervention; (2) The intervention must be given on a selective basis, and therefore not available to all enterprises in the State; (3) Competition is or may be distorted as a result; and (4) The intervention is likely to affect trade between member states.[5] The EU's definition of state aid therefore serves to minimize any government-sponsored advantage the member state is offering to its industries at the expense of other member states. This definition is a limitation on what member states can utilize via state aid.

By contrast to the EU, the United States offers a limited view of how it defines state aid, without providing much detail on any potential restrictions. For the purposes of analysis, state aid in the United States means, "an exchange of mutually beneficial commitments between a state or local government and a business."[6]

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[4] *Competition Policy: State Aid*, EUR. COMM'N, https://ec.europa.eu/competition/state_aid/overview/index_en.html (last visited Jan. 4, 2021) (emphasis added).

[5] *Id.*

[6] Diane P. Wood, *State Aid Management in the United States*, 12 EUR. STATE AID L.Q. 40, 41 (2013).

This predominantly includes, but is not limited to, tax grants and incentives, as well as loans and direct capital infusions.[7]

III. EUROPEAN UNION

A. Legal Framework

Given that the EU and the United States are structurally different governmental bodies, it is not surprising that they possess different legal frameworks for structuring and regulating state aid. In contrast to the lack of a governmental apparatus to regulate state aid in the United States, the EU typically maintains a highly regulated set of guidelines. "Europe has developed a sophisticated legal regime for managing and regulating State aids, whereas the United States has no systems that come close to any such organized effort."[8]

The EU is a supranational political and economic union that consists of twenty-seven member states,[9] each agreeing to interdependently participate in the European Economic Community.[10] Similarly to the United States, the EU is primarily structured as a system featuring seven branches of governance, as well as separate distinct agencies and advisory bodies of the EU.[11] Most notably, the European Commission ("Commission") serves as the EU's executive branch.[12]

State aid regulations in the EU are codified in the Treaty on the Function of the European Union ("TFEU"), most pertinently Articles 107 through 109.[13] The TFEU gives the Commission control over authorization of grants, a monumental task given the competing economic interests of the twenty-seven European nations.[14] Article 107 of the TFEU states that:

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[7] *Id.*

[8] *Id.* at 40.

[9] *The EU in Brief*, EUR. UNION (Nov. 24, 2020), https://europa.eu/european-union/about-eu/eu-in-brief_en.

[10] *Id.*

[11] *See generally* Consolidated Version of the Treaty on the Functioning of the European Union art. 107–09, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

[12] *Id.*

[13] *Id.*

[14] *Id.*

> Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.[15]

As such, the TFEU puts the Commission in charge of ensuring that no member state gains an unfair advantage through state aid. Article 109 expressly grants the Commission the power to regulate the application of Articles 107 and 108 and to determine which categories of state aid are exempt from the procedures.[16]

While the TFEU contains what amounts to a general prohibition on state aid, the Commission encourages state aid in a number of forms. Namely, it encourages state aid that works to ensure "a well-functioning economy," such as when there is a need to stave off market failure in the EU.[17] The EU is uniquely constrained by its centralized monetary policy and fragmented fiscal policy lacking strict, centralized national balance budget constraints. While the Treaty on Stability, Coordination, and Governance in the Economic and Monetary Union ("TSCG") was enacted in 2013—which set balanced budget requirements for member states and other countries that chose to opt in—member states routinely present debt-GDP ratios well beyond sixty percent, the general cap established through the treaty.[18] Any fiscal response is felt not just by the indebted member state, but by other jurisdictions.[19] A weaker euro and a depression of free trade among the member states in the EU are notable economic consequences of an EU without strong controls.[20] Thus, "state aid provisions are a discipline for member states."[21] Regulations serve to

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15 TFEU art. 107.

16 TFEU art. 109.

17 *Competition: State Aid Procedures*, EUR. UNION (2020), https://ec.europa.eu/competition/publications/factsheets/state_aid_procedures_en.pdf.

18 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Jan. 1, 2013.

19 Albert Heimler & Frédéric Jenny, *The Limitations of European Union Control of State Aid*, 28 OXFORD REV. ECON. POL'Y 347, 351 (2012).

20 *Id.*

21 *Id.*

maintain economic balance among the member states and reduce the potential for free-riding among unregulated local governments.[22]

B. Procedures to Acquire State Aid

Although the TFEU's general prohibition of state aid ensures state resources do not distort competition among the member states,[23] its legal framework leaves open the ability to apply for state aid to achieve specific policy objectives that benefit the EU.[24] Each application for state aid must go through the same EU controls regulated by the Commission.[25] State aid control requires that the Commission be notified of any new measures enacted by a member state, subject to de minimis limitations.[26] The Commission then commences a preliminary investigation into whether the aid request is compatible with rules set out by the TFEU.[27] The Commission can issue a few possible outcomes: (1) a positive outcome, which establishes that the aid is compatible with the Internal Market; (2) a conditional outcome, which establishes that the proposed state aid is compatible with the Internal Market only under specific conditions; and (3) a negative outcome, a decision that rejects the aid as incompatible with the Internal Market.[28] The Commission also has the power to investigate existing state aid policies that have already been implemented, to determine whether they are still compatible with the Internal Market, and to recover aid from beneficiaries that received state aid before a negative decision was issued.[29]

This is not to say that the Commission intentionally restricts member states' freedom to grant state aid. The majority of state aid requests that the Commission grants are through the use of block exemptions.[30] The General Block Exemption Regulation ("GBER") allows the Commission to declare specific categories of state aid that

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[22] *Id.*
[23] *State Aid Procedures*, EUR. UNION (2015), https://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Heimler & Jenny, *supra* note 19 at 365.

are preemptively compatible with the TFEU under specific conditions, and are thus exempt from going through the Commission's notification regulations.[31] The exemptions exist primarily to help support small and medium-sized enterprises ("SMEs") and advance broad EU interests and projects.[32]

> When setting up the GBER, the Commission has sought to get the right balance between, on the one hand, the simplification objective, and, on the other hand, the need to ensure that the positive effects of the aid outweigh the negative effects of the aid in terms of distortion of competition.[33]

Thus, the Commission plays an active role in the different types of state aid that member states can adopt.

C. Examples of State Aid Grants

The Commission approves billions of euros in state aid every year that are not deemed to distort competition.[34] These policies have played an essential role in the EU's stability, such as during the EU's response to the 2007–2008 financial crisis. In the wake of the collapse of Lehman Brothers and subsequent European banking crisis, for example, the Commission sought to stabilize European banks that were otherwise on the path toward financial collapse.[35] Under the guidelines of the EU's Article 107 framework, the Commission approved €4.5 trillion in state aid assistance to banks and financial institutions by October of 2008.[36] "State support measures took very

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[31] *Legislation > Block Exemption Regulations*, EUR. UNION (July 10, 2020), https://ec.europa.eu/competition/state_aid/legislation/block.html.

[32] *See generally* Kristyna Deiberova & Harold Nyssens, *The New General Block Exemption Regulation (GBER): What Changed?*, 8 EUR. STATE AID. L.Q. 27, 27 (2009) ("Beyond simplification, the main policy objective of GBER is to create an incentive for Member States to focus their aid budgets on the types of aid which are contributing to realise the revamped Lisbon Strategy objectives in such areas as development of SMEs, facilitating SMEs access to finance, promoting environmental protection, stimulating innovation or ensuring access to training for European workers.").

[33] *Id.* at 28.

[34] *See generally State Aid Scoreboard 2019*, EUR. COMM'N (May 7, 2020), https://ec.europa.eu/competition/state_aid/scoreboard/index_en.html.

[35] François-Charles Laprévote, *Selected Issues Raised by Bank Restructuring Plans Under EU State Aid Rules*, 11 EUR. STATE AID L. Q. 93, 93 (2012).

[36] *Id.*

diverse forms such as liability guarantees, recapitalizations, subordinated instruments, asset guarantees or liquidity lines."[37]

Yet even in the midst of a banking crisis that warranted deep financial flexibility, the Commission aimed to adhere to a number of core regulatory tenants. First, the Commission maintained complete control over state aid, promoting only temporary flexibility among the member states.[38] Second, the Commission maintained their regulatory presence over the state aid that had been approved.[39] Third, the Commission could not be the lone financial regulator of the European financial sectors.[40] The Commission, even during a worsening global financial crisis, provided substantial aid, but with extensive conditions to maintain competitive balance.

A prominent example of European state aid procedures in the 2007–2008 financial crisis occurred when the Commission approved the British government's plan to bailout and restructure Lloyds Banking Group ("Lloyds").[41] In the months leading up to the crisis, Lloyds, then known as Lloyds TSB Group, acquired and immediately absorbed Halifax Bank of Scotland ("HBOS") into the Lloyds bank structure.[42] Like many banks at the time, HBOS was in danger of bankruptcy due, in large part, to risky lending practices.[43] It controlled over twenty percent of the United Kingdom's ("UK") market share of mortgage lending.[44] In a phrase popularized at the time, the UK government believed that HBOS was "too big to fail."[45] Therefore, in October of 2009, at the height of the banking crisis, the UK facilitated

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[37] *Id.* at 94.

