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The Status of Small and Medium-Sized Enterprises under EU General Block Exemption Regulation

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Abstract

The Commission has privileged SMEs in the European state aid scheme through the GBER to ensure the financial support and channel the aid towards SMEs. This thesis has focused on SMEs under the GBER by determining the scope of the GBER and comparing SMEs and the GBER with relevant German provisions. The differences between German and EU law are systematic in nature, while the GBER and the SME have in common, a common, standardized and universally applicable approach in order to archive a simple, but effective support for SMEs, in order to maintain the competition in the internal market.

Die Kommission hat KMU in der europäischen Beihilferegelung durch die AGVO privilegiert, um die finanzielle Unterstützung sicherzustellen und die Beihilfen an KMU zu lenken. Diese Arbeit konzentriert sich auf die KMU im Rahmen der AGVO, indem sie den Anwendungsbereich der AGVO bestimmt und die KMU und die AGVO mit den einschlägigen deutschen Bestimmungen vergleicht. Die Unterschiede zwischen dem deutschen und dem EU-Recht sind systematischer Natur, während die AGVO und die KMU einen gemeinsamen, standardisierten und universell anwendbaren Ansatz haben, um eine einfache, aber effektive Unterstützung für KMU zu gewährleisten und den Wettbewerb im Binnenmarkt aufrechtzuerhalten.

Table of content

A. Introduction 5

B. General Block Exemption Regulation (GBER) 9

I. Status of the GBER inside the European state aid law 9
1. European state aid law 9
2. Development of the GBER 14
3. Legal status of the GBER 18

II. Structure and Scope of the GBER 20

III. Requirements of the GBER 23

IV. Summary 25

C. SME Definition 25

I. Reasons for one SME Definition 26
1. "Unique set of issues" for SMEs 26
2. United application of one Definition in the internal market 27

II. Structure and Requirements 29
1. Enterprise 29
2. SME parameters 32
3. Types of enterprises 34
4. Data for determining a SME 43

III. Conclusion 44

D. SMEs under the GBER 46

I. Categories and Articles for SME under the GBER 47

II. Requirements 50

III. Loss of the SME status 52
1. EU law 52
2. German Law 62

E. Overall Conclusion 65

Bibliography 67

Legislation ***..... 67***
EU 67
Germany 68

Case Law ***..... 68***
Case law Court of Justice of the European Union 68
Case law General Court of the European Union 70
Case law Decision of the Commission 70

Legal Commentaries ***..... 71***

Legal articles, reports, reviews ***..... 72***

Abbreviations

AEUV	**Vertrag über die Arbeitsweise der Europäischen Union**
AktG	**Stock Corporation Act, Aktiengesetz**
Art.	**Article**
BFH	**Federal Finance Court, Bundesfinanzgerichtshof**
BVerfG	**Federal Constitutional Court, Bundesverfassungsgericht**
Com	**European Commission**
DStR	**Deutsches Steuerrecht**
EC	**Treaty establishing the European Community**
ECJ	**Court of the European Union**
ECSC	**Treaty establishing the European Coal and Steel Community**
EEC	**European Economic Community, Treaty of Rome**
EStAL	**European State Aid Law Quarterly**
EU	**European Union**
EUV	**Vertrag über die Europäische Union**
EuZW	**Europäische Zeitschrift für Wirtschaftsrecht**
GBER	**General Block Exemption Regulation**
GG	**German Constition, Grundgesetz**
HGB	**Commercial Code, Handelsgesetzbuch**
KSchG	**Employment Protection Act, Kündigungsschutzgesetz**
SME	**Small and medium-sized Enterprises**
TEU	**Treaty for the European Union**
TFEU	**Treaty for the Functioning of the European Union**
VwVfG	**Adminstrative Procedures Act, Verwaltungsverfahrensgesetz**
WTO	**World Trade Organisation**

The Status of Small and Medium-Sized Enterprises under EU General Block Exemption Regulation

A. Introduction

In the past few years, the granting of aid and subsidies in the EU and Germany, embraced by multiple crises like the Covid-19 pandemic, the climate crises, and the war against Ukraine, has risen to an all-time high.[1]

While the former and the latter are not as harsh on the economy as they used to be at their respective onset, granting aid to the economy will stay at a high level, at least in comparison to pre-COVID-19 times. According to the Commission and other member states like Germany, this is due to a much needed transformation of the economy towards a more sustainable and independent one.[2] The green transformation will be tremendously expensive. According to the "Strategic Foresight Report 2023"[3], annually 620 billion Euros of additional investments will be needed Europe-wide to ensure this transformation.[4]

Although this data is the investment requirement for the whole economy, 17-20% of public investment into the economy will also be needed.[5]

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[1] Bundesministerium der Finanzen, „29. Subventionsbericht des Bundes 2021-2024", p.18, https://www.bundesfinanzministerium.de/Content/DE/Downloads/Broschueren_Bestellservice/29-subventionsbericht.pdf?__blob=publicationFile&v=3, accessed 30.11.2024; Ingo Nathusius, „Wenn der Staat die Wirtschaft päppelt", (Tagesschau.de, 08.02.2023), https://www.tagesschau.de/wirtschaft/konjunktur/subventionen-deutschland-100.html, accessed 30.11.2024.

[2] Mauderer, „Grüne Transformation der Wirtschaft: Wie kann der Strukturwandel gelingen?", (Deutsche Bundesbank Eurosystem, München, 06.11.2023), https://www.bundesbank.de/de/presse/reden/gruene-transformation-der-wirtschaft-wie-kann-der-strukturwandel-gelingen--918140, accessed 30.11.2024; Europäischer Rat, „Schlussfolgerungen" (Tagung des Europäischen Rates, 12.12.2019), https://www.consilium.europa.eu/media/41779/12-euco-final-conclusions-de.pdf, accessed 30.11.2024; European Commission, "The European Green Deal", https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_de, 30.11.2024.

[3] European Commission, "Strategic Foresight Report 2023", (06.07.2023), https://commission.europa.eu/document/download/ca1c61b7-e413-4877-970b-8ef619fc6b6c_en?filename=SFR-23-beautified-version_en_0.pdf, 30.11.2024.

[4] European Commission, "Strategic Foresight Report 2023", (06.07.2023), https://commission.europa.eu/document/download/ca1c61b7-e413-4877-970b-8ef619fc6b6c_en?filename=SFR-23-beautified-version_en_0.pdf, 30.11.2024.

[5] European Commission, "Investment needs assessment and funding availabilities to strengthen EU´s Net-Zero technology manufacturing capacity", (Commission Staff Working Document, 23.03.2023, SWD (2023) 68 final), https://single-market-economy.ec.europa.eu/system/files/2023-

However, the cost of the transformation towards a green economy are not the only problems the EU and its member states are facing. Over the last few years, the EU has been experiencing slow economic growth.[6] Vast markets like the USA and China are choosing a more protectionist approach. The cheap energy from the past, generated mainly by Russian gas, is no longer available. For the moment, it seems like the multilateral environment imposing free world trade has vanished or is at least distorted. Also, in the EU the productivity has slowed down and new technologies from countries outside the area are emerging.[7] The EU is losing its competitiveness, finds Mr. Mario Draghi, former President of the European Central Bank and former Prime Minister of the Republic of Italy, in his so-called "Draghi Report"[8] on behalf of the Commission.[9]

In his report, Mr. Draghi goes beyond the anticipated investments in the "Strategic Foresight Report 2023". He suggests annual investments of between 750 and 800 billion Euros per year in total into the competitiveness of the EU. He also demands more public spending to unlock private capital. However, he states that the usual 1/5 of public investment in total investments would not be enough to achieve more

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03/SWD_2023_68_F1_STAFF_WORKING_PAPER_EN_V4_P1_2629849.PDF, accessed 30.11.2024; European Commission, "Environmental Implementation Review 2022", (08.09.2022, COM (2022) 438 final), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022DC0438, accessed 30.11.2024.

[6] European Commission, "The future of European competitiveness, Part A, A competitiveness strategy for Europe"- "The Draghi Report", (09.09.2024), p.5-7, https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=The%20future%20of%20European%20competitiveness%20_%20A%20competitiveness%20strategy%20for%20Europe.pdf, accessed 18.01.2025.

[7] European Commission, "The future of European competitiveness, Part A, A competitiveness strategy for Europe"- "The Draghi Report", (09.09.2024), p.5-7, https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=The%20future%20of%20European%20competitiveness%20_%20A%20competitiveness%20strategy%20for%20Europe.pdf, accessed 18.01.2025.

[8] European Commission, "The future of European competitiveness, Part A, A competitiveness strategy for Europe"- "The Draghi Report", (09.09.2024), p.5-7, https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=The%20future%20of%20European%20competitiveness%20_%20A%20competitiveness%20strategy%20for%20Europe.pdf, accessed 18.01.2025.

[9] European Commission, "The future of European competitiveness, Part A, A competitiveness strategy for Europe"- "The Draghi Report", (09.09.2024), p.5-7, https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=The%20future%20of%20European%20competitiveness%20_%20A%20competitiveness%20strategy%20for%20Europe.pdf, accessed 18.01.2025.; Bundesministerium für Wirtschaft und Klimaschutz, „Draghi-Bericht zur Zukunft der Wettbewerbsfähigkeit der EU", (30.09.2024), https://www.bmwk.de/Redaktion/DE/Schlaglichter-der-Wirtschaftspolitik/2024/10/04-draghi-bericht.html, accessed 08.12.2024; Pressemitteilung Europäisches Parlament: „Draghi: „Europa hat die Wahl zwischen Austritten und Lähmung oder Integration", (17.09.2024), https://www.europarl.europa.eu/news/de/press-room/20240913IPR23903/draghi-europa-hat-die-wahl-zwischen-austritten-und-lahmung-oder-integration, accessed 08.12.2024.

competitiveness and the needed transformation. It can be concluded that huge investments supported by public spending are necessary for this transformation.[10]

Large corporations with a lot of resources and influence are more likely to manage this transformation than small and middle-sized enterprises, also called SME, and legally defined by the Commission, because the SME definitions differ under national law.[11] 99% of all companies in the EU and Germany are SME. In Germany SMEs employ 55% of all working people and are responsible for 42% of the gross value added.[12] SME's are the backbone of the European and German economies.[13]
This is the reason why especially the Commission has developed a lot of programs to support SMEs.[14] However, Art. 107 (1) TFEU usually prohibits the member states to grant aid. To ensure the financial support and channel the aid towards the SMEs, the Commission has privileged the SMEs in the European state aid scheme through the GBER, allowing the member states and their agencies to grant them more or more specific aid. The main requirement for this privileged treatment is the SME status, legalizing the granted aid under the European state aid regime of the Art. 107 TFEU.[15]

However, this status can be lost by transgressing the defined thresholds. The thresholds can be crossed through mergers and acquisitions between other companies or growth of the company. Relevant is this loss when the aid is still afforded to a company and the company receives state aid based on the SME status. The question arises if that part of the granted aid, based on the SME privilege, becomes an illegal