[38] *Id.*

[39] *Id.* at 95.

[40] *Id.*

[41] European Commission Press Release IP/09/1728, State Aid: Commission Approves Restructuring Plan of Lloyds Banking Group (Nov. 18, 2009) [hereinafter Commission Press Release]; *Lloyds TSB Seats £12bn HBOS deal*, BBC, (Sept. 17, 2009), http://news.bbc.co.uk/2/hi/business/7622180.stm.

[42] Jill Treanor, *Lloyds Shareholders 'Mugged' by 2008 HBOS Takeover, High Court Told*, GUARDIAN (Oct. 18, 2017), https://www.theguardian.com/business/2017/oct/18/llyods-shareholders-mugged-by-2008-hbos-takeover-high-court-told.

[43] *Id.*

[44] Commission Press Release, *supra* note 41. *Lloyds TSB Seats £12bn HBOS deal*, BBC (Sept. 17, 2009), http://news.bbc.co.uk/2/hi/business/7622180.stm.

[45] Steve Webb, *10 Years On: Has "Too Big to Fail" Been Resolved*, ENVORSO (Feb. 7, 2019), https://envorso.com/10-years-on-has-too-big-to-fail-been-resolved/.

Lloyds' takeover of HBOS, proposing a massive state funded, £17 billion restructuring and recapitalization of HBOS.[46]

The state aid project resulted in the UK government owning a 43.5% ownership stake in one of the largest banking conglomerates in Europe, while simultaneously using state funds to stave off the bankruptcy of one of Europe's largest mortgage lenders.[47] In a further effort to prop up Lloyds, now deep in HBOS's troubled assets, the UK government announced a plan to admit Lloyds to the UK's Asset Protection Scheme.[48] Access to the scheme would have provided the bank with state-sponsored refunds of losses generated, in addition to other asset-protection measures.[49] This move further raised competition concerns about state-sponsored aid by a member state in the Common Market.[50]

Like other state aid plans with a potential to distort European competition, the UK government's plan to recapitalize Lloyds needed to be approved by the Commission under Article 107 of the TFEU.[51] Concerned that the Commission would reject Lloyds' involvement in the Asset Protection Scheme or force the bank to offload HBOS, among other more austere measures, the UK government instead agreed to focus the bailout on recapitalization.[52] After subjecting the plan to normal state aid procedures, the Commission approved the £17 billion plan of financial support, with significant conditions.[53] The recapitalization was conditioned on, among other economic factors, a guarantee that Lloyds, and by proxy the British government, divest a portion of their retail banking market share within five years.[54] Lloyds was also banned from issuing dividends for two years and from

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[46] Commission Press Release, *supra* note 41.

[47] Commission Press Release, *supra* note 41; BBC, *supra* note 44.

[48] Commission Press Release, *supra* note 41.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Lloyds Banking Group Announces Asset Protection Deal*, REUTERS (Mar. 9, 2009), https://www.reuters.com/article/us-lloyds-text-sb/lloyds-banking-group-announces-asset-protection-deal-idUSTRE5261K320090309; Commission Press Release, *supra* note 41.

[53] Commission Press Release, *supra* note 41.

[54] *Id.*

making new acquisitions for four years.[55] The Commission aimed to use its regulatory power to ensure and maintain competitive balance across the industry, and "facilitate the entry of a new competitor or the reinforcement of a smaller existing competitor . . . created by the aid."[56] The Commission also sought to ensure through a fee structure that Lloyds, while still retaining financial viability through the banking crisis, did not gain too much of an advantage in the industry.[57]

A significant number of banks across Europe requested bailouts throughout the 2007–2008 financial crisis.[58] As the EU's primary regulatory watchdog, the burden fell on the Commission to ensure the bailouts were equitable and did not skew market share and competition among the member states. Yet the Commission also promoted a level of flexibility, through crisis, to ensure the continued health of the European economy. This came with some risk to the Internal Market.

D. Temporary Framework and the EU COVID-19 Response

The advent of the COVID-19 pandemic placed an immense strain on the economic health and viability of the member states. Unsurprisingly, the vast majority of the economic response to COVID-19 was pursued by the member states themselves, through the use of their own national budget and resources, and their personal knowledge of national circumstances.[59] A number of options for economic relief that fell outside of the confines of the TFEU's state aid regulations were available to the member states. Among other options, member states most decisively had the authority to offer wage and tax subsidies to all employees and companies,[60] put in place General Block Exemptions,[61] and provide subsidies directly to the

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[55] Foo Yun Chee, *EU State Aid Decision on Lloyds Due Wednesday – Source*, REUTERS (Nov. 17, 2009), https://www.reuters.com/article/lloyds-kbc-eu/eu-state-aid-decision-on-lloyds-due-wednesday-source-idUSLH68636020091117.

[56] Commission Press Release, *supra* note 41.

[57] *Id.*

[58] *Factbox – What Has Happened to More Than 30 Bailed-out European Banks*, REUTERS (Aug. 21, 2015), https://www.reuters.com/article/europe-banks-bailouts/factbox-what-has-happened-to-more-than-30-bailed-out-european-banks-idUKL5N10W0XJ20150821.

[59] Daniela Panc, *Compatibility of State Aid with the Internal Market of the EU in Times of Public Health Crisis Caused by COVID-19*, 2020 CONF. INT'L DR. 235, 236 (Editura Hamangiu S.R.L., 2020).

[60] *Id.*

[61] *See generally* Deiberova & Nyssens, *supra* note 32.

consumers themselves.[62] Yet those solutions are generally directed toward the health of individual consumers, not the industries themselves. Broader challenges to liquidity and bankruptcy concerns among industries impacted by the pandemic generally fell under Articles 107 through 109 of the TFEU.[63] The pandemic has therefore required unprecedented response, approval, and coordination from the EU and the member states. Adjustments in law as a result of the pandemic have created a fundamental dilemma in structure and governance for the EU going forward.

On March 19, 2020, soon after the initial COVID-19 outbreak, the EU announced a state aid Temporary Framework under Article 107(3)(b) of the TFEU.[64] Article 107(3)(b) generally allows for "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."[65] Like other economic stimulus programs during the COVID-19 crisis, the Temporary Framework sought to prop up financial institutions. This was necessary to maintain the flow of credit through the EU, even as liquidity dried up in response to shutdowns and social distance measures.[66] It was also essential to support industries that were financially viable before the outbreak.[67] The Temporary Framework notes that, "against this background, it is appropriate that Member States can take measures to incentivize credit institutions and other financial intermediaries to continue to play their role in continuing supporting economic activity in the EU."[68]

The Temporary Framework under Article 107(3)(b) was not carte blanche authorization for member states to subsidize their industries as they saw fit without falling under state aid regulations. Instead, the Temporary Framework set out guidelines that kept state aid approvals

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[62] Panc, s*upra* note 59, at 236–37.

[63] *Id.* at 237.

[64] European Commission Press Release IP/20/838, State Aid: Commission Expands Temporary Framework to Recapitalisation and Subordinated Debt Measures to Further Support the Economy in the Context of the Coronavirus Outbreak (May 8, 2020).

[65] TFEU art. 107.

[66] *Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak*, COM (2020) (Mar. 20, 2020).

[67] *Id.*

[68] *Id.*

within the minimum realm of fiscal reasonability.[69] The Framework states that:

> Recapitalisations must therefore not exceed the minimum needed to ensure the viability of the beneficiary, and should not go beyond restoring the capital structure of the beneficiary to the one predating the COVID-19 outbreak. Large undertakings must report on how the aid received supports their activities in line with EU objectives . . ..[70]

The Temporary Framework, and its four amendments,[71] focus on four primary categories for economic recovery: (1) providing financial support for undertakings, such as direct grants, tax advantages, and member state guarantees; (2) aid for COVID-19 research, testing, and production; (3) employment preservation through tax and social security contribution deferrals and wage subsidies; and (4) recapitalization measures.[72] The initial EU recovery fund invested €540 billion in these policies, focused mostly on domestic healthcare industries and on small and local businesses.[73] Since then, the EU has committed more than €2.3 trillion to fight the pandemic as of September of 2021.[74] This represents a massive EU budgetary outlay, and the most forthright step towards a more federalized European governing body. Even as the Commission proclaimed to grant state aid in a mostly sector-neutral manner to maintain competitive balance through the pandemic, an unprecedented eighty-five percent of state

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[69] *Id.*

[70] *Id.*

[71] *EU: COVID-19 – State Aid Update*, BAKER MCKENZIE (Feb. 1, 2021), https://www.bakermckenzie.com/en/insight/publications/2021/02/eu-covid19-state-aid-update ("On 28 January 2021, the Commission amended the Temporary Framework for COVID-19 ('Framework') again. This 5th Amendment prolongs its application until 31 December 2021.").

[72] Gerhard Dijkstra, *State Aid: COVID-19 Temporary Framework*, 11 NAT'L L. REV. 1 (2020); *see generally* Panc, *supra* note 59.

[73] Alasdair Sandford, *Coronavirus in Europe: How Will the EU €500bn Rescue Deal Help People and Businesses?*, EURONEWS, (Apr. 10 2020), https://www.euronews.com/2020/04/10/coronavirus-in-europe-how-will-the-eu-500bn-rescue-deal-help-people-and-businesses.

[74] Impact of State Aid on Competition and Competitiveness During the COVID-19 Pandemic: An Early Assessment, EUR. PARL. DOC. PE 658.214 (2020) [hereinafter EUR. PARL. DOC. PE 658.214]; *COVID-19: The EU's Response to the Economic Fallout*, EUR. COUNCIL (July 29, 2021), https://www.consilium.europa.eu/en/policies/coronavirus/covid-19-economy/.

aid requests by member states, made as of October 9, 2020, were granted.[75]

Member states have proportionally different budgets and have been inequitably impacted by COVID-19.[76] The EU acknowledged the difficulty in tracking economic impact and the potential for inequitable state aid distributions to member states and their affected industries.[77] The EU justified the breakdown of competitive balance in the Internal Market by arguing that there would be substantial positive cross-border spill-over among member states and that more than the granted member state would benefit from the state aid.[78] This statement is an indication of how COVID-19 has moved the Commission from its basic principles to achieve some semblance of economic stability. Given the clear link between state aid grants and fiscal spending among the member states, a debt crisis is on the horizon.[79] The most likely response by the member states would then be a further step toward the American system: a tax-based race to the bottom.[80] Without further federal intervention, budgetary inequalities would only serve to further destroy competitive balance in the EU. The EU responded in kind.

E. The EU's "Alexander Hamilton" Moment

In July of 2020, the twenty-seven member states reached a series of agreements on debt-sharing to help alleviate the pressures of the future liquidity crisis.[81] The agreement served to both further ensure the economic endurance of the EU through the remainder of the pandemic and provide for gradual economic recovery as the pandemic eventually winds down in the coming years. First, the Commission was tasked with borrowing up to €750 billion in funds from the capital

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[75] EUR. PARL. DOC. PE 658.214, *supra* note 74, at 6.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 7.
[80] *Id.* at 37.
[81] *The Fiscal Implications of the EU's Recovery Package*, EUR. CENT. BANK (2020), https://www.ecb.europa.eu/pub/economic-bulletin/focus/2020/html/ecb.ebbox202006_08~7f90a18630.en.html.

markets on behalf of the EU itself.[82] €390 billion were allocated as grants toward member state projects and EU investments,[83] with the remaining €360 billion allocated toward direct loans to member states.[84] Known as the European Recovery Plan ("ERP"), the debt buying plan is the first of its kind in the EU, and a massive sign of member states' willingness to move toward a more centralized American financial structure, at least in the immediate term of the pandemic.[85] The deal has been lauded by proponents as a step toward a more centralized EU, akin to the 1790 agreement between Alexander Hamilton and Thomas Jefferson on public borrowing.[86] The public funding deal, combined with the additional €600 billion in government bonds that the European Central Bank agreed to purchase in July of 2020 through the Pandemic Emergency Programme, means that the EU agreed to purchase up to €1.35 trillion in government debt through June of 2021.[87]

The EU certainly intended for fiscal cooperation among the member states, especially with the short-term unified goal of investing in green technology and tackling climate change as part of pandemic recovery investment.[88] Yet it is an unusual development for a union that has long resisted joint debt sharing, given the differing fiscal priorities and circumstances of the member states.[89] As it is, the €390

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[82] European Council Conclusions, Brussels European Council (July 21, 2020), https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf.

[83] *Recovery Plan for Europe*, EUR. COMM'N, https://ec.europa.eu/info/strategy/recovery-plan-europe_en (last visited Jan. 10, 2021).

[84] Silvia Amaro & Christine Wang, *EU Leaders Reach $2 Trillion Deal on Recovery Plan After Marathon Summit*, CNBC (July 20, 2020), https://www.cnbc.com/2020/07/21/eu-leaders-reach-a-breakthrough-on-the-regions-recovery-fund.html.

[85] *See* Niall Ferguson, *Europe's 'Hamilton Moment' Is a Flop. That's Fine.*, BLOOMBERG (July 19, 2020), https://www.bloomberg.com/opinion/articles/2020-07-19/coronavirus-and-the-economy-europe-s-hamilton-moment-is-a-flop.

[86] *Id.*

[87] Silvia Amaro, *European Central Bank Takes Its Pandemic Bond Buying to 1.35 Trillion Euros to Try to Prop Up Economy*, CNBC (June 4, 2020), https://www.cnbc.com/2020/06/04/european-central-bank-ramps-up-its-pandemic-bond-buying-to-1point35-trillion-euros.html.

[88] Al Root, *Europe's Hamilton Moment*, BARRON'S (July 21, 2020), https://www.barrons.com/articles/europes-hamiltonian-moment-51595334081; European Council Conclusions, *supra* note 88, at 2, 14.

[89] Root, *supra* note 88.

billion debt-sharing deal was watered down from Germany and France's proposed €500 billion deal after opposition from the traditionally frugal members: the Netherlands, Austria, Denmark, and Sweden.[90] The deal itself is an affirmation of the EU, and an indication that COVID-19 has served to tighten member state cooperation in a time where cooperation and organization are essential.

The fiscal health of a number of the member states and the European common market is arguably better assured with a more federalized EU.[91] With that comes a more centralized federal European governing body.[92] A legal structure that supports further debt sharing, unified investment, and fiscal stimulus leaves open the possibility of a greater competitive advantage for the common market against the United States, especially as the United States faces its own potential impending debt crisis in the wake of COVID-19.[93] Although it is entirely possible that the relief fund is a one-off policy in a time of severe crisis, the hope of many is that the fund creates a precedent for future legal reforms toward uniformity in the face of other eventual crises.[94]

F. The Coming Debt Crisis and the End of Competitive Balance in the EU

It remains to be seen if the debt-sharing scheme is a sign of a growing member state belief that the EU project requires a more American system of government to succeed. On the other hand, the debt-sharing scheme may be a harbinger of future fiscal and legal struggles, and the eventual weakening of the EU. As it is, there will

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90 *Id.*

91 Silvia Amaro, *The Pandemic Will Make European Bonds More Attractive than Their US Peers, Economist Predicts*, CNBC (Sept. 21, 2020), https://www.cnbc.com/2020/09/21/european-debt-will-be-more-attractive-than-us-bonds-post-covid-economist-says.html.

92 *Large-scale Joint EU Borrowing Should Remain One-off: Weidmann*, REUTERS (Oct. 19, 2020), https://www.reuters.com/article/us-ecb-policy-weidmann/large-scale-joint-eu-borrowing-should-remain-one-off-weidmann-idUSKBN274281.

93 Amaro, *supra* note 91.

94 Peter Fitzpatrick, *EU Recovery Fund is a Step Towards a More Resilient Eurozone*, FITCH RATINGS (July 23, 2020), https://www.fitchratings.com/research/sovereigns/eu-recovery-fund-is-step-towards-more-resilient-eurozone-23-07-2020.

always be resistance from governing bodies to giving up a level of national autonomy, even for the benefit of a democratic federal state.[95]

At the heart of the issue remains the maintenance and future of competitive state balance. Many of the provisions of the July 2020 stimulus and debt sharing plan seek to limit the immediate fiscal strains, as countries of varying fiscal health move into the recovery phase of the pandemic.[96] EU debt repayments do not begin until 2028, and loans to countries cannot exceed 6.8% of Gross National Income.[97] On the whole, the next EU budget allocates €1.8 trillion to COVID-19-related investments, grants, loans, and the recovery fund.98 The question becomes, how will the stimulus and recovery funds be allocated equitably so as to not disturb competitive balance.

As the pandemic has progressed and the Commission has eased state aid regulations, there has been a clear pattern between member states' fiscal health and their subsequent abuse of the relaxed state aid standards. Germany, generally the most fiscally balanced country in the EU, even as it pushed austerity for debt-riddled countries such as Greece and Italy, accounted for more than half of the nearly €2 trillion in state aid granted by the Commission.[99] France, also featuring a larger, healthier economy, accounted for the second most state aid granted through May of 2020.[100] As a result, the Commission acknowledged concern about the long-term effects on parity in the Internal Market.[101] In a more pessimistic view of the future, Germany's abuse of relaxed state aid procedures and continued comparative fiscal health only serves to exacerbate comparative inadequacies between members-states. Fiscally healthy countries, such as Germany, utilized the relaxed state aid procedures to shower their industries with state aid, even as other, debt-riddled countries

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95 REUTERS, *supra* note 92.