[10] European Commission, "The future of European competitiveness, Part A, A competitiveness strategy for Europe"- "The Draghi Report", (09.09.2024), p.59, https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=The%20future%20of%20European%20competitiveness%20_%20A%20competitiveness%20strategy%20for%20Europe.pdf, accessed 18.01.2025.
[11] European Commission, "User guide to the SME Definition", (2020).
[12] Statistisches Bundesamt, „De-Statis", „Kleine und mittlere, Unternehmen", https://www.destatis.de/DE/Themen/Branchen-Unternehmen/Unternehmen/Kleine-Unternehmen-Mittlere-Unternehmen/_inhalt.html, accessed 30.11.2024; European Commission, „User guide to the SME Definition", 2020.
[13] European Commission, "An SME strategy for a sustainable and digital Europe", (Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee for the region, Com (2020), 103 final, 10.03.2020).
[14] European Commission, "Entrepreneurship and small and medium-sized enterprises (SMEs)", https://single-market-economy.ec.europa.eu/smes_en, accessed 30.11.2024; European Commission, "An SME strategy for a sustainable and digital Europe", (Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee for the region, Com (2020), 103 final, 10.03.2020).
[15] Deloitte, "SME Enhance GBER and SME Enhance (de minimis)", (02.07.2023), https://www.deloitte.com/mt/en/services/tax/perspectives/gi3/sme-enhance-gber-and-sme-enhance.html, accessed 30.11.2024.

state aid, after the loss of the SME status. The follow-up question is, what happens with the aid? Although it seems like a foreseeable situation that a SME loses its status and becomes a larger company, the provisions in the GBER, which regulate the requirements, have no direct rules and are unclear on the timing and duration of the requirement. Neither the Commission nor the European Courts had ruled on this problem. In the legal literature, only two German attorneys, Mr. von Donat and Mr. Knott, have published one article regarding this problem. Therefore, it is safe to say that the situation is at least unclear under EU law yet.[16]

However, it is not only European law that is relevant to this problem.
The aid is granted by national agencies under national law. National law and the aid grant notice usually determine the terms for granting aid. These rules can determine the outcome under national law. German administrative law could solve this problem by its national provisions. However, this could lead to a conflict between German and EU law.[17]

Before discussing the problem and finding a possible solution, this thesis will analyze the GBER and the SME definition and compare the requirements of the SME definition between the European Union and German law to acknowledge a deeper understanding of the SMEs under the GBER for the discussion of the problem. Afterwards, this thesis will analyze the arguments brought by the attorneys von Donat and Knott's article and discuss the legal situation. Lastly, this thesis will assess the problem according to German administrative law. This is achieved by a systematic approach.
Therefore, three research questions can be deducted:

1) What differences occur in the SME definition between EU and German law?

[16] Knott/von Donat, “Is state aid to start-ups and SMEs becoming illegal if the company is sold?”, (Revista de direito commercial, 31.02.2021),pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 02.01.2025.
[17] Knott/von Donat, “Is state aid to start-ups and SMEs becoming illegal if the company is sold?”, (Revista de direito commercial, 31.02.2021),pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 02.01.2025.

2) Does a granted aid, which is exempt through the GBER, become illegal when the SME status during the granted period is lost?

3) How is the situation of losing the SME status based on German administrative law?

B. General Block Exemption Regulation (GBER)

In the EU, aid granted by the member states is incompatible with the internal market according to Art. 107 (1) TFEU. However, Regulation (EU) No. 651/2014[18] (last amended by Regulation (EU) 2023/1315[19]) declares certain categories of aid compatible with the internal market. These categories, which are based on Commission Regulation (EU) No 651/2014, are in application with Art. 107 and Art. 108 TFEU, and the regulation has been given its name: General Block Exemption Regulation.[20]

I. Status of the GBER inside the European state aid law

1. European state aid law

In chapter seven, “rules on competition,” section two, “aids granted by states,” of the TFEU, the European state aid law is regulated. European state aid law is therefore part of European Competition Law. While section one “rules applying to undertaking” is directed against the anti-competitive behavior like dominant position of companies and other undertakings in the internal market, section two is addressed towards the member states, because they can distort the competition in the internal market by

[18] Commission Regulation (EU) No. 651/2014 of 17.06.2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.
[19] Commission Regulation (EU) 2023/1315 of 23.06.2023 amending Regulation (EU) No. 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertaking active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty.
[20] Commission Regulation (EU) No. 651/2014 of 17.06.2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty; Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol.5, 2, XII, (6. Ed. 2022), para.21.

subsidizing their economy through their nearly endless funds.[21] Poorer states could not participate. This could endanger the cohesion goal of Art. 3 TEU. Therefore, a contest for the highest or the most national subsidies has to be prevented.[22] The existence of the internal market and undistorted competition are the goals of European state aid law.[23]

Although competition law or antitrust law[24] does contain regulations for the prohibition of anti-competitive behavior, the European state aid law has no provisions that directly prohibit state aid.[25] Art. 107 (1) TFEU, which contains the criteria for state aid, only states that any granted aid is incompatible with the internal market. However, the ECJ ruled already in 1977 in the case "Steinike und Weinling"[26] that the Art. 92 EEC, which is the predecessor provision of Art. 107 (1) TFEU, prohibits state aid. The prohibition of state aid is a necessary tool to achieve the above-mentioned goals.[27]
The ECJ has also stated in its judgement that the prohibition of state aid is neither absolute nor unconditional because Art. 107 TFEU grants the Commission a wide discretionary adjudication in exempting state aid in order to react to complex economic situations.
Therefore, the Art. 107 (1) TFEU has no direct effect.[28] This approach differs from Art. 4 (c) ECSC which was absolute and unconditional in its prohibition of state aid. Any national aid policies in favor of the own industrial economy in the founding member states should be prevented by Art. 4 (c) ECSC.[29]

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[21] Bartosch, EU-Beihilfenrecht, A, I, (2. Ed., 2016), para. 1; Heidenhain, European state aid law, § 1, (1. Ed., 2010), para. 1; Schweitzer/Mestmäcker in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, I, A, (6. Ed. 2022), paras.1-4.
[22] Schweitzer/Mestmäcker in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, I, A, (6. Ed. 2022), paras.1-4.
[23] Bartosch, EU-Beihilfenrecht, A, I, (2. Ed., 2016), para. 1; Heidenhain, European state aid law, § 1, (1. Ed., 2010), para. 1; Schweitzer/Mestmäcker in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, I, (6. Ed. 2022), paras.1-4; Eisenhut in: Geiger/Khan/Kotzur/Kirchmair, EUV/AUEV, AEUV Art. 107, (7.ed 2023) paras. 4,5.
[24] Gerber, "Competition Law and Antitrust", (Oxford University Press, 22.10.2020), https://academic.oup.com/book/33439, accessed 06.01.2025.
[25] Art. 101, 102 TFEU, Art. 107 I TFEU; Heidenhain, European state aid law, § 1, (1. Ed., 2010), para. 1; Schweitzer/Mestmäcker in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, I, A, (6. Ed. 2022), paras.1-4.
[26] ECJ, Judgement of the Court of 22.03.1977, C 78/76, "Steinike Weinling".
[27] Bartosch, EU-Beihilfenrecht, A, I, (2. Ed., 2016), para. 1; Heidenhain, European state aid law, § 1, (1. Ed., 2010), para. 1; Schweitzer/Mestmäcker in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, I, A, (6. Ed. 2022), paras.1-4.
[28] ECJ, Judgement of the Court of 22.03.1977, C 78/76, „Steinike Weinling"; Schweitzer/Mestmäcker in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, I, A, (6. Ed. 2022), paras.1-4;
[29] Schweitzer/Mestmäcker in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, I, A, (6. Ed. 2022), pars.1-4.

Today an aid in the light of Art. 107 (1) TFEU can be compatible with the internal market, when it is either exempt or notified through the European Commission. Without this exemption or notification, it is an illegal aid.[30]

This is reflected in the structure of European state aid law.[31] According to Art. 107 (1) TFEU state aid is prohibited, when the five criteria of state aid are fulfilled: transfer of state resources, granting of an economic advantage, favoring of a certain undertaking, distortion of competition and adverse effects on trade between member states. These criteria are very broadly interpreted.[32] Art. 107 (2) TFEU contains legal exemptions like natural disasters, and Art. 107 (3) TFEU governs exemptions based on the discretionary adjudication of the Commission. It is generally understood that the Commission has only discretionary adjudication for Art. 107 (3) TFEU. This discretionary adjudication of the Commission is through to the various economic situations exempt in Art. 107 (3) TFEU very broad, as mentioned above.[33] The Commission is able to exempt aid, when the requirements of Art. 107 (3) TFEU are fulfilled by using the described discretionary adjudication. The aid needs to be necessary and appropriate to reach the goals and requirements of Art. 107 (3) TFEU.[34]

However, the discretionary adjudication is not unlimited. It can be restricted by the control of the ECJ or requirement of consistent interpretation.[35] The Commission is therefore obliged to avoid contradictions against the Fundamental Freedoms, when it applies European state aid law.[36] From the requirement of consistent interpretation

[30] Art. 108 (2), (3) TFEU; Bartosch, EU-Beihilfenrecht, A, I, (2. Ed., 2016), para. 4; Achleitner, "Interplay between the Commission, National Authorities and Courts: An Attempt to Cut the Gordian Knot", (EStAL, Vol. 21, Issue 2, 2022), p. 173-180.
[31] Art. 107-109 TFEU; Cremer in: Caliess/Rufer, EUV/AEUV, AEUV Art. 107, (6. ed. 2022), para. 1.
[32] Bacon, "State aids and general measures", (Yearbook of European Law, Vol. 17, Issue 1, 1997), p. 269-321.
[33] Cremer in: Caliess/Rufer, EUV/AEUV, AEUV Art. 107, (6. ed. 2022), para. 1.
[34] ECJ, Judgement of the Court of 17.09.1980, C 730/79 "Philip Morris"; Bacon, "State aids and general measures", (Yearbook of European Law, Vol. 17, Issue 1, 1997), p. 269-321; Eisenhut in: Geiger/Khan/Kotzur/Kirchmair, EUV/AUEV, AEUV Art. 107, (7. ed 2023) para. 24.
[35] ECJ, Judgement of the Court of 02.09.2010, C 290/07 "Scott"; ECJ, Judgement of the Court of 19.09.2000, C 156/98 "Deutschland/Kommission".
[36] ECJ, Judgement of the Court of 19.09.2000, C 156/98. "Deutschland/Kommission"; Schweitzer/Mestmäcker in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, I, A, (6. Ed. 2022), para. 11.

follows that an aid cannot be notified, when it infringes the Fundamental Freedoms, the principle of non-discrimination or secondary EU law.[37]

Art. 108 TFEU contains the procedural rules for a compatibility examination of an aid with the internal market. In Art. 108 (1) TFEU it is laid down, that the Commission has the right and the duty to control all existing aid systems in the member states and ensures a functioning internal market. Art. 108 (2) TFEU allows the Commission to investigate and evaluate granted aid and to direct the member state stop or reform it, when an infringement against Art. 107 (1) TFEU was detected. When the member states do not comply, the Commission or other member states can sue the infringing member State in front of the ECJ. To conclude, Art. 108 (2) concedes the Commission sole competence on the field of European state aid law.