96 Fitzpatrick, *supra* note 94.

97 *Id.*

98 Amaro & Wang, *supra* note 84.

99 Aoife White, *Germany's Virus Aid Is More Than Half Total for Entire EU*, BLOOMBERG (May 18, 2020), https://www.bloomberg.com/news/articles/2020-05-18/germany-s-virus-aid-is-more-than-half-total-for-entire-eu.

100 *Id.*

101 Oliver Sachgau & Nikos Chrysoloras, *EU's Vestager Says Uneven Post-Virus Aid Surge Is Concern*, BLOOMBERG (May 17, 2020), https://www.bloomberg.com/news/articles/2020-05-17/eu-s-vestager-says-uneven-post-virus-aid-in-eu-is-concern.

could not.[102] This could serve as a major blow to long-standing competitive balance, while ushering in an era of inter-state competition amongst the members.

The Commission responded to concerns over the general inequality of state aid allocation by loosening state aid even further. The April 3, 2020 amendment to the Temporary Framework authorized countries to recapitalize companies and lenders through the issuance of both equity and hybrid debt instruments.[103] Certain basic restrictions still remained in place to prevent the immediate distortion of competition. Although member states had discretionary authority to decide which companies to recapitalize and how much recapitalization support to grant, it could not recapitalize beyond the capitalization structure in place before the COVID-19 outbreak.[104] In other words, a company cannot use the state aid to engage in aggressive market expansion that would distort competition.[105]

Where member states control more than €250 million in the saved company, and therefore possess "significant market power," the member state must propose measures to ensure the preservation of competitive market balance in the industry across the EU.[106] More importantly, the member state still had to notify the Commission and receive approval for their recapitalization plan.[107] Also, member states

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[102] *Id.*

[103] Thomas Wilson & Philipp Gnatzy, *COVID-19 and EU State Aid Recapitalisation*, KLUWER COMPETITION L. BLOG (May 15, 2020), http://competitionlawblog.kluwercompetitionlaw.com/2020/05/15/COVID-19-and-eu-state-aid-recapitalisation.

[104] *Id.*

[105] Francois-Charles Laprévote, Giulio Cesare Rizza & Victoria Blanc, *The Commission Relaxes State Aid Rules for COVID-19-Related Recapitalisations*, CLEARY GOTTLIEB (May 11, 2020), https://www.clearygottlieb.com/news-and-insights/publication-listing/the-european-commission-relaxes-state-aid-rules-for-COVID-19-related-recapitalizations.

[106] *Id.*

[107] Wilson & Gnatzy, *supra* note 103; European Commission Press Release IP/20/1668, State Aid: Commission Approves €44 Billion Italian Recapitalisation Scheme to Support Large Companies Affected by Coronavirus Outbreak (Sept. 17, 2020); *EU Regulators Okay with Conditions Lufthansa's 6 Billion Euro Recapitalisation*, REUTERS (June 25, 2020), https://www.reuters.com/article/us-health-coronavirus-lufthansa-eu/eu-regulators-okay-with-conditions-lufthansas-6-billion-euro-recapitalisation-idUKKBN23W11A; European Commission Press Release IP/20/1041, State Aid: Commission Approves Polish Recapitalisation Scheme to Enable Up to €1.65 Billion of Capital Support to SMEs and Large Enterprises Affected by the Coronavirus Outbreak (June 11, 2020).

with more than twenty-five percent equity in the saved companies had to propose a viable exit strategy within twelve months of recapitalization.[108] Therefore, despite concerns of loosening regulations and state aid abuse, some restrictions remain in place in attempts to ensure some maintenance of competitive balance through the pandemic, even as the EU strives to save as many industries as possible. It is a far cry from the United States' policies, which wildly throw money at whoever could comprehend the various programs.

There is no doubt that short-term fiscal cooperation has been essential to the survival of the EU through the pandemic, by pooling hundreds of billions of euros in resources to ensure the fiscal stability of nations.[109] Even as discrepancies in state aid distribution threaten to upend future fiscal unification in the EU, the impending debt crisis that will result will only further serve to forge a more unified, Americanized EU.[110]

As European state aid is funding lenders so as to provide more loans to businesses and industries throughout Europe, the second wave of COVID-19 has further strained corporate and household borrowers to the point of not being able to pay immediate debts.[111] Many European banks feel a return to the dark days of the 2008 banking crisis, a crisis Europe never truly economically recovered from.[112] The debt crisis will only be exacerbated as companies, banks, and member states are unable to pay off their own debts based on earnings. Such a crisis brings the EU even closer to a proverbial fork in the road. Beyond short-term COVID-19 relief, should the EU continue to allow banks and corporations to rely mostly on individual member state recapitalization and highly regulated state aid governance?[113] Or does the EU forge ahead toward a more federal union in the mold of the United States, expanding upon the EU's move toward Eurobonds and

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[108] Laprévote, Rizza & Blanc, *supra* note 105.

[109] John O'Donnell, *Analysis: Pandemic Payment Holidays Mask Wave of European Problem Debt*, REUTERS (Nov. 11, 2020), https://www.reuters.com/article/health-coronavirus-debt/analysis-pandemic-payment-holidays-mask-wave-of-european-problem-debt-idUSKBN27R1RX.

[110] Barry Eichengreen, *Coronavirus Pandemic: Europe Is Once Again Forged in a Crisis*, 55 INTERECONOMICS REV. EUR. ECON. POL'Y 199 (2020).

[111] Editorial Board, *Europe's Banks Have a Looming Debt Problem*, BLOOMBERG (July 31, 2020), https://www.bloomberg.com/opinion/articles/2020-07-31/europe-s-banks-have-a-looming-debt-problem.

[112] *See* O'Donnell, *supra* note 109.

[113] Editorial Board, *supra* note 111.

a greater union budget?[114] Given the EU's recent actions, a more unified EU seems more likely than not.

G. Taxation and the Future of State Aid Beyond COVID-19

As the COVID-19 crisis reforms the EU's state aid programs into a less regulated, more American system, there is increasing evidence that the EU is further remodeling its state aid enforcement to match the move toward the American system of minimally regulated state aid. A recent decision in the European General Court against the Commission and in favor of Apple and the Republic of Ireland, threatens the Commission's ability to maintain that balance through litigation and to respond to distorted competition.[115] If the Commission loses its appeal, it is unclear if the Commission can effectively regulate the single market.

The Republic of Ireland is one of the most preferred corporate tax havens in Europe.[116] U.S. multinational corporations such as Apple, seeking to escape the United States' more aggressive tax regime, flocked to Ireland to take advantage of tax loopholes and hide profits in Irish subsidiaries.[117] Ireland's 12.5% base corporate tax rate is already substantially lower than the United States' previous 35% marginal rate and current 21% rate.[118] However, companies more effectively avoided taxation by using a structure known as the "Double Irish with a Dutch Sandwich" to erode their corporate tax base and shift profits.[119] The tax loophole used Irish and Dutch subsidiaries to

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[114] Sir Michael Leigh, *Relaunch or Disintegration? What COVID-19 Means for the Future of Europe*, LONDON SCH. ECON. BLOG (Dec. 14, 2020), https://blogs.lse.ac.uk/europpblog/2020/12/14/relaunch-or-disintegration-what-COVID-19-means-for-the-future-of-europe.

[115] Silvia Amaro, *EU Appeals Against Apple Ruling in $15 Billion Tax Battle*, CNBC (Sept. 25, 2020, 5:46 AM), https://www.cnbc.com/2020/09/25/eu-appeals-against-apple-ruling-in-15-billion-tax-battle.html/.

[116] Adrian Potoroaca, *The Commission Will Appeal Ruling That Favored Apple in $15 Billion Tax Case*, TECHSPOT (Sept. 26, 2020), https://www.techspot.com/news/86893-european-commission-appeal-ruling-favored-apple-15-billion.html.

[117] Aidan Regan, *Until the EU Tackles Tax Avoidance, Big Companies Will Keep Getting Away with It*, THE GUARDIAN (July 16, 2020, 12:47 AM), https://www.theguardian.com/commentisfree/2020/jul/16/eu-tax-avoidance-big-companies-ireland-apple-state-aid.

[118] Potoroaca, *supra* note 116.

[119] *See generally* Chris B. Murphy, *What Is the Double Irish with a Dutch Sandwich?*, INVESTOPEDIA (Mar. 8, 2020),

offshore profits in low-tax jurisdictions, such as Bermuda.[120] The technique allowed American companies to pay little to no corporate taxes.[121] It is estimated that American companies had sequestered more than $1 trillion in profits in Ireland by 2017, with Apple representing the largest percentage of the profits.[122]

In August of 2016, the Commission announced that Ireland had granted Apple over €13 billion in undue tax benefits from 2003 to 2014.[123] The landmark decision followed a two-year investigation into Ireland's corporate tax practices, allowance of the Double Irish system, and use of private tax rulings.[124] The Commission argued that Ireland's 1991 and 2007 private tax rulings legitimized Apple's unique tax structure in Europe and allowed Apple's income tax rate in Ireland to drop from 1% in 2003 to 0.005% in 2014.[125] The investigation stated that, "Member States cannot give tax benefits to selected companies – this is illegal under EU state aid rules."[126] The private tax rulings were seen as the result of an exclusive negotiation between Ireland and Apple, which allowed Apple to use a corporate structure nearly identical to the Double Irish, but with one Irish company instead of the standard two.[127] The rulings were not available to other European and U.S. multinationals.[128] In general, Ireland's corporate tax regime was seen as so generous to corporations, to Apple in particular, that it was akin to illegal state aid.[129] Thus, it served to uproot the EU's competitive balance.

The decision was in line with the Commission's typical regulation of the single market. Ireland, fearing a €13 billion fine, a significant

https://www.investopedia.com/terms/d/double-irish-with-a-dutch-sandwich.asp (providing further detail on the structure of the Double Irish tax technique).

[120] *Id.*

[121] Edward Helmore, *Google Says It Will No Longer Use 'Double Irish, Dutch Sandwich' Tax Loophole*, GUARDIAN (Jan. 1, 2020, 10:49 AM), https://www.theguardian.com/technology/2020/jan/01/google-says-it-will-no-longer-use-double-irish-dutch-sandwich-tax-loophole.

[122] *Id.*

[123] European Commission Press Release IP/16/2923, State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth Up to €13 Billion (Aug. 30, 2016).

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

percentage of its GDP, appealed the decision.[130] In 2020, the European General Court annulled the Commission's decision and sided with Ireland and Apple, ruling that the Commission failed to meet its burden of proof in arguing that contested tax rulings were the result of a deal struck between Ireland and Apple.[131] The decision is a massive blow to the EU's ability to regulate tax anticompetitive behavior through litigation.[132] The EU has since appealed the decision with the European Court of Justice.[133]

The 2020 General Court ruling is a landmark decision that could have substantial implications for how the Commission is able to effectively regulate state aid policies among the member states. The Commission is expected to ensure that each member state, despite its own tax laws and individual interests, adheres to EU treaties and interests as a whole.[134] By raising the evidentiary standard, the courts have ensured that litigating state aid programs become a lengthy and complicated task.[135] Years of continued litigation have the potential to cloud the Commission's regulatory authority. Member states, taxpayers, investors, and multinational companies all now have good reason to proceed cautiously until a final outcome is decided.[136] An adverse decision would further force the EU to reshape how it maintains competitive balance among the member states. "What is at stake is . . . the ability of the Commission to use state aid to rebalance tax regimes across Europe and also on its current plans to pursue low-tax member states which have advantageous corporate tax regimes."[137]

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[130] Marie O'Halloran & Michael O'Regan, *Dáil Apple Debate: Government Wins Appeal Motion*, IRISH TIMES (Sept. 7, 2016, 9:29 AM), https://www.irishtimes.com/news/politics/d%C3%A1il-apple-debate-government-wins-appeal-motion-1.2782484.

[131] Adam Satariano, *Apple Scores Legal Victory Against $14.9 Billion EU Tax Demand*, N.Y. TIMES (July 15, 2020), https://www.nytimes.com/2020/07/15/business/apple-eu-ireland-tax.html.

[132] *Id.*

[133] Amaro, *supra* note 115.

[134] *Id.*

[135] *Id.*

[136] Josh White, *Autumn Tax Disputes: EU State Aid Law Still Causing Headaches*, INT'L TAX REV. (Oct. 15, 2020), https://www.internationaltaxreview.com/article/b1nthrrcgxxqzn/autumn-tax-disputes-eu-state-aid-law-still-causing-headaches.

[137] Silvia Amaro, *What Losing a Landmark Tax Case to Apple Means for the EU*, CNBC (July 15, 2020, 9:35 AM), https://www.cnbc.com/2020/07/15/what-the-

The decision and subsequent appeal also serve to breed uncertainty during a time when the EU and the United States made progress towards closing some of Europe's larger tax loopholes. In 2014, during the Commission's initial investigation, and under pressure from the United States and the EU, Ireland began to crack down on the Double Irish tax system.[138] Ireland's 2015 budget closed the loophole and gave corporations already benefiting from the Double Irish tax structure until 2020 to adjust their corporate structures accordingly.[139] The announcement, along with concerns over impending tax reform in the United States, led U.S. multinational companies, such as Google, to abandon the Double Irish structure early and repatriate some earnings back to the United States.[140]

It remains unclear how effective closing the Double Irish loophole has been to ending tax avoidance in Europe and reinstituting a measure of competitive balance. Even as Ireland closed the Double Irish, new Irish low-tax structures aimed at attracting companies to onshore their intellectual property have taken its place.[141] Europe, its citizens, and its businesses continue to use European offshore accounts and corporate tax loopholes to shelter profits.[142]

It is also unclear what else the EU can do to effectuate competitive balance and regulate balanced tax regimes. If the Commission's attempt to regulate tax regimes through litigation fails, potential alternative measures include litigating from the perspective of violations of the single market, or even an attempt to aggressively restructure the EU with a uniform tax system.[143] Neither option is likely to attract much support among member states, although a

apple-ruling-means-for-the-eu-and-other-companies-operating-there.html (quoting Paolo Palmigiano, Head of U.K. Competition, EU and Trade Practice, Taylor Wessing, Interview with CNBC (July 15, 2020)).

[138] Henry McDonald, *Ireland to Close 'Double Irish' Tax Loophole*, GUARDIAN (Oct. 13, 2014, 11:50 AM), https://www.theguardian.com/business/2014/oct/13/ireland-close-double-irish-tax-loophole.

[139] Murphy, s*upra* note 119.

[140] Helmore, *supra* note 121.

[141] Regan, *supra* note 117.

[142] *See generally Offshore Trove Exposes Trump-Russia Links and Piggy Banks of the Wealthiest 1 Percent*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Nov. 5, 2017), https://www.icij.org/investigations/paradise-papers/paradise-papers-exposes-donald-trump-russia-links-and-piggy-banks-of-the-wealthiest-1-percent/.

[143] Amaro, *supra* note 137.

uniform tax system would be a necessary step in the event of a unified federal EU. More so than that, competitive tax policies will become the battleground for member states seeking to attract new businesses to bolster their economies after COVID-19.

Thus, the European Court of Justice's eventual decision will serve either to boldly reinforce the Commission's ability to regulate state aid, or to accentuate state aid deregulation by limiting the Commission's ability to effectively maintain competitive balance among the several states and in the global market. In a time of rapidly increasing instability in the Internal Market, the General Court's ruling looks to be another sign that the EU is moving away from a strictly regulated competitive market.

IV. THE UNITED STATES: A FEDERAL UNION WITHOUT REGULATION

By contrast, no such federal statutory state aid structure exists in the United States. Although state aid programs exist at the federal, state, and local level, the programs exist with predominantly individualized goals, and lack centralized rules and governance that promote balance and competition among the states. As a result, state aid trends in the United States are decidedly pro-business, at the expense of effective regulation and state cooperation. Pushed to its limits of effectiveness during the COVID-19 pandemic, it is clear that as the EU advances toward a more federalized system of aid distribution, combined with more individualistic goals, it must avoid the United States' enforcement mistakes.

A. DaimlerChrysler v. Cuno and the Dormant Commerce Clause

In addition to limited statutory guidance on state aid policies and goals, the lack of definitive common law decisions has fed a decentralized policy on state aid in the United States. In 1995, Chrysler, a staple of the United States' industrial Midwest auto industry, sought to replace an aging Jeep factory in Toledo, Ohio, with an updated facility.[144] Chrysler publicly debated whether to build the

[144] Sarah Holder, *The (Legal) Case Against Bidding Wars Like Amazon's*, BLOOMBERG (Jan 17, 2018, 10:59 AM), https://www.bloomberg.com/news/articles/2018-01-17/what-if-bidding-wars-like-amazon-s-were-illegal.

new plant in Ohio or in Michigan.[145] The process that followed came to reflect American policy toward interstate competition for the next three decades.