Art. 108 (3) TFEU contains the so called "stand still clause"[38], which obliges member states to inform the Commission, when they are planning to grant aid and stand still until the Commission has reached a conclusion. This is also called notification. Therefore, the "stand still clause" is also a prohibition to grant the aid regime to companies.[39] Hence to Art. 107 (1) TFEU, Art. 108 (3) TFEU has direct effect, because the "stand still clause" grants no discretionary adjudication, moreover it demands to hold the aid, therefore, it is sufficient enough and unambiguous, which are the criteria for direct effect.[40] According to Art. 108 (4) TFEU the Commission can pass exemption regulations on fields and topics, which are granted by the council. In 2015 the Council has issued the Regulation (EU) 2015/1589[41] determining the rules and procedures for the application of Art. 108 TFEU. The regulation contains definitions of aid, procedural rules regarding notified aid, procedural rules regarding unlawful aid, penalties,

[37] ECJ, Judgement of the Court of 21.05.1980, C 73/79 "Italien/Commission". Schweitzer/Mestmäcker in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, I, A, (6. Ed. 2022), para. 11.
[38] Achleitner, "Interplay between the Commission, National Authorities and Courts: An Attempt to Cut the Gordian Knot", (EStAL, Vol. 21, Issue 2, 2022), p. 173-180.
[39] Achleitner, "Interplay between the Commission, National Authorities and Courts: An Attempt to Cut the Gordian Knot", (EStAL, Vol. 21, Issue 2, 2022), p. 173-180.
[40] ECJ, Judgement of the Court of 11.12.1973, C 120/73 "Lorenz"; ECJ, Judgement of the Court of 14.07.1964, C 4/64 "Costa v. Enel"; Schweitzer/Mestmäcker in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, I, A, (6. Ed. 2022), para. 11; Eisenhut in: Geiger/Khan/Kotzur/Kirchmair, EUV/AUEV, AEUV Art. 107, (7. ed 2023) para. 7.
[41] Council Regulation (EU) 2015/1589 of 13.07.2015 laying down detailed rules for the application of Art. 108 of the Treaty on the Functioning for the European Union.

procedural rules of misuse of aid, procedural rules regarding existing aid schemes, right of interested parties and monitoring and investigation instruments.[42]

Art. 109 TFEU allows the Council to adopt regulations and therefore enact secondary legislation in the field of European state aid law. Although Art. 106 TFEU is not part of section two of European state aid law, Art. 106 (2) TFEU can also be applied as an exemption for the general economic interests.[43]

To sum up, the European state aid law system prohibits state aid, but allows exemptions, which can be granted through a notification process by the Commission. The Commission has a very broad discretionary adjudication, while granting the aid systems of the member state. It also has the sole competence of control.

This structure and system led to an overload of notifications by the Commission. The Commission modernized the European state aid law several times, introducing the "De-minimis-aid" and the block exemption regulations, which allow aid when the requirements are met. These exemptions are based on the Commission's broad discretionary power to exempt state aid in light of the Art. 107 (3) TFEU. In order to do so, the Council issued an implementation regulation under Art. 109 TFEU, which allowed the Commission to enact its own regulations according to Art. 108 (4) TFEU. Through these instruments, the Commission shifted the control and responsibility towards the member state at least in the cases, which are based on these exemptions, especially the GBER. The member states are responsible to grant and control the aids, which are given under these instruments, they have to do the so-called ex-ante control. While the Commission will do only an ex-post control, in order to concentrate itself with its ex-ante control on the very large notifications and aids, which could impact the internal market the most.[44] This approach is also known as "big on big; small on small".[45]

[42] Council Regulation (EU) 2015/1589 of 13.07.2015 laying down detailed rules for the application of Art. 108 of the Treaty on the Functioning for the European Union.
[43] Bartosch, EU-Beihilfenrecht, A, I, (2. Ed., 2016), para. 1.
[44] Schweitzer/Mestmäcker in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, I, A, (6. Ed. 2022), para. 16; European Commission, „Communication from the Commission-Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest", (08.05.2012), OJ 2014/C 188/02, p. 4.
[45] José Luis Buendia Sierra, „Small On Small: Towards a Two-Speed State Aid Control?", (EStAL, Issue 4, 2016), p. 501.

The reform attempts lead from several block exemption regulation to the GBER.[46]

2. Development of the GBER

The path for a GBER wasn´t an easy one. For years the Commission fought for an implementing regulation based on the provision, which allowed the Council to concede regulations. Art. 109 TFEU is the provision in question today.[47]

In contrast to competition/antitrust law, where block exemption regulations are in play since the 1960s, European state aid law was without secondary legislation for decades. Two attempts, one in 1966 and another in 1972, failed, because the Council was reluctant to issue secondary law in the field of State aid law. That changed in 1996 with the Republic of Ireland leading the Council Presidency, causing a change in European state aid law. [48] On 07.05.1998, the Council issued the Council Regulation (EC) No. 994/98[49], establishing certain categories of horizontal state aid for the European Community. In this regulation and other evaluation and validity provisions.[50] Based on this Council regulation, the Commission issued in the year 2001 two group exemption regulations.[51] Regulation (EC) 68/2001[52] on training aid and Regulation (EC) 70/2001[53] exempting aid to SME. In 2002 Regulation (EC) 2204/2002[54] on

[46] Schweitzer/Mestmäcker in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, I, A, (6. Ed. 2022), para. 16.
[47] Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, IV, A, (6. Ed. 2022), para. 5; Berghofer, “The General Block Exemption Regulation: A Giant on Feet of Clay”, (EStAL, 2009, Issue 3), p.323-336.
[48] Berghofer, “The General Block Exemption Regulation: A Giant on Feet of Clay”, (EStAL, 2009, Issue 3), p.323-336.
[49] Council Regulation (EC) No. 994/98 of 07.05.1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State Aid.
[50] Council Regulation (EC) No. 994/98 of 07.05.1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State Aid.
[51] Berghofer, “The General Block Exemption Regulation: A Giant on Feet of Clay”, (EStAL, 2009, Issue 3), p.323-336; Bartosch, EU-Beihilfenrecht, J, I, (2. Ed., 2016), para. 1.
[52] Commission Regulation (EC) No 68/2001 of 12.01.2001 on the application of Articles 87 and 88 of the EC Treaty to training aid.
[53] Commission Regulation (EC) No. 70/2001 of 12.01.2001 on the application of Articles 87 and 88 of the EC Treaty to Staite aid to small and medium-sized enterprises.
[54] Commission Regulation (EC) No. 2204/2002 of 12.12.2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment.

employment aid followed. In 2006, the last single block regulation, Regulation (EC) 1628/2006[55] for regional investment aid, was issued.[56]

In 2001, the "De-minimis" regulation was also enacted. However, the "De-minimis"-regulation is not a block exemption. Meanwhile, aid that fulfills the requirements of the block exemption regulation is aid according to Art. 107 (1) TFEU, which is exempt from notification and therefore is not an illegal aid. An aid based on "De-minimis" does not fulfill the criteria of art. 107 (1) TFEU. The distortion of competition and adverse effects on trade between member states are especially not fulfilled when the thresholds laid down in the "De-Minimis" regulation are not reached.[57]

In 2005, the Commission presented the "State Aid Action Plan"[58] for a less and better targeted state aid.[59] Part of this plan was a more, but simpler economic approach. The "more economic approach"[60], which originated from competition/antitrust law, should accompany the state aid law from here after.[61]
These goals should be met by uniting the different block exemption regulations into one block exemption regulation.[62] With Regulation (EC) No. 800/2008[63] the GBER was put into play replacing the other block exemption regulations, which already were expired, except for Regulation (EC) 1628/2006, which was discontinued. The meaning of the block exemption was consolidated in the new GBER. Besides the consolidation, new kinds of exempted aid were introduced with the new GBER, like environmental aid, venture capital, or research and development aid.[64] Also new was the incentive

[55] Commission Regulation (EC) No. 1628/2006 of 24.10.2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid.
[56] Berghofer, "The General Block Exemption Regulation: A Giant on Feet of Clay", (EStAL, 2009, Issue 3), p.323-336.
[57] Bartosch, EU-Beihilfenrecht, J, I, (2. Ed., 2016), para. 1.
[58] European Commission, "State aid action plan- Less and better target state aid: a roadmap for state aid reform 2005-2009", (Consultation document, COM (2005), 107 final).
[59] European Commission, "State aid action plan- Less and better target state aid: a roadmap for state aid reform 2005-2009", (Consultation document, COM (2005), 107 final).
[60] Thiele in: Dauses/Ludwigs Handbuch des EU-Wirtschaftsrechts, H. III, (61. ed., September 2024), para. 200.
[61] Thiele in: Dauses/Ludwigs Handbuch des EU-Wirtschaftsrechts, H. III, (61. ed., September 2024), para. 200.
[62] European Commission, "State aid action plan- Less and better target state aid: a roadmap for state aid reform 2005-2009", (Consultation document, COM (2005), 107 final).; Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, IV, A, (6. Ed. 2022), para. 10.
[63] Commission Regulation (EC) No. 800/2008 of.08.2008 declaring certain categories of aid compatible with the common market in application of Articles 97 and 88 of the Treaty (General block exemption Regulation).
[64] Bartosch, EU-Beihilfenrecht, J, I, (2. Ed., 2016), para. 2.

effect, which underlined the more economic approach of the Commission in European state aid law.[65] The GBER Regulation (EC) No. 800/2008 expired on the 30.06.2014, after it was accelerated by half a year.[66]

The Commission started in 2012 the "State Aid Modernization"[67] reform process. The goals of the modernization are described above, containing mostly the "big on big, small on small" approach.[68] To ensure and enact this approach, the GBER was enhanced.[69]

This process also led to modernization of the Regulation (EC) Regulation No. 994/98, which was amended by Regulation (EU) No. 733/2013[70]. The alteration of Regulation No. 994/98 was necessary because the Commission wanted to introduce more aid exemption types regulations under the old regime that was not possible. Based on the altered implementing regulation, the new GBER was enacted, Regulation (EU) No 651/2014.[71] It modified existing aid exemption articles, added new ones and determined the SME definition. Especially the threshold for notifications, which are based under GBER, was increased. The requirements for the "incentive effect" were lowered. By introducing an online register for paid aid to enterprises, it was made easier for the competition to enforce European state aid law privately before national courts.[72] Also, the administrative treatment was simplified.[73]
Together with Regulation (EU) No. 651/2014, a new block exemption regulation for the forestry and agricultural sector was enacted. The Regulation (EU) 702/2014[74]

[65] Berghofer, "The General Block Exemption Regulation: A Giant on Feet of Clay", (EStAL, 2009, Issue 3), p.323-336; Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, IV, A, (6. Ed. 2022), para. 11.
[66] Bartosch, EU-Beihilfenrecht, J, I, (2. Ed., 2016), para. 3.
[67] European Commission, „Communication from the Commission-Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest", (08.05.2012), OJ, 2014/C 188/02, p. 4.
[68] B, I, 1; José Luis Buendia Sierra, „Small On Small: Towards a Two-Speed State Aid Control?", (EStAL, Issue 4, 2016), p. 501.
[69] José Luis Buendia Sierra, „Small On Small: Towards a Two-Speed State Aid Control?", (EStAL, Issue 4, 2016), p. 501.
[70] Council Regulation (EU) No. 733/2012 of 22.07.2013 amending Regulation (EC) No. 994/98 on the application of Articles 92 and 93 and of the Treaty establishing the European Community to certain categories of horizontal state aid.
[71] Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, IV, A. (6. Ed. 2022), para. 13.
[72] Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, IV, A. (6. Ed. 2022), para. 13.
[73] Dascalescu, "State-aid Complaint Equity Risk Finance Measures und the GBER- A Witch´s Brew?", (EStAL, Issue 2, 2024) pp.151-165.
[74] Commission Regulation (EU) No. 702/2014 of 25.06.2014 declaring certain categories of aid in the agricultural and forestry sectors an in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union.

succeeded the Regulation (EC) 1857/2006[75]. With the beginning of the year 2015, the block exemption regulation for fishing and aquaculture was issued.[76]

Although the implementation regulation of the council was originally from 1998 and amended in 2013, which allowed the Commission to issue its own regulations for the control and notification of state aid, it was replaced by a brand-new Council Regulation (EU) 2015/1588[77] and amended by Regulation (EU) 2018/1911[78].

The GBER Regulation (EU) No. 651/2014 was amended through Regulation (EU) 2017/1084[79] adding three new aid exemption articles for harbor and airport infrastructure. While Regulation (EU) 2020/972[80] just extended the duration, Regulation (EU) 2021/1237[81] added more aid exemption articles.[82]

Recently, Regulation (EU) 1315/2023[83] amended Regulation (EU) No. 651/2014. The aim was to facilitate the various new EU strategies and policies like digital transformation, innovation processes or the "Green Deal" into the GBER. It was an update for the current needs.[84] It can be applied until 31.12.2026. After that period, the GBER needs to be extended or renewed.[85]

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[75] Commission Regulation (EC) No. 10857/2006 of 15.12.2006 on the application of Articles 87 and 88 of the Treaty to State Aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No. 70/2001.

[76] Commission Regulation (EU) No. 1388/2014 of. 16.12.2014 declaring categories of aid to undertaking active in the production, processing and marketing of fishery and aquaculture products compatible with internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union.

[77] Council Regulation (EU) 2015/1588 of 13.07.2015 on the application of Articles 107 and 108 of the treaty on the Functioning of the European Union to certain categories of horizontal State aid.

[78] Council Regulation (EU) 2018/1911 of 26.11.2018 amending Regulation (EU) 2015/1588 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State Aid.

[79] Commission Regulation (EU) 2017/1084 of 14.07.2017 amending Regulation (EU) No. 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No. 702/2014 as regards the calculation of eligible costs.

[80] Commission Regulation (EU) 2020/972 of 02.07.2020 amending Regulation (EU) No. 1407/2013 as regards its prolongation and amending Regulation (EU) No. 651/2014 as regards its prolongation and relevant adjustments.

[81] Commission Regulation (EU) 2021/1237 of 23 July 2021 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

[82] Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, IV, A. (6. Ed. 2022), para. 13.

[83] Commission Regulation (EU) 2023/1315 of 23 June 2023 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty.

[84] Dascalescu, "State-aid Complaint Equity Risk Finance Measures und the GBER- A Witch´s Brew?", (EStAL, Issue 2, 2024) pp.151-165.

[85] Art. 59 GBER.

After a long draught of changes and modifications in European state aid law, especially in its secondary law, the last two and a half decades have seen a vital change. The Commission has tried to simplify and standardize European state aid law with the GBER while responding to the current issues of the internal market.

3. Legal status of the GBER

An aid which fulfills the requirements of the GBER is compatible with the internal market in light of Art. 107 (1) TFEU and does not need a notification by the Commission under Art. 108 (3) TFEU. When the requirements aren´t fulfilled, the aid becomes an unlawful aid in light of Art. 1 (f) Regulation (EU) 2015/1589.[86] As mentioned above, the Commission only does an ex-post control of the aid granted under the GBER.[87] This approach deviates from the usual system of aid control, which demands a notification of an aid in order to be compatible with the internal market.[88] That is the reason why the requirements of the GBER, which exempt the aid, have to be strictly and narrowly interpreted.[89]

Although the legal basis for a regulation is laid down for the Council in Art. 109 TFEU and for the Commission itself in Art. 108 (4) TFEU, [90] the question of the legal status of the GBER has to be raised. [91]

The GBER, like the other existing block exemption regulation in competition/antitrust law, is a regulation according to Art. 288 TFEU. Therefore, they are binding and directly applicable in every member state.[92] In this, the GBER differs from guidelines or other notifications of the Commission, which can exempt aid, but are not a regulation in light

[86] Bartosch, EU-Beihilfenrecht, J, II, (2. Ed., 2016), para. 6.
[87] B, I, 1.
[88] Thiele in: Dauses/Ludwigs Handbuch des EU-Wirtschaftsrechts, H, III, (61. Ed., September 2024), para. 194.
[89] ECJ, Judgement of the Court of 05.03.219, C-349/17, “Eesti Pagar”; Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, IV, A. (6. Ed. 2022), para. 22.
[90] Thiele in: Dauses/Ludwigs Handbuch des EU-Wirtschaftsrechts, H, III, (61. Ed., September 2024), para. 194; Bartosch, EU-Beihilfenrecht, J, II, (2. Ed., 2016), para. 5.
[91] Bartosch, EU-Beihilfenrecht, J, II, (2. Ed., 2016), para. 5.
[92] Saria in: Liebscher/Flohr/Petsche/Metzlaff, Handbuch EU-Gruppenfreistellungsverordnungen, 2, § 5 (3. Ed., 2023), paras. 3,4; Thiele in: Dauses/Ludwigs Handbuch des EU-Wirtschaftsrechts, 61. El., September 2024, H. III, Rn. 194.

of Art. 288 TFEU.[93] However, the GBER itself does not state the status of the exempt aids in the system of European state aid law.[94]
Some legal scholars have taken the view that block exemption regulations have the status of "existing aid" system according to Art. 108 (1) TFEU and Art. 1 (b) "existing aid" of Regulation (EU) 2015/1589. Seeing in the GBER a preopened notification by the Commission.[95]

Others do not share this view, in their opinion, the GBER is its own aid category, an aid "sui generis".[96] They argue that the aid categories of the GBER do not align with the existing aid categories of Art. 1 (b) of the Regulation (EU) 2015/1589. When the GBER expires and is not extended, all aid measures granted under the GBER need to be notified by the Commission. The scholars, which advocate the opinion, that the GBER is an aid "sui-generis", feel themselves affirmed in their view, because the existing aid system does not have such a revival of an aid, which needs to be notified again, after it was seen compatible with the internal market for a time.[97] In contrast to existing aid, which is controlled on the basis of Art. 108 (1) TFEU, the GBER has its own control mechanisms.[98]

The legal opinion of those scholars, who determine the GBER as an existing aid, is not convincing. To start with, the Art. 1 (b) Regulation (EU) 2015/1589 does not specify the GBER as an "existing aid". This paragraph covers mostly the aid schemes of those member states that joined the EU and its predecessors later on. However, the section contains a definition for authorized aid in Art. 1 (b (ii)) (EU) 2015/1589. Some of these scholars would state that the GBER is precisely that. However, the aid granted under the GBER does not yet exist. One might argue that the categories of aid are authorized and therefore the specific aid is also authorized, but Art. 1 (b (ii)) (EU) 2015/1589 aims through its precise wording toward specific aid and not only for groups. A specific aid still needs to meet the requirements of the GBER and these requirements have to be

[93] Thiele in: Dauses/Ludwigs Handbuch des EU-Wirtschaftsrechts, H, III, (61. Ed., September 2024), paras. 194, 195.
[94] Bartosch, EU-Beihilfenrecht, J, II, (2. Ed., 2016), para. 5
[95] Schweda in: Heidenhain, European Sate Aid Law, § 14, (1. Ed. 2010), para. 62; Bartosch, EU-Beihilfenrecht, J, II, (2. Ed., 2016), para. 5.
[96] Bartosch, EU-Beihilfenrecht, J, II, (2. Ed., 2016), para. 5; Thiele in: Dauses/Ludwigs Handbuch des EU-Wirtschaftsrechts, H, III, (61. Ed., September 2024), para. 194.
[97] Bartosch, EU-Beihilfenrecht, J, II, (2. Ed., 2016), para. 5.
[98] Bartosch, EU-Beihilfenrecht, J, II, (2. Ed., 2016), para. 5.

strictly interpreted. When the requirements aren´t met and that is later detected, the aid becomes illegal, and the latest case law of the ECJ has confirmed that.[99]

The term “specific aid” is not known to the Commission or the Council. Therefore, they can´t authorize it. This argument is also underlined by the ex-post control of the Commission, which was one of the aims for the GBER. It would also be in conflict with the known system of state aid, where a specific aid is assessed in light of the compatibility with the internal market. Furthermore, a once authorized existing aid does not need to be notified again, an aid based on the GBER does, when the GBER expires. Lastly, the GBER has its own control mechanism. The existing aid relies on Art. 108 (1) TFEU. The state aid control mechanisms of the GBER would be obsolete if Art. 108 (1) TFEU could be applied. The system of the GBER, the European state aid law, and the wording and meaning of Art. 1 (b) Regulation (EU) 2015/1589 do support the second opinion. Overall, the better arguments are in favor of the second opinion. Therefore, this opinion will be applied to this thesis.

To sum up, the GBER is a regulation in light of Art. 288 TFEU. Through its system which declares aid compatible with the internal market and relinquish the need of a notification, when the requirements of the GBER are fulfilled, it differs from the regular scheme in European state aid law, when an aid has to be notified by the Commission in order to be compatible with the internal market. Therefore, it is an aid system of its own kind. When the requirements aren´t met, the aid becomes unlawful.

II. Structure and Scope of the GBER

While the GBER has a unique system as opposed to the regular European state aid law, it is secondary EU Law based on Council regulations. The block categories as a whole are regulated by these Council regulations.[100] They determine the scope of the

[99] ECJ, Judgement of the Court of 05.03.2019, C-349/17, “Eesti Pagar”; ECJ, Judgement of the Court of 29.07.2019, C-654/17, “BMW”; ECJ, Judgement of the Court of 12.10.2023, C-11/22, “Est Wind Power”.
[100] B, I, 2, p. 9-11.