In a desperate effort to retain the Jeep factory and the $1.2 billion in economic benefits that came with it, Ohio offered Chrysler $280 million in property tax waivers and franchise tax credits to build the new factory in Toledo.[146] In response, a group of Toledo residents and business owners sued Chrysler.[147] The plaintiffs argued that their own state and local tax burdens would be negatively impacted as a consequence of the tax incentives and investment credits Ohio was providing to the car manufacturer.[148] The challengers therefore sought to invalidate the state tax incentives by claiming that they violated the Dormant Commerce Clause of the United States Constitution, as the resulting diminished state and local funds disproportionately burdened Ohio residents.[149] In addition, state aid opponents who helped facilitate the lawsuit viewed the case as an opportunity to stop the economic incentive race and end state aid bidding wars altogether.[150]

This case raised the issue of whether offering the incentives under Ohio law violated the Dormant Commerce Clause.[151] The Sixth Circuit found that the state franchise tax credit offered to Chrysler violated the Dormant Commerce Clause, but the Supreme Court of the United States reversed this decision.[152] The Court refused to rule on the merits of the challenge, and instead held that the plaintiffs' case failed due to a lack of taxpayer standing—a mere procedural violation.[153] The Court held that "state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers."[154] More importantly, the Court dismissed the challenge to the state aid plan and did not provide

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[145] *Id.*

[146] For an explanation of the franchise tax, see generally *Corporation Franchise Tax*, OHIO DEP'T TAX'N, https://tax.ohio.gov/static/communications/publications/corporation_franchise_tax.pdf (last visited Feb. 13, 2021); Holder, *supra* note 144.

[147] *Id.*

[148] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 338 (2006).

[149] *Id.*

[150] Holder, *supra* note 144.

[151] *DaimlerChrysler Corp.*, 547 U.S. at 338.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 346.

guidance for future state aid policies in the context of the Commerce Clause.[155]

DaimlerChrysler v. Cuno ("*DaimlerChrysler*") remains the only Supreme Court case that raised a serious challenge to the United States' intentionally competitive state incentive policies. This is not to say that the Court's judgment foreclosed the possibility of deciding the issue on the merits in the future. "The long journey to the Supreme Court of the United States in *DaimlerChrysler* does not result in clarity concerning the constitutionality of state use of tax incentives to attract businesses within state borders."[156]

In 2007, soon after *DaimlerChrysler* was handed down, the citizen-plaintiffs in *Olson v. Minnesota* sought an end to similar incentive-based state economic expansion programs.[157] However, their case plateaued in the Minnesota Court of Appeals due to a similar lack of standing.[158] Other opportunities to challenge United States' state aid policy, either through the court system or legislation, have come and gone without a serious attempt to resolve the issue of whether state aid policies violate the Dormant Commerce Clause.[159] Opponents of state incentive policies strongly believe that had a state or local government body sued in place of Toledo taxpayers, there would have been a better chance that the case would have survived beyond the standing hurdle.[160] Yet in the years since *DaimlerChrysler*, no serious attempt at common law reform has been pursued. Attempts at reform have instead been focused at the legislative level.

In the absence of any attempt by the court system to regulate competitive state incentive policies through the Dormant Commerce Clause, parties have tried to intervene at the legislative level with no success. In 1999, United States Representative David Minge (D-Minnesota), along with economists from the University of Minnesota,

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155 *See generally id.*

156 John J. Garman, *The New War Between the States: A Look at the Incentives to Recruit Foreign Automakers to the South, DaimlerChrysler Corp. v. Cuno, and the European Union's Prohibition Against State Aid*, 24 T.M. COOLEY L. REV. 313, 324 (2007).

157 *See generally* Olson v. State, 742 N.W.2d 681 (Minn. Ct. App. 2007).

158 *Id.* at 683.

159 Holder, *supra* note 144.

160 *Id.*

drafted the Distorting Subsidies Limitation Act of 1999.[161] Cosponsored by a number of notable advocates of economic reform in the House of Representatives, such as then-Representatives Bernie Sanders and Barney Frank, the bill stated that "State and local governments are being forced to compete against each other for businesses with scarce tax dollars that would otherwise be used for essential public goods and services."[162] The law proposed amending the Internal Revenue Code to impose "an excise tax on any person engaged in a trade or business who derives any benefit . . . from any targeted subsidy provided by any State or local government unit."[163] The bill further defined the subsidy as one "which is designed to encourage any trade or business operation of such person to locate in a particular governmental jurisdiction or to remain in a particular governmental jurisdiction . . . . "[164] The proposal did not stop jurisdictions from offering property and workforce incentive grants, it merely provided a disincentive from offering massive local tax breaks.[165]

Jack Markell, the governor of Delaware from 2009 until 2017, argued in favor of a similar fiscal intervention at the federal level, recommending a one hundred percent federal tax on corporate subsidies.[166] The objective was to force states to stop competing against each other for businesses.[167] The shift in investment strategy would leave more money in cash-strapped state and local budgets for investing in infrastructure, education, affordable housing, and immigration, to attract new businesses without paying out massive taxpayer-funded subsidies.[168] Both proposals gained little traction, and the bill died in the House.[169] In today's hypercompetitive environment, few, if any, challenges to state aid policies are considered anymore.

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[161] *Id.*; Distorting Subsidies Limitation Act of 1999, H.R. 1060, 106th Cong. (1999).

[162] Distorting Subsidies Limitation Act of 1999, H.R. 1060, 106th Cong. (1999).

[163] *Id.*

[164] *Id.*

[165] Holder, *supra* note 144.

[166] Derek Thompson, *Amazon's HQ2 Spectacle Isn't Just Shameful—It Should Be Illegal*, ATLANTIC (Nov. 12, 2018), https://www.theatlantic.com/ideas/archive/2018/11/amazons-hq2-spectacle-should-be-illegal/575539/.

[167] *Id.*

[168] *Id.*

[169] *Id.*

The United States' state aid policy, or lack thereof, structurally benefits pro-business, localized interests. It is therefore clear why no successful challenges were made and so few were attempted. In an environment where states are not just competing with other countries for industrial dominance, but with other states as well, politicians from both parties fear alienating the business community and the potential of their own incentive-based economic windfall.[170] "As a political measure, Democrats and Republicans alike want to show their constituents that they're taking, and creating, economic opportunities."[171] Under the individualized aid structure, major corporations will continue to utilize the premise of jobs and economic development to pit states against each other and earn an economic windfall.[172] On its face, this is certainly a positive aspect of the free market. Yet, as the COVID-19 pandemic has revealed, interstate competition without a sufficient federal regulation structure has directly contributed to fraud and economic imbalance.

B. Are State Tax Incentives Legal in the United States?

It is clear that the Supreme Court has not yet decided the constitutionality of state aid on the merits. Yet many constitutional law scholars concur that state aid, at the very least in the form of state tax incentives, violates the Dormant Commerce Clause.[173] However, until the Supreme Court definitively rules one way or another, it remains uncertain as to whether the federal court system views state tax incentives as legal. The Court in *Boston Stock Exchange v. State Tax Commissioner* was hostile toward any state position that "forecloses tax-neutral decisions and creates both an advantage for the exchanges and a discriminatory burden on commerce for its sister states."[174] Yet the Court also proclaimed that the decision "does not prevent the

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[170] Holder, *supra* note 144.

[171] *Id.*

[172] Zoe Willingham, *From Giveaways to Investments*, CTR. FOR AM. PROGRESS (Feb. 27, 2020, 10:00 AM), https://www.americanprogress.org/issues/economy/reports/2020/02/27/480909/from-giveaways-to-investments/.

[173] Christopher Klimmek, *Challenging State Investment Tax Credits After* DaimlerChrysler Corp. v. Cuno, 60 TAX L. 1115, 1117 (2007).

[174] Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 331 (1977).

States from structuring their tax systems to encourage the growth and development of interstate commerce and industry."[175]

C. Amazon HQ2—A Modern Look at United States State Aid Policies

In the years following the Court's decision to not rule on the merits in *DaimlerChrysler*, the United States' custom of encouraging state-versus-state competition remained effectively unabridged. Desirable corporations sought to leverage United States state aid policies into more lucrative incentive races between poorly funded state governments.[176] Potential jobs and hypothetical community investment were offered up to the highest bidder.[177] In 2017, the state-versus-state incentive system came under a new, increasingly scrutinized light when Amazon announced plans to build a second headquarters outside of Seattle, Washington, colloquially known as "Amazon HQ2."[178] Amazon promised $5 billion in investment towards construction and 50,000 new jobs to the city with the most "attractive" bid.[179] In the end, 238 cities across the United States submitted bids to be chosen as the home of HQ2.[180] What followed was a cornucopia of either generous state incentive packages, or corporate giveaways, depending on one's perspective. New Jersey offered Amazon $7 billion in economic incentives, including $1 billion in property tax breaks and $1 billion in wage tax incentives for Amazon employees.[181]

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[175] *Id.*

[176] Holder, *supra* note 144.

[177] *Id.*

[178] Laura Stevens, Keiko Morris & Katie Honan, *Amazon Picks New York City, Northern Virginia for its HQ2 Locations*, WALL ST. J. (Nov. 13, 2018), https://www.wsj.com/articles/amazon-chooses-new-york-city-and-northern-virginia-for-additional-headquarters-1542075336.

[179] Nathan Bomey, S*ee the Cities Hoping to Land 50,000 Amazon Jobs, Headquarters*, USA TODAY (Oct. 19, 2017), https://www.usatoday.com/story/money/2017/10/19/amazon-headquarters-bids/779232001/.

[180] Alison Griswold, *A Nearly Complete List of the 238 Places that Bid for Amazon's Next Headquarters*, QUARTZ (Nov. 4, 2017), https://qz.com/1119945/a-nearly-complete-list-of-the-238-places-that-bid-for-amazons-next-headquarters/.

[181] Leanna Garfield, *Amazon Just Visited New Jersey—and the State is Offering a $7 Billion Incentive to Land HQ2*, BUS. INSIDER (Apr. 13, 2018, 3:05 PM), https://www.businessinsider.com/amazon-headquarters-hq2-new-jersey-economic-incentive-2017-10.

Long Island City, New York (a developed industrial region in Queens, New York City) and Crystal City, Virginia (a suburb of Washington, D.C.) were selected as the winning locations.[182] New York City's successful bid drew particularly vocal criticism. The harshest criticism stemmed from New York City's monumentally generous incentive package offered to entice Amazon to the Big Apple. Outlay of public funds was estimated to be anywhere between \$1.7 and \$3 billion, including \$325 million in cash grants from the Empire Development Program and \$1.2 billion through New York's Excelsior Program, which subsidizes Amazon for a percentage of employee salaries.[183] At an average wage of \$150,000 per employee, Amazon estimated they would receive \$48,000 in subsidies from New York City, per employee.[184] By any metric, Amazon was to receive substantial incentives, especially for a company that already had a market capitalization over \$1 trillion.[185]

From a public policy perspective, Amazon's bidding war for HQ2 highlights the inequities that can arise from a two-tiered, decentralized state aid system. Specifically, the bidding war raises questions as to whether it is in the best interests of the cities and the United States to encourage such inter-competitive policies. Critics of New York City's HQ2 proposal argued that the deal would only exacerbate economic inequality, while bringing in a company that was already likely to come to New York anyway.[186] Dedicating blocks of physical space to HQ2 in an area populated with affordable housing complexes could reasonably be expected to exacerbate New York City's already

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[182] Stevens, Morris & Honan, *supra* note 178.

[183] Lauren Feiner, *Amazon Will Get Up to \$2.2 Billion in Incentives for Bringing New Offices and Jobs to New York City, Northern Virginia and Nashville*, CNBC (Nov 13, 2018, 10:46 AM), https://www.cnbc.com/2018/11/13/amazon-tax-incentives-in-new-york-city-virginia-and-nashville.html; Riley Edwards, *Breaking Down the Amazon HQ2 Deal: Facts and Takeaways*, CITIZENS BUDGET COMM. (Nov. 21, 2018), https://cbcny.org/research/breaking-down-amazon-hq2-deal (noting that the Excelsior Jobs Growth Tax Credits is a performance-based subsidy for Amazon based on the number of net new full-time employees hired by 2028).

[184] Feiner, *supra* note 183.

[185] Priya S. Gupta, *The Fleeting, Unhappy Affair of Amazon HQ2 and New York City*, 10 TRANSNAT'L LEGAL THEORY 97, 98 (2019).

[186] Ben Casselman, *A \$2 Billion Question, Did New York and Virginia Overpay for Amazon?*, N.Y. TIMES (Nov. 13, 2018), https://www.nytimes.com/2018/11/13/business/economy/amazon-hq2-va-long-island-city-incentives.html.

worsening housing crisis.[187] Money could otherwise be spent on education and public works, and would therefore arguably do more for local and state economies than the incentives would provide.188 Existing state aid programs that distribute money conceivably harm home grown entrepreneurial business ventures as well.[189]

Without more aggressive federal regulation, the United States' two-tiered structure of state aid left state and local governments, as well as competing businesses, to fend for themselves. Amazon's HQ2 is a prime example of the lack of state aid procedures exposing state and local governments to economic burden through inequitable competition. It was clear that when the time came for the United States to put forward a united federal, state, and local aid response to a broader economic crisis, the United States was initially unprepared.

D. United States State Aid Regime During COVID-19

As the EU's state aid regime increasingly mirrors the dual federalist structure of the United States, the EU must be wary of the consequences of the inter-competitive state aid regime to the United States COVID-19 response. Unsurprisingly, the COVID-19 pandemic has exacerbated funding strains at all levels of government in the United States.[190] State and local governments rely on steady revenue streams to fund even the most basic civic services, such as public safety, education, and health and human services.[191] What follows is a vicious cycle of economic struggle at the local level for many industries harmed by the pandemic. State and local governments, starved of both emergency federal funding and tax revenue from businesses within their jurisdictions, are unable to provide adequate financial incentives for companies to stay open.[192] The companies, in

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[187] Gupta, *supra* note 185, at 108–09.

[188] Casselman, *supra* note 186.

[189] *Id.*

[190] Anshu Siripurapu & Jonathan Masters, *How COVID-19 Is Harming State and City Budgets*, COUNS. ON FOREIGN REL. (Mar. 19, 2021), https://www.cfr.org/backgrounder/how-covid-19-harming-state-and-city-budgets.

[191] Erica Michel, *State Aid to Local Governments*, NAT'L CONF. STATE LEGIS. https://www.ncsl.org/research/fiscal-policy/state-aid-to-local-government-update.aspx (last visited Jan. 10, 2021).

[192] Jared Walczak, *State Aid Provisions of the Federal Coronavirus Response Bill*, TAX FOUND. (Mar. 25, 2020), https://taxfoundation.org/state-aid-coronavirus-provisions-of-the-federal-coronavirus-response-bill/.

turn, are unable to provide revenue to state and local governments and are closing at record rates.[193] The impetus thus falls on the federal government to provide adequate state aid to businesses to help them weather the pandemic.

To that end, the highlight of the United States federal government's initial COVID-19 state aid response for businesses was the Coronavirus Aid, Relief, and Economic Security ("CARES") Act.[194] The CARES Act, enacted on March 27, 2020, was without a doubt large in scope and efficient in its passing.[195] The $2.2 trillion Phase 3 aid package was the largest in modern American history,[196] and it provided necessary support to both businesses and employees when the need was at its most dire.[197] The Paycheck Protection Program ("PPP"), the CARES Act's primary benefit to American businesses, featured an initial funding of $350 billion for small businesses with less than five hundred employees, and over $500 billion for large corporations.[198] Since the passage of the CARES Act, the Consolidated Appropriations Act of 2021 provided an additional $900 billion in COVID-19 relief, and the Biden Administration's American Rescue Plan Act of 2021 provided another $1.9 trillion.[199] The ultimate effectiveness of the PPP's economic intervention is up for debate, but there is no doubt that the implementation of the state aid program highlights a potential shift in American state aid policies away from primarily offering tax incentives and toward outright loan

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[193] Catherine Thorbecke, *840,000 More Workers Filed for Unemployment Insurance Last Week*, ABC (Oct 8, 2020, 9:05 AM), https://abcnews.go.com/Business/840000-workers-filed-unemployment-insurance-week/story?id=73496770.

[194] Walczak, *supra* note 192.

[195] *Id.*

[196] Carl Hulse & Emily Cochrane, *As Coronavirus Spread, Largest Stimulus in History United a Polarized Senate*, N.Y. TIMES (Mar. 26, 2020), https://www.nytimes.com/2020/03/26/us/coronavirus-senate-stimulus-package.html.

[197] Kathryn Judge, *The Design Flaw at the Heart of the CARES Act*, FORBES (Apr. 20, 2020, 6:41 AM), https://www.forbes.com/sites/kathrynjudge/2020/04/20/the-design-flaw-at-the-heart-of-the-cares-act/#3f0a52cf6bed.

[198] Kelsey Snell, *What's Inside the Senate's $2 Trillion Coronavirus Aid Package*, NPR (Mar. 26, 2020, 5:34 PM), https://www.npr.org/2020/03/26/821457551/whats-inside-the-senate-s-2-trillion-coronavirus-aid-package.

[199] Adam Taylor, *How the $1.9 Trillion U.S. Stimulus Package Compares with Other Countries' Coronavirus Spending*, WASH. POST (Apr. 5, 2021), https://www.washingtonpost.com/world/2021/03/10/coronavirus-stimulus-international-comparison/.

programs. It also highlights the struggle under the American regime to match the pre-COVID-19 regulatory effectiveness of the EU.

The PPP attempted to implement a new regulatory framework to what was to be a massive undertaking: distributing upwards of 10.7 million loans to borrowers across the country.[200] Achieving equitable distribution proved to be difficult without an existing structure akin to the TFEU. The program purported to offer regulation through multiple decentralized avenues, including a Special Inspector General and a Congressional Oversight Commission.[201] The United States Small Business Administration ("SBA") oversaw the administration of the small business loans.[202] Unlike the Commission's regulatory framework, the SBA and the United States have generally come under substantial criticism for its weak regulatory regime. The lack of any baseline statutory or common law regulatory structure in the United States, shown in part above, led to reliance on the federal government to offer the stopgap regulatory measures through the CARES Act itself, with limited effectiveness.