GBER and limit the Commission's power in creating block categories under the GBER as the Commission sees fit.[101]

At the moment Regulation (EU) 2015/1588 issued by the Council approves the following block categories under the GBER: Regional aid, aid to SMEs, aid for research and development and innovations, training aid, aid for disadvantaged workers, aid for workers with disabilities, aid for environmental protection, aid to make good the damage caused by certain natural disasters, social aid for transport for residents of remote regions, aid for broadband infrastructures, aid for culture and heritage conservation, aid for sport and multifunctional recreational infrastructures and aid for local infrastructure.[102]

However, the detailed arrangements and requirements of each block category and of the GBER itself are determined by the Commission. Like all exemptions which are within the scope of the Art. 107 (3) TFEU, the Commission has a broad discretionary power. This broad discretionary power allows the Commission to be stricter with requirements, than it was in former versions of the GBER, even when the new GBER is still based on the current Council regulation.[103]

The GBER is structured into four chapters. The first chapter contains standard provisions. The basic requirements for the GBER are laid down in this chapter, like the scope of the GBER in Art. 1, the definitions for the whole GBER, including for the specific categories in Art. 2 GBER, and the general requirements for the GBER in Art. 3-7 GBER. However, these paragraphs will be complemented through the specific articles for aid categories. If an aid is granted under the GBER, this information has to be made public according to Art. 9 GBER.[104]

In chapter two, the monitoring and reporting requirements are laid down. The third chapter contains the specific provisions for different categories of aid. This chapter is

[101] B, I, 2, p. 10-12; Thiele in: Dauses/Ludwigs Handbuch des EU-Wirtschaftsrechts, H, III, (61. Ed., September 2024), para. 200.
[102] Council Regulation (EU) 2015/1588 of 13.07.2015 on the application of Articles 107 and 108 of the treaty on the Functioning of the European Union to certain categories of horizontal State aid.
[103] ECJ, Judgement of the Court of 14.04.2005, C 110/03, “Commission/Belgium”; Bartosch, EU-Beihilfenrecht, H, III, (2. Ed., 2016), para. 7.
[104] Commission Regulation (EU) No. 651/2014 of 17.06.2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

structured into the different block exemptions. Each block contains an article for an aid exemption category. The GBER is concluded by the final provisions in the fourth chapter. Attached to the GBER are three appendices. The first annex contains the SME definition, defining in six articles the requirements for a SME. Annex II contains information regarding state aid exemptions under the conditions of the GBER. Two formulas are attached. In Annex three, the needed information for the requirements of Art. 9 GBER is laid down.[105]

Before an aid is granted under the GBER, the GBER must be applicable. Therefore, an aid has to be an aid from the categories mentioned in Art. 1 (1 (a-l)) GBER. There is regional aid, aid to SMEs in the form of investment aid, operating aid and SME´s access to finance, aid for environmental protection, aid for research and development and innovation, training aid, recruitment and employment aid for disadvantaged workers and workers with disabilities, aid to make good the damage caused by certain natural disasters, social aid for transport for residents of remote regions, aid for broadband infrastructures, aid for culture and heritage conservation, aid for sport and multifunctional infrastructures and lastly aid for local infrastructures.[106] The definitions for these aid categories are laid down in Art. 2 GBER. However, not all of the terms are completely defined in Art. 2 GBER. For example, Art. 2 (2) GBER refers to the definition of SME´s in Annex I of the GBER.

Even when an aid is from the above-mentioned categories and fulfils all of the requirements of the GBER, it has to be excluded from the GBER after six months, when the aid is bigger than 150.000.000,00 Euro. This period can be extended by the Commission, when an evaluation plan is submitted by the member state.[107] Also, aid for export-related activities is excluded by the GBER to comply with WTO treaties. The same goes for an aid, which is granted to prefer local goods.[108]
In Art. 1 (3) GBER certain sector activities are excluded. However, there are exemptions, like the SME´s access to finance and aid for SME innovation.[109] Art. 1 (4) GBER contains a recipient-related scope exclusion. For this exclusion, the recipient

[105] Commission Regulation (EU) No. 651/2014 of 17.06.2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.
[106] Art. 1 (1 (a-l)) GBER.
[107] Art. 1 (2 (a,b)) GBER; Bartosch, EU-Beihilfenrecht, J, Art. 1 (2. Ed., 2016), para. 2.
[108] Art. 1 (2 (c, d)) GBER; Bartosch, EU-Beihilfenrecht, J, Art. 1 (2. Ed., 2016), para. 2.
[109] Art. 1 (3 (a-e)) GBER; Bartosch, EU-Beihilfenrecht, J, Art. 1 (2. Ed., 2016), para. 4.

must be undertaking difficulties or subject to an outstanding recovery.[110] Art. 1 (5) excludes aid, when the EU law is violated and this violation cannot be excluded from the granting of the aid.[111]

III. Requirements of the GBER

When the GBER is applicable for an aid category, all aid has to fulfill the general requirements laid down in chapter I, as well as the specific requirements dedicated towards the aid categories regulated in chapter III, in order to be compatible with the internal market within the meaning of Art. 107 (2) or (3) TFEU and exempt from notification, Art. 3 GBER states. Therefore, Art. 3 GBER concludes the main element of the GBER, the exemption requirements. Only when these conditions are met is the aid exempt under the GBER.

To start with the general requirements, Art. 4 GBER has laid down the thresholds, which should not be exceeded. While Art. 1 (2 (a)) GBER excludes aid schemes from the scope of the GBER which reaches a threshold of annually 150.000.000,00 Euro, Art. 4 GBER contains thresholds for each category, which have to be met in order to achieve the exemption through the GBER. When these thresholds are exceeded, the aid has to be notified under Art. 108 (3) TFEU.[112] Each aid category influences and interferes with the internal market in its own way. Hence the distortion of competition in the internal market is different as well. That is the reason why the Commission enacted Art. 4 GBER with different thresholds for each category.[113] To ensure that the thresholds are not artificially split, the Commission issued with Art. 4 (2) GBER a circumvention ban.

Besides the thresholds, the aid needs to be transparent in light of Art. 5 GBER. This is the case, when the aid can be precisely calculated before the aid is granted.[114] Art. 5

[110] Art. 1 (4 (a-c)), Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, IV, B, (6. Ed. 2022), paras. 26, 27.
[111] Art. 1 (5 (a-c)), Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, IV, B, (6. Ed. 2022), para. 32.
[112] Art. 4 (1 (a-z)) GBER; Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, IV, B, Ar. 4 (6. Ed. 2022), para. 1.
[113] Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, IV, B, Ar. 4 (6. Ed. 2022), para. 1.
[114] Art. 5 (1) GBER.

(2 (a- j)) GBER contains a list of aid categories which are transparent in light of the provision.

With the economic approach of the Commission towards the European state aid law, the incentive effect was introduced. Consequently, an aid has to have an incentive effect.[115] The Commission chooses a formal approach to determine the incentive effect.[116] The possible aid beneficiaries have to submit an application for aid.[117] The exact criteria are laid down in Art. 6 (2-4) GBER. Art. 6 (5) GBER contains the exemptions. For example, aid for SMEs' access to finance is exempt from the incentive effect when Art. 21 GBER and Art. 22 GBER are fulfilled. The whole exemption of the incentive effect works in that way. The incentive effect is only exempt when the requirements for the more specific provisions are fulfilled.[118]

Art. 7 GBER determines the aid intensity and the eligible costs of the aid. The specific amount of aid should be identified through this provision. In order to guarantee the proportion and necessity of aid, the Council Regulation (EC) No. 994/98 and the successor Council Regulation (EU) 2015/1588 obliged the Commission to determine either an aid intensity or an aid cap. [119] Together with Art. 4 GBER, the scope of the GBER in terms of the amount of aid that is exempt is limited.[120]

Hence, the requirements in Art. 7 GBER are of a general nature and complemented by the provisions of the specific categories. Provisions that do not contain their own intensity regulations are determined by Art. 7 GBER.[121]

To ensure that the goals of Art. 4, 7 GBER and the maximum of aid intensities in chapter III GBER are met, the whole amount of granted aid for projects or activities should be accumulated and therefore taken into account. The rules for accumulation of aid are stated in Art. 8 (2-6) GBER. [122]

Chapter I of the GBER is closed by Art. 9 “publication and information”. This provision was introduced as part of the State Aid Modernization process to make aid control

[115] Art. 6 (1) GBER.
[116] Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, IV, B, Ar. 4 (6. Ed. 2022), para. 1.
[117] Art. 6 (2) GBER.
[118] Art. 6 (5 (a-h)) GBER.
[119] Recital 22 of the GBER; Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, IV, B, Art. 7 (6. Ed. 2022), para. 2.
[120] Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, IV, B, Art. 7 (6. Ed. 2022), para. 2.
[121] Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, IV, B, Art. 7 (6. Ed. 2022), para. 11.
[122] Art. 8 GBER.

simpler and the ex-post-control for the Commission easier. It also took the transparency requirements of Art. 1 (2) TEU into account.[123]

These general requirements need to be fulfilled as well as the specific requirements of chapter III.

While each category and article has its own regulatory content and meaning, they are similar in structure. Each article begins with the determination of which aid or aid activity is exempt in the meaning of Art. 107 (3) TFEU and Art. 108 (3) TFEU. The aid and the aid activities are defined and specified in Art. 2 GBER. The provision is followed by the eligible costs and the calculation of the aid intensity.[124]
The specific requirements will be explained in detail, and an example of the SME status will be provided in chapter D. SMEs under the GBER, II. Requirements.

IV. Summary

To sum up, the GBER is an instrument that exempts state aid from the prohibition of State Aid in Art. 107 (1) TFEU. It is an ordinary regulation in light of Art. 288 TFEU issued by the Commission under Art. 108 (4) TFEU and based on Council Regulation (EU) 2015/1589. It was introduced as part of the “more economic approach” to concentrate the commission's attention on the “big cases” and make aid exemptions simpler, quicker and easier for the smaller aids.

When the general requirements of chapter I of the GBER and the specific requirements of the categories of chapter III are met, the aid is compatible with the internal market and a notification under Art. 108 (3) TFEU is not necessary. This approach differs from the usual state aid exemption process and gives the GBER a unique standing inside the European state aid law regime. That is the reason why the GBER is an aid of its own kind or an aid “sui generis”.

C. SME Definition

[123] Nowak in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 1, IV, B, Art. 7 (6. Ed. 2022), para. 11.
[124] Chapter III of the GBER.

The definition of SMEs is based on the Recommendation 2003/361/EC[125] of the Commission from 2003.[126] This recommendation replaced Recommendation 96/280/EC[127].[128] The Recommendation 96/280/EC was as Annex I part of the Regulation (EC) No. 70/2001,[129] the SME block exemption regulation.[130] As mentioned above, the SME block exemption regulation was merged into the first GBER of 2008.[131] Before the Recommendation 96/280/EC there were a number of SME definitions.[132]

I. Reasons for one SME Definition

The reasons for an SME Definition can be divided into two groups: "unique set of issues"[133] for SMEs and the common application of this definition in the internal market.[134]

1. "Unique set of issues"[135] for SMEs

SMEs are very important for the economy of the European Union, as stated above.[136] Therefore, the SMEs are of particular interest to the Commission.[137] Although SMEs are the backbone of the European Economy, they are facing problems that bigger corporations do not have. Unlike large enterprises, which are publicly traded or have access to huge loans from multinational banks, SMEs do not have these kinds of access to finances. Because of their small size and narrow market (share) they lack of securities for large investments in research, development and innovations. They often

[125] Recommendation 2003/361/EC.
[126] Bartosch, EU-Beihilfenrecht, J, II, (2. Ed., 2016), para. 7.
[127] Recommendation 2003/361/EC.
[128] Recital 1 of Recommendation 2003/361/EC; Bartosch, EU-Beihilfenrecht, J, II, (2. Ed., 2016), para. 7.
[129] Commission Regulation (EC) No. 70/2001 of 12.01.2001 on the application of Articles 87 and 88 of the EC treaty to State aid to small and medium-sized enterprises.
[130] Kekelekis, "The big Enterprise of defining SMEs in State Aid Cases", (EStAL, Issue 1, 2008), pp. 12-27.
[131] B, I, 2, p. 13.
[132] Recital 1 of Recommendation 2003/361/EC.
[133] European Commission, "User guide to the SME Definition", (2020), p. 5.
[134] Recital 1 of Recommendation 2003/361/EC; European Commission, "User guide to the SME Definition", (2020), p. 5.
[135] European Commission, "User guide to the SME Definition", (2020), p. 5.
[136] A, p.5.
[137] European Commission, "User guide to the SME Definition", (2020), p. 53; Thiele in: Dauses/Ludwigs Handbuch des EU-Wirtschaftsrechts, H, III, (61. Ed., September 2024), para. 267.

do not have the resources to comply with regulations like environmental ones nor to do research and innovations. Therefore, the SMEs can´t get the access or the resources they need to operate and compete within the market. The market fails the SMEs in these areas.[138]

However, it is not only market failures that make it hard for SMEs. They often lack the needed skills for management, are bound to the local labor markets, and have often only a limited knowledge and opportunities for international expansions. But also the bureaucratic requirements are a big challenge for SMEs as well as the Draghi Report found out.[139] Due to their size, they are not experienced in administrative and management factors and do not have the manpower, especially in bureaucratic matters, in comparison to large enterprises. Besides the market failures, they also have structural barriers.[140]

Market failures and structural barriers lead towards issues that can endanger the backbone of Europe's economy.

That is why the Commission and the member states support their SMEs. The support is therefore political in nature. [141]

2. United application of one Definition in the internal market

[138] European Commission, "User guide to the SME Definition", (2020), p. 5; Bartosch, EU-Beihilfenrecht, J, II, (2. Ed., 2016), para. 7; von Wallenberg/Schütte in: Grabitz/Hilf Nettesheim, „Das Recht der EU", AEUV Art. 107, (83. Ed. Juli 2024), para. 379.

[139] European Commission, "The future of European competitiveness, Part A, A competitiveness strategy for Europe"- "The Draghi Report", (09.09.2024), p.5-7, https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=The%20future%20of%20European%20competitiveness%20_%20A%20competitiveness%20strategy%20for%20Europe.pdf, accessed 18.01.2025.

[140] European Commission, "User guide to the SME Definition", (2020), p. 5; European Commission, "The future of European competitiveness, Part A, A competitiveness strategy for Europe"- "The Draghi Report", (09.09.2024), p.5-7, https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=The%20future%20of%20European%20competitiveness%20_%20A%20competitiveness%20strategy%20for%20Europe.pdf, accessed 18.01.2025.; von Wallenberg/Schütte in: Grabitz/Hilf Nettesheim, „Das Recht der EU", AEUV Art. 107, (83. Ed. Juli 2024), para. 379.

[141] European Commission, "User guide to the SME Definition", (2020), p. 5; Thiele in: Dauses/Ludwigs Handbuch des EU-Wirtschaftsrechts, H, III, (61. Ed., September 2024), para. 267.; Recital 1 of Recommendation 2003/361/EC.

In the European Union, many different types of commercial and corporate codes on the member state level exist. In some member states, a united and common SME regime played a more vital role than in other member states.[142] There are member states that do not have a common definition of SMEs and are therefore not familiar with the one common SME regime, like the Federal Republic of Germany.[143] German Law has provisions like § 267 HGB, which regulates the assessments of balance sheets for limited liability corporations. Therefore, it distinguishes between smaller, small, middle-sized, and large corporations. However, this provision does not contain a common definition for all entities in Germany. German antitrust law has different rules defining an SME. The Federal Cartel Office of Germany has published an information paper on SME for antitrust law under national rules, it varies from § 267 HGB because it is based on individual cases and markets and is only applicable for antitrust law.[144] It can be concluded that the Federal Republic of Germany has no common definition of SME and no united approach in exerting it.[145] Different definitions of SME could distort competition in an internal market. In one member state, an enterprise is an SME and therefore supported; in another, it is not and would not get these subsidies.[146] Furthermore, the SME Definition is used not only in European state aid law but in other branches of EU Law as well.[147]

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[142] European Commission, "User guide to the SME Definition", (2020), pp. 3,5; Recital 1 of Recommendation 2003/361/EC; Hänel in: Beck´sche Online-Kommentare, Unternehmensstatbilisierungs- und- restrukturierungsgesetz-StaRUG, § 73, (14. Ed. 01.10.2024), para. 18, beck-online; Prozeezynska, "Can the EU´s SME Definiton be limited?, Comments on the Background of the Polish Financial Shield", (EStAL, Issue 3, 2020), pp. 339-345; Zimmer in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 1, Art. 101 (1) AEUV (7. Ed. 2020), para. 9.

[143] Hänel in: Beck´sche Online-Kommentare, Unternehmensstatbilisierungs- und-restrukturierungsgesetz-StaRUG, § 73, (14. Ed. 01.10.2024), para. 18, beck-online; Prozezynska, "Can the EU´s SME Definiton be limited?, Comments on the Background of the Polish Financial Shield", (EStAL, Issue 3, 2020), pp. 339-345; Zimmer in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 1, Art. 101 (1) AEUV (7. Ed. 2020), para. 9.

[144] Hänel in: Beck´sche Online-Kommentare, Unternehmensstatbilisierungs- und-restrukturierungsgesetz-StaRUG, § 73, (14. Ed. 01.10.2024), para. 18, beck-online; Bundeskartellamt, Merkblatt des Bundeskartellamtes über Kooperationsmöglichkeiten für kleinere und mittlere Unternehmen, (März 2007), para. 12, https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Merkblaetter/Merkblatt%20-%20Kooperationsmöglichkeiten%20für%20KMUs.pdf?__blob=publicationFile&v=2, accessed 21.12.2024.

[145] Hänel in: Beck´sche Online-Kommentare, Unternehmensstatbilisierungs- und-restrukturierungsgesetz-StaRUG, § 73, (14. Ed. 01.10.2024), para. 18, beck-online.

[146] European Commission, "User guide to the SME Definition", (2020), pp. 3,5; Recital 1 of Recommendation 2003/361/EC.

[147] Smucr, "SME Status- Threat or Opportunity?", (EStA, Issue 4, 2019), pp. 545-548; European Commission, "User guide to the SME Definition", (2020), p3.

A common definition and tied in the application of it, guarantees consistency and security. Otherwise, competition would be distorted from within, and it would be very chaotic and bureaucratic, especially when choosing which definition to use.[148]

II. Structure and Requirements

The SME Definitions are located in Recommendation 2003/361/EC and include six articles determining a SME and how to identify the relevant criteria. Art. 1 SME definition describes what an enterprise is. Art. 2 SME definition is set up based on the definition of an enterprise, contains the financial thresholds as well as the staff headcount, and therefore determines the criteria for an SME. In Art. 3 SME definition, the different types of enterprises that can influence the calculation of the financial thresholds and the staff head count are laid down. Articles 4-6 SME definition determine the rules for the assessment of the data used for the staff head count and the financial thresholds. The recommendation is only binding for European agencies.[149]

1. Enterprise

The status of an enterprise is required and necessary for an SME.[150] According to Art. 1 SME definition, an enterprise is any entity that is engaged in an economic activity. It is generally understood that this definition of an enterprise is based on the established jurisprudence of the ECJ.[151] In the landmark ruling “Höfner Elser”[152] in 1991, the ECJ determined for the first time an EU-wide, applicable definition for an undertaking. According to the ECJ an undertaking is any “entity engaged in an economic activity”[153]. Furthermore, the ECJ stated that the legal status or the type and form of financing of

[148] European Commission, “User guide to the SME Definition”, (2020), pp. 3,5; Recital 1 of Recommendation 2003/361/EC
[149] Recommendation 2003/361/EC.
[150] Art. 1, 2 SME definition of Recommendation 2003/361/EC.
[151] ECJ, Judgement of the Court of 24.03.1991, C-41/90, “Höfner Elser”; ECJ, Judgement of the Court of 12.09.2000, C- 180/98- 184/98,“Pavlov”, paras. 75, 76; Bartosch, EU-Beihilfenrecht, J, II (2. Ed., 2016), para. 7; Kainer in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 2, X, C, (6. Ed., 2022), para. 9; Hornkohl in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, VO (EU) 2022/2560 Art. 20, (24. Ed. September 2024), para. 7.
[152] ECJ, Judgement of the Court of 24.03.1991, C-41/90, “Höfner Elser”.
[153] ECJ, Judgement of the Court of 24.03.1991, C-41/90, “Höfner Elser”, para. 21.

an entity is not relevant for an undertaking.[154] This means also that a profit-making basis or just the intention of a profit-making entity is not necessary for an undertaking.[155] The ECJ substantiated an economic activity in 1998 with the case "Commission v Italy"[156]. It held that an economic activity is an offering of goods and services on a market.[157] With the case "Pavlov"[158] the ECJ confirmed its definition of an economic activity and established its jurisprudence on this matter.[159] In "Cassa di Risparmio di Firenze"[160] the ECJ followed its jurisprudence, but clarified that the mere holding of shares is not sufficient for an economic activity. For an economic activity, the owner of the shares needs to exercise control by involving him/herself directly or indirectly in management activities and, therefore, taking an active part. Hence, a controlled economic activity is necessary for an undertaking.[161]

The definition of the ECJ of an undertaking orientates itself on the actions and can be concluded as functional.[162] While the ECJ has established a definition of functional undertaking under EU law, the definitions of the member states can differ.

In Germany, an undertaking or enterprise is not universally defined. There is no standard undertaking definition. Each undertaking has to be interpreted in light of the provision and codes of the different fields of law in which the undertaking occurs.[163] However, the courts and legal scholars have developed requirements for an undertaking. Under these requirements, an undertaking has to be interpreted according to the meaning of different provisions and fields of law, such as the

[154] ECJ, Judgement of the Court of 24.03.1991, C-41/90, "Höfner Elser", para. 21.
[155] ECJ, Judgement of the Court of 16.11.1995, C-244/94,"Federation francaise des societes d´aussurance", paras. 14, 17; ECJ, Judgement of the Court of 10.01.2006, C 222/04, para. 111, "Cassa di Risparmio di Firenze"; Cremer in: Calliess/Ruffert, EUV/AEUV, Art. 107 AEUV, (6. Ed. 2022), para. 30.
[156] ECJ, Judgement of the Court of 18.06.1998, C-35/96, "Commission v Italy".
[157] ECJ, Judgement of the Court of 18.06.1998, C-35/96, "Commission v Italy", para. 36.
[158] ECJ, Judgement of the Court of 12.09.2000, C- 180/98- 184/98, "Pavlov".
[159] ECJ, Judgement of the Court of 12.09.2000, C- 180/98- 184/98, „Pavlov", paras. 74, 75; Hornkohl In: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, VO (EU) 2022/2560 Art. 20, (24. Ed. September 2024), para. 8.
[160] ECJ, Judgement of the Court of 10.01.2006, C 222/04, Cassa di Risparmio di Firenze.
[161] ECJ, Judgement of the Court of 10.01.2006, C 222/04, no. 111, 112, Cassa di Risparmio di Firenze.
[162] Kainer in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 2, X, C, (6. Ed., 2022), para. 9; Hornkohl in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, VO (EU) 2022/2560 Art. 20, (24. Ed., September 2024), para. 7.
[163] BGH, Judgement of the Court of 07.07.1060, VIII ZR 215/59; BGH, Judgement of the Court of 16.03.2000, VII ZR 324/99; Körber in: Oekter, Handelsgesetzbuch, § 1 HGB, (8. Ed., 2024), para. 11.

commercial code, the civil code, labor law, social law, tax law, and trade regulations.[164] Therefore, an undertaking is an activity that is independent, planned, and designed for a longer purpose, market-orientated, and in return for payment. A freelance activity cannot be an undertaking.[165] While the caselaw of the German courts demands a profit-oriented activity,[166] the German legal literature finds that requirement no longer necessary.[167]
Some of these requirements depend on the detailed provisions and fields of law.[168] For example, forestry and agricultural activities are an undertaking under the German civil and commercial codes, but they aren´t an undertaking under German tax law.[169]

This shows the complexity in the assessment of an undertaking under German law. On the one hand, it seems meaningful and logical to take all the different factors of each field of law and provision into account, and to do an individual interpretation and assessment. On the other hand, these complex provisions are difficult to apply and to steer.