Without an established centralized system of regulation, the cracks in the quickly and haphazardly-delegated regulatory regime led to significant accusations of fraud and abuse in the distribution and use of CARES Act funds, as well as criticism of the PPP's ability to prevent such abuses.[203] For example, in September of 2020, the United States Department of Justice charged fifty-seven people in attempting to defraud the PPP's small business program of $175 million.[204] Billions of dollars in fraudulent requests and distributions have since

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[200] Carmen Reinicke, *Paycheck Protection Program Has Run Out of Money for Most Borrowers. What You Need to Know*, CNBC (May 5, 2021, 12:31 PM), https://www.cnbc.com/2021/05/05/ppp-has-run-out-of-money-for-most-borrowers-what-to-know.html.

[201] Snell, *supra* note 198.

[202] *SBA's Paycheck Protection Program for Small Businesses Affected by the Coronavirus Pandemic Launches*, U.S. SMALL BUS. ADMIN. (Apr. 3, 2020), https://www.sba.gov/article/2020/apr/03/sbas-paycheck-protection-program-small-businesses-affected-coronavirus-pandemic-launches.

[203] Koh Gui Qing, *U.S. Starts Forgiving Pandemic Loans Amid Criticism, Uncertainty*, REUTERS (Oct. 7, 2020, 1:07 PM), https://www.reuters.com/article/us-health-coronavirus-usa-ppp/u-s-starts-forgiving-pandemic-loans-amid-criticism-uncertainty-idUSKBN26S2YA.

[204] Katie Benner, *Justice Dept. Announces Dozens of Fraud Charges in Small-Business Aid Program*, N.Y. TIMES (Sept. 10, 2020), https://www.nytimes.com/2020/09/10/us/politics/ppp-fraud-coronavirus.html.

been uncovered.[205] Loans that were supposed to be used to maintain payroll and pay bills, and were eventually to be forgiven, were instead being used by owners to fund extravagant lifestyles and buy luxury cars as their employees suffered.[206] December 2020 SBA data dumps indicated that around one percent of PPP applicants received over one quarter of the allocated PPP funds.[207] Watchdogs corroborated the data dump, reporting that much of the money was instead distributed to large corporations and special interests, not to the small businesses primarily in need of the money.[208]

The United States Government Accountability Office ("GAO"), a nonpartisan watchdog under Congressional authority, identified several concerns about the implementation of the PPP. Without established controls in place, the SBA had no choice but to streamline the program to send out funds as quickly as possible.[209] Streamlining is useful when implemented effectively, but when combined with lax vetting standards, it leads to widespread misconduct.[210] Without time to implement safeguards upfront before loan approval, the SBA allowed lenders to rely on prospective borrowers' self-certifications for eligibility of the loans.[211] The GAO identified this as a significant fraud risk.[212] In light of the GAO's concerns, the SBA has since had to expend significant time and resources investigating cases of fraud related to the PPP program.[213] Much of the monitoring was left to the

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[205] Stacy Cowley, *15% of Paycheck Protection Program Loans Could be Fraudulent, Study Shows*, N.Y. TIMES (Aug. 17, 2021), https://www.nytimes.com/2021/08/17/business/ppp-fraud-covid.html.

[206] Benner, *supra* note 204.

[207] Stacy Cowley & Ella Koeze, *1 Percent of P.P.P. Borrowers Got Over One-Quarter of the Loan Money*, N.Y. Times (Dec. 2, 2020), https://www.nytimes.com/2020/12/02/business/paycheck-protection-program-coronavirus.html.

[208] Rey Mashayekhi, *'Poorly Designed and Irresponsibly Run': PPP Scrutiny Mounts After SBA Data Dump*, FORTUNE (Dec. 11, 2020, 6:04 PM), https://fortune.com/2020/12/11/ppp-scrutiny-sba-trump-administration-big-companies-small-businesses-COVID-relief/.

[209] *Id.*

[210] *Id.*

[211] U.S. SMALL BUS. ADMIN., REP. NO. 20-14, IMPLEMENTATION OF THE PAYCHECK PROTECTION PROGRAM REQUIREMENTS 10 (2020); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-21-117T, COVID-19 LOANS LACK CONTROLS AND ARE SUSCEPTIBLE TO FRAUD 1 (2020).

[212] GAO-21-117T, *supra* note 211.

[213] *Id.*

lenders and borrowers themselves to make sure they adhered to the program's regulations.[214] Overall, the United States House of Representatives Select Subcommittee on the Coronavirus Crisis identified upwards of $84 billion in fraud related to coronavirus relief funds, yet only seized $626 million as of March of 2021.[215] Moreover, given the rushed guidelines, many businesses applying for aid through the PPP program were unsure if they even qualified for state aid.[216]

A more comprehensive structure in place to regulate and analyze state aid would have ensured equitable and efficient distribution of funds and served to deter abuses of the program. Instead, the crown jewel of the United States' state aid response to COVID-19 turned into an unregulated race to receive funding. The start of the Biden Administration has shown a renewed interest in fraud prevention, as the American Rescue Plan provided more resources to federal watchdogs to combat the problem.[217] Yet in the end, little changed.[218] If the EU is to move toward a more federalized system of risk sharing, combined with member state and federal state aid, it must learn from the mistakes of the United States and adapt its system to maintain a centralized system of regulation.

V. CONCLUDING THOUGHTS: THE EU LOOKING TO THE FUTURE

Although not the EU's intention, it is clear that easing the EU state aid framework has opened the door to a fundamental transformation in the EU and the TFEU. The Temporary Framework and member state response have led to two competing, but not necessarily mutually exclusive, shifts in the EU's traditional mission. First, by loosening the TFEU's state aid regulations, the EU threatened the long-term health of the Internal Market through competitive imbalance. More fiscally stable countries, the traditional power centers of the EU, such as Germany and France, have utilized allowable state aid procedures

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[214] Robert Anello, *How DOJ Shows it "Cares" About CARES Act Fraud*, FORBES (Oct. 27, 2020), https://www.forbes.com/sites/insider/2020/10/27/how-doj-shows-it-cares-about-cares-act-fraud/?sh=6f5ca3966876.

[215] S. COMM. ON CORONAVIRUS CRISIS, 117TH CONG., LOWER THE GUARDRAILS: HOW THE TRUMP ADMINISTRATION FAILED TO PREVENT BILLIONS IN PANDEMIC SMALL BUSINESS FRAUD 1 (2020).

[216] Reinicke, *supra* note 200.

[217] *Id.*

[218] Cowley, *supra* note 205.

and fiscal stimulus to artificially prop up their own industries, as less fiscally stable countries in the EU endure the pandemic with less stimulus.[219] Even as each member state attempts to sustain their economy through the pandemic with government stimulus to the extent that the TFEU allows, the ensuing debt crisis would normally represent its own impending crisis for Europe. Thus, in the EU's second major shift, the EU's joint borrowing program serves, among other policies, to head off the debt crisis. This has opened the door to a closer federal union, one that member states appear more willing to engage in since the onset of the pandemic.[220] On the whole, shifts in legal enforcement and tax rulings have created an EU governing structure that fundamentally risks the Internal Market as each member state competes for their own economic dominance, while simultaneously unifying the EU under a growing, federalized geopolitical entity akin to the United States' deregulated fiscal regime. The question is whether this is the direction the EU should take.

As the COVID-19 pandemic continues to evolve, there is no better time to continue to restructure the EU into a closer federal union. The combination of the frugal member states, agreeing to joint borrowing (with the added point of another frugal member state, the UK, having left the EU), during a time when Article 107 state aid restrictions are loosened indicates a growing consensus towards a more fiscally unified yet less regulated EU. Maintaining the trajectory toward fiscal unity is the only measure to head off the growing member state economic conflict. As it is, a shockingly unified EU has begun to show some rifts in the new year due to the stresses of early-stage, and arguably inequitable, vaccine distribution.[221] As the economies of the Eastern Bloc peers continue to grow closer and more competitive to that of the traditional European powers, it is imperative that the EU is prepared.[222] Deeper EU fiscal integration at the federal level is the solution to increasingly decentralized state aid management.

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219 White, *supra* note 99.

220 Ferguson, *supra* note 85.

221 John Chalmers & Francesco Guarascio, *Slow Vaccine Rollout Stokes Tensions Among EU States*, REUTERS (Jan. 6, 2021), https://www.reuters.com/article/us-health-coronavirus-eu/slow-vaccine-rollout-stokes-tensions-among-eu-states-idUSKBN29B1UC.

222 *Brexit Set to Take Full Effect as UK Leaves Single Market*, DECCAN HERALD (Dec. 31, 2020), https://www.deccanherald.com/international/world-news-politics/brexit-set-to-take-full-effect-as-uk-leaves-single-market-933511.html.