It seems understandable that the ECJ developed one definition for an undertaking. While the ECJ made it simpler, it also created a very broad interpretation, otherwise it wouldn´t fit into the different fields of law, in which the definition is applied, and also in the competition of the internal market.

While the EU definition of undertaking is extensive and universally applicable, the requirements for an undertaking under German law are quite narrow and not universally applicable. Therefore, the definitions can lead to different outcomes. It is

[164] BGH, Judgement of the Court of 07.07.1060, VIII ZR 215/59; BGH, Judgement of the Court of 16.03.2000, VII ZR 324/99; Körber in: Oekter, Handelsgesetzbuch, § 1 HGB, (8. Ed., 2024), para. 11; Schmidt in: Münchener Kommentar zum HGB, § 1 HGB, (5. Ed. 2021), para. 23.
[165] BGH, Judgement of the Court of 07.07.1060, VIII ZR 215/59; BGH, Judgement of the Court of 16.03.2000, VII ZR 324/99; Körber in: Oekter, Handelsgesetzbuch, § 1 HGB, (8. Ed., 2024), para. 12; Schmidt in: Münchener Kommentar zum HGB, § 1 HGB, (5. Ed., 2021), para. 23.
[166] BGH, Judgement of the Court of 07.07.1960, VIII ZR 215/59; BGH, Judgement of the Court of 16.03.2000, VII ZR 324/99.
[167] Körber in: Oekter, Handelsgesetzbuch, § 1 HGB, (8. Ed., 2024), para. 11; Schmidt in: Münchener Kommentar zum HGB, § 1 HGB, (5. Ed., 2021), para. 26.
[168]BGH, Judgement of the Court of 16.03.2000, VII ZR 324/99; Körber in: Oekter, Handelsgesetzbuch, § 1 HGB, (8. Ed., 2024), para. 11.
[169] BGH, Judgement of the Court of 07.07.1960, VIII ZR 215/59; Julia Urthaler, § 15 EstG, Merkblatt Einkommensteuer- Einkünfte aus Gewerbebetrieb, (Industrie und Handelskammer zu Dortmund), https://www.ihk.de/dortmund/menue/recht/steuerrecht/merkblatt-einkommensteuer-einkuenfte-aus-gewerbebetrieb-4949888, accessed 21.12.2024.

likely that the EU definition determines an entity as an undertaking, while the German requirements would not. Because the EU definition is mostly used in the field of antitrust and state aid law, the competition of the internal market could be endangered. In the end, the same motives, which were considered for one SME definition, are applicable for the purpose of undertaking the definition of the ECJ.

It is established jurisprudence of the ECJ that EU law exercises precedence and supremacy over national law of the member states.[170] National law and provisions that are in conflict with EU law infringe the loyalty principle of Art. 4 (3) TEU and hinder the effectiveness of EU law have to be interpreted within the meaning of EU Law accordingly.[171] Therefore, the definition of an undertaking has to be interpreted and applied within the meaning of the ECJ rulings.[172]

For the SME Definition, which is used in European state aid law, the European definition of an undertaking has to be applied in all member states, including those that have a different definition of an undertaking.

2. SME parameters

In Art. 2 SME definition the requirements for the different enterprise categories are explained. An SME is a company that employs less than 250 employees and has an annual turnover below 50 million Euro or an annual balance sheet that does not exceed 43 million Euro.[173]
Within the SME Category there are different types. A micro-enterprise is an enterprise that has fewer than 10 employees and an annual turnover or annual balance sheet that does not exceed 2 million Euro.[174] An enterprise that employs more than 10 employees but is less than 50 and whose annual turnover or balance sheet is more than 2 million Euro but is below 10 million Euro is a small enterprise.[175] Every enterprise which is

[170] ECJ, Judgement of the Court of 14.07.1964, C 4/64, “Costa/Enel”; ECJ, Judgement of the Court of 05.02.1963, C 26/62, “Van Gend en Loos”.
[171]ECJ, Judgement of the Court of 11.11.2015, C 505/14, „Klausner Holz v NRW“; Polzin in: Dauses/Ludwigs Handbuch des EU-Wirtschaftsrechts, A, IV (61. Ed., September 2024), para. 4.
[172] Zimmer in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 1, Art. 101 (1) AEUV, (7. Aufl. 2025), para. 9.
[173] Art. 2 (1) SME definition.
[174] Art. 2 (3) SME definition.
[175] Art. 2 (2) SME definition.

above these parameters, but below the headcount of 250 employees and under the financial threshold of an annual turnover of 50 million Euro or annual balance sheet of 43 million Euro is a medium-sized enterprise.[176] These two requirements must be cumulatively in place.[177]

As already mentioned, the Federal Republic of Germany has no common definition or thresholds to determine SMEs.[178] The German Federal Cartel Office stated in an information paper that an SME cannot be identified by thresholds or headcount but by the relation of the company to the relevant market in which the enterprise is active. It is a very individual approach and only used for merger control.[179]

According to § 267 HGB a small limited liability corporation is an entity, whose balance sheet is below 7.5 million Euro, whose turnover in the last twelve months does not exceed 15 million Euro and the annual average headcount is also below 50.[180] A medium-sized limited liability corporation exceeded the headcount and financial thresholds of a small limited liability corporation, but whose balance sheet is below 25 million Euro, the turnover in the last twelve months did not reach 50 million Euro, and the annual average headcount is below 250.[181] Two of the three requirements should be fulfilled or not exceeded to qualify as a corporation in one of these categories.[182] However, these categories are only needed for the creation and determination of a balance sheet according to the HGB and are not universally applicable.[183]

Yet again German law chooses to distinguish and interpret individually within the meaning of the relevant provision.[184] On the one hand, the situation is comparable to the definition and requirements of an undertaking, described above. On the other hand,

[176] Art. 2 (1-3) SME definition.
[177] Art. 2 (1) SME definition.
[178] C, I, 2.
[179] Bundeskartellamt, Merkblatt des Bundeskartellamtes über Kooperationsmöglichkeiten für kleinere und mittlere Unternehmen, (März 2007), para. 12. https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Merkblaetter/Merkblatt%20-%20Kooperationsmöglichkeiten%20für%20KMUs.pdf?__blob=publicationFile&v=2, accessed 22.12.2024.
[180] § 267 (1) HGB.
[181] § 267 (2) HGB.
[182] § 267 (1 (2)) HGB.
[183] § 260 (1) HGB.
[184] C, I, 2, pp. 25, 26; C, II, 1, pp. 27-30.

it is not. While there are general requirements for an undertaking, there are no general guidelines for SME headcounts, financial thresholds or other terms under German law. Although in some German fields of law, a SME is known, it is only used for this specific provision and fields of law and applied very individually, as shown with the information paper of the German Federal Cartel Office and § 267 HGB. Beyond these specific circumstances, there is no common definition and therefore a void.

This void is filled by the SME parameters of the European SME definition. The SME definition is foremost a recommendation and not a regulation on its own; it enjoys precedence and has to be applied to matters that affect EU law to ensure an effective internal market.

3. Types of enterprises

Art. 3 SME definition determines three types of enterprises: an autonomous enterprise, a partner enterprise and a linked enterprise. An autonomous enterprise is any enterprise that is neither a partner nor a linked enterprise.[185]
According to Art. 3 (3) SME definition a partner enterprise is an enterprise that does not fulfil the criteria of a linked enterprise and has a relationship with an enterprise that holds solely or jointly with one or more linked enterprises 25% or more of the capital or the voting shares of another enterprise. Although an enterprise may fulfil the requirements as a partner enterprise, it is not. Subparagraph 2 of Art. 3 (2) SME definition does exempt certain enterprise constellations. Therefore, business angels who are invested with less than 1.25 million Euro in an enterprise are not a partner enterprise. Also, universities, non-profit research centers, institutional investors and autonomous local authorities with an annual budget of less than 10 million euros and fewer than 5.000 inhabitants are not partner enterprises according to Art. 3 (2) the SME Definition.[186]

Art. 3 (3) the SME Definition lists the categories of linked enterprises that have a relationship with each other. According to this provision a linked enterprise has to have

[185] Art. 3 (1) SME definition.
[186] Art. 3 (2) SME definition.

the majority of the voting rights in another enterprise or has to have a control over majority of the administrative, management or supervisory body or an enterprise has a dominant influence over another enterprise based on a contract or a provision or, lastly, an enterprise, a shareholder or a member of another enterprise can exercise control over another enterprise. Subparagraph 2 describes that business angels according to Art. 3 (2) SME definition have no dominant influence, when they are not directly involved in the business of running the enterprise. However, Subparagraph 3 clarifies that enterprises that act through other enterprises or investors and are in a relationship with subparagraph 1 can be linked companies.[187]

Besides enterprises and investors, natural persons and groups of natural persons that are acting jointly, in a relationship in the meaning of subparagraph 1, and are active on the same relevant or adjunct market are linked companies within the meaning of Art. 3 (3) SME definition.[188] An adjunct market is determined in subparagraph 5. This is a market whose products or services are directly situated upstream or downstream of the relevant market of the enterprise.[189]
Alongside the exemption in Art. 3 (2 (2)) SME definition, Art. 3 (4) SME definition declares enterprises, which are controlled with more than 25% or more by public entities, exempt from being an SME.
Art. 3 (5) SME definition allows enterprises to declare themselves as an autonomous, partner or linked enterprise.

These three different categories become relevant for the calculation of the headcounts and financial thresholds in order to determine an SME.[190] The closer the relationship with another enterprise, the more the headcount and financial thresholds of the other enterprise need to be considered. Enterprises that are closely tied together have more resources and a different standing within the market, so they can overcome market failures and structural barriers that affect SMEs more easily.[191]

[187] Art. 3 (3) SME definition.
[188] Art. 3 (3) SME definition.
[189] Art. 3 (3) SME definition.
[190] Art. 3 (1 (3)) SME definition; General Court, Judgement of the Court of 15.09.2016, T 675/13, ”Chimica Srl v European Chemicals Agency”; Kainer in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol.5, 2, X, C, (6. Aufl. 2022), para. 13.
[191] Commission Decision of 07.06.2006, C 8/2005, „Nordbrandenburger Umsteuerungswerke”, para. 49; recital 12 of Recommendation 2003/361/EC; Kainer in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol.5, 2, X, C, (6. Aufl. 2022), para. 13.

Art. 3 SME definition is mostly based on the directive on consolidated accounts[192], thus the assessment of a relationship between enterprises in the meaning of Art. 3 SME definition includes mostly financial and corporate data.[193] These requirements are clearly stated in the provisions, complemented by the Art. 4-6 SME definition, and therefore, at least for professionals, it is easier to assess.[194]

Although these criteria are clear and based on common, available data, subparagraph 4 adds another possibility for a linked enterprise, when a group of natural persons act jointly in a relevant or adjunct market. Besides an adjunct market, which is explained by the Commission[195], the criterion is not defined and clarified by the definition itself.[196]

In 2006, the Commission expressed in the decision "NUW" [197] itself for the first time what it considered as "acting jointly".[198] In view of the Commission, a family link between the majority shareholders and owners of different enterprises is sufficient for the determination of a linked enterprise in the meaning of Art. 3 (3) SME definition.[199] In this particular case, the Commission stated in their decision that the group of natural persons was determined through the family link alongside an economic perspective, which was determined by the many business relationships and cooperations between the companies. The Commission did a deep analysis and investigation of the different enterprises and business relationships of the family. This led to the consideration of the enterprises of the family as one entity, which acted jointly within the meaning of Art. 3 (3) SME definition. Therefore, the family link wasn´t the only criterion that led to the Commission's conclusion.[200] Although it was an individual assessment with

[192] Seventh Council Directive 83/349/ EEC of 13.07.1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts.
[193] Dietze, „Gesellschaftsrecht: "Verbundene Unternehmen" im Sinne der KMU-Empfehlung", (EuZW, 2014), p. 343; Art. 3-6 SME definition; Hillemann/Ehls, „Corona-Überbrückungshilfen: Verbundene Unternehmen allein aufgrund familiärer Strukturen", (DStR, 2023), p. 226.
[194] Art. 3-6 SME definition; Hillemann/Ehls, „Corona-Überbrückungshilfen: Verbundene Unternehmen allein aufgrund familiärer Strukturen", (DStR, 2023), p. 226.
[195] Commission notices on the definition of the relevant market for the purposes of Community competition law, (09.12.1997, C 372).
[196] Smucr, "SME Status- Threat or Opportunity?", (EStAL Issue 4, 2019), pp. 545-548.
[197] Commission Decision of 07.06.2006, C 8/2005, „Nordbrandenburger Umsteuerungswerke"; Nordbrandenburger Umsteuerungswerke, heronafter NUW.
[198] Commission Decision of 07.06.2006, C 8/2005, „Nordbrandenburger Umsteuerungswerke", European Commission, "User guide to the SME Definition", (2020), p. 34.
[199] Commission Decision of 07.06.2006, C 8/2005, „Nordbrandenburger Umsteuerungswerke"; European Commission, "User guide to the SME Definition", (2020), p. 34.
[200] Commission Decision of 07.06.2006, C 8/2005, „Nordbrandenburger Umsteuerungswerke", para. 57.

multiple factors which led to the conclusion of the Commission, the Commission stated in their SME guidelines that a family link is sufficient to conclude acting jointly of natural persons.[201]

Neither in the decision nor later on was it substantiated what a family link was, how distant the relation could be, or what the character or quality of the family link should have been.[202] It was also not made clear whether a family link triggers an automatism for the assessment of a linked company. This would be in contrast to the established case law of the ECJ, because the mere owning of shares is not sufficient enough for an economic activity.[203] These circumstances led to an unclear path for those who had or have to apply the SME Definition and assess if an enterprise is a natural group of persons acting jointly together. [204]

Eight years after "NUW" the ECJ determined in the case "HaTeFo"[205] the requirements for a group of natural persons acting jointly. The court held that a group of natural persons is acting jointly, when they are "working together to exercise influence over the commercial decisions of an enterprise"[206], these decisions lead to the economic dependency of the enterprises of each other, and these enterprises have to be seen as one economic entity.[207] These conditions should be assessed by a case-by-case analysis. [208] Like the Commission in "NUW" the ECJ considered economic and financial parameters for the assessment of jointly acting.[209]

On the one hand, the requirements of the ECJ for a group of natural persons acting jointly are not so limitless as the family link assessment of the Commission, on the other hand, detailed parameters on how to determine the influence and where the limits

[201] European Commission, "User guide to the SME Definition", (2020), p. 34.
[202] Smucr, "SME Status- Threat or Opportunity?", (EStAL Issue 4, 2019), pp. 545-548; European Commission, "User guide to the SME Definition", (2020), p. 34.
[203] ECJ, Judgement of the Court of 10.01.2006, C 222/04, "Cassa di Risparmio di Firenze"; Smucr, "SME Status- Threat or Opportunity?", (EStAL Issue 4, 2019), pp. 545-548.
[204] Smucr, SME Status- Threat or Opportunity?, EStAL 4, 2019, p. 545-548.
[205] ECJ, Judgement of the Court of 27.02.2014, C 110/13, "HaTeFo".
[206] ECJ, Judgement of the Court of 27.02.2014, C 110/13, "HaTeFo", para. 35.
[207] ECJ, Judgement of the Court of 27.02.2014, C 110/13, "HaTeFo", para. 35; Dietze, „Gesellschaftsrecht: "Verbundene Unternehmen" im Sinne der KMU-Empfehlung", (EuZW, 2014), p. 343.
[208] ECJ, Judgement of the Court of 27.02.2014, C 110/13, "HaTeFo", para. 35.
[209] ECJ, Judgement of the Court of 27.02.2014, C 110/13, "HaTeFo", para. 36; Dietze, „Gesellschaftsrecht: "Verbundene Unternehmen" im Sinne der KMU-Empfehlung", (EuZW, 2014), p. 343.

of this influence over the commercial decisions lie, are not given.[210] It is still a very broad definition. Moreover, the ECJ chooses a case-by-case analysis and stands on a path of the Commission, which is at least for the parties who have to apply the requirements and comply with the rules, an unclear one.[211] The reasons for this path are to hinder and circumvent attempts.[212]

While in Germany the requirements of Art. 3 (3 (1)) SME definition are quite well know, due to the instance that Germany implemented the directive on consolidated accounts in national law with § 290 HGB, the assessment of acting jointly in the meaning of Art. 3 (3 (4)) SME definition caused problems.[213] Especially during the COVID-19 pandemic where a linked enterprise was used as a main requirement for the aid, because the German Covid-19 aid scheme was notified by the Commission and had to fulfil the requirements of European state aid law.[214] "FAQ 5.2 Überbrückungshilfe"[215], "Überbrückungshilfe 1-4" which was one of the main aid programs during the COVID-19 pandemic, held that a mere family link was sufficient for a linked company. The FAQ and the requirements for "Überbrückungshilfe" were based on SME definition in the GBER, because the FAQ 5.2 relegated to the Users guideline SME definition. The aid granting authorities followed strictly and accordingly the SME definition and the "Users guide" and assumed linked enterprises just on a

[210] ECJ, Judgement of the Court of 27.02.2014, C 110/13, "HaTeFo", paras, 35-37; Commission Decision of 07.06.2006, C 8/2005, „Nordbrandenburger Umsteuerungswerke";
Dietze, „Gesellschaftsrecht: "Verbundene Unternehmen" im Sinne der KMU-Empfehlung", (EuZW, 2014), p. 343.
[211] Dietze, „Gesellschaftsrecht: "Verbundene Unternehmen" im Sinne der KMU-Empfehlung", (EuZW, 2014), p. 343.
[212] ECJ, Judgement of the Court of 27.02.2014, C 110/13, „HaTeFo", para. 31; Dietze, „Gesellschaftsrecht: "Verbundene Unternehmen" im Sinne der KMU-Empfehlung", (EuZW, 2014), p. 343.
[213] Bundesministerium für Wirtschaft und Klimaschutz/ Bundesministerium der Finanzen, FAQs zur „Corona-Überbrückungshilfe für kleine und mittelständische Unternehmen", FAQ 5.2, https://www.ueberbrueckungshilfe-unternehmen.de/DE/FAQ/Ubh-III/ueberbrueckungshilfe-iii.html, accessed 25.12.2024; Hillemann/Ehls, „Corona-Überbrückungshilfen: Verbundene Unternehmen allein aufgrund familiärer Strukturen", (DStR, 2023), p. 226.
[214] Oberverwaltungsgericht Nordrhein-Westfalen, Judgement of the court of 06.03.2024, 4 A 1581/23; Europäische Kommission, „Staatliche Beihilfen: Coronavirus: Kommission genehmigt deutsche Beihilferegelung", (24.03.2020), https://ec.europa.eu/commission/presscorner/detail/de/ip_20_524, accessed 26.12.2024; Bundesministerium für Wirtschaft und Klimaschutz/ Bundesministerium der Finanzen, FAQs zur „Corona-Überbrückungshilfe für kleine und mittelständische Unternehmen", FAQ 5.2, https://www.ueberbrueckungshilfe-unternehmen.de/DE/FAQ/Ubh-III/ueberbrueckungshilfe-iii.html, accessed 25.12.2024; Hillemann/Ehls, „Corona-Überbrückungshilfen: Verbundene Unternehmen allein aufgrund familiärer Strukturen", (DStR, 2023), p. 226
[215] Bundesministerium für Wirtschaft und Klimaschutz/ Bundesministerium der Finanzen, FAQs zur „Corona-Überbrückungshilfe für kleine und mittelständische Unternehmen", FAQ 5.2, https://www.ueberbrueckungshilfe-unternehmen.de/DE/FAQ/Ubh-III/ueberbrueckungshilfe-iii.html, accessed 25.12.2024.

mere family link. A lot of enterprises which were affected by the Covid-19 pandemic had not got any aid before.[216] They weren't familiar with the SME definition and the possibility, that a family link could lead to the assessment of a linked enterprise was not well known. A lot of enterprises, weren't linked enterprise under German law. The assessment of the aid granting agencies caused a lot of confusion and uncertainty.[217] This confusion arose from two factors: different assessment under German law and unclear behavior of the Commission and the ECJ.[218]

Under German law, there is no common definition of a linked enterprise. Each field of law and each provision has its own individual definition for its own needs.[219] It is the same as with the definition of an undertaking or the SME parameters.[220]
The German Stock Corporation Act defines a linked enterprise as an enterprise that is autonomous and in relationship with another enterprise through a majority ownership[221], a dominated and dependent position[222], an incorporation[223], reciprocal shareholdings[224], or a part of an intercompany agreement[225].[226] This definition is only applicable for enterprises under the German Stock Corporation Act.[227]
Meanwhile the German Commercial Code determines a linked enterprise on the basis of the fulfilment of the requirements of § 290 HGB. § 290 HGB is the provision on the creation of consolidated account, which was issued on the directive on consolidated accounts.[228] The German provisions on linked enterprises correspond with Art. 3 (3 (1)) SME definition, but they do not contain rules for natural groups acting jointly.

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[216] Bundesministerium für Wirtschaft und Klimaschutz/ Bundesministerium der Finanzen, FAQs zur „Corona-Überbrückungshilfe für kleine und mittelständische Unternehmen", FAQ 5.2, https://www.ueberbrueckungshilfe-unternehmen.de/DE/FAQ/Ubh-III/ueberbrueckungshilfe-iii.html, accessed 25.12.2024; Hillemann/Ehls, „Corona-Überbrückungshilfen: Verbundene Unternehmen allein aufgrund familiärer Strukturen", (DStR, 2023), p. 226.
[217] Bundesministerium für Wirtschaft und Klimaschutz/ Bundesministerium der Finanzen, FAQs zur „Corona-Überbrückungshilfe für kleine und mittelständische Unternehmen", FAQ 5.2, https://www.ueberbrueckungshilfe-unternehmen.de/DE/FAQ/Ubh-III/ueberbrueckungshilfe-iii.html, accessed 25.12.2024; Hillemann/Ehls, Hillemann/Ehls, „Corona-Überbrückungshilfen: Verbundene Unternehmen allein aufgrund familiärer Strukturen", (DStR, 2023), p. 226
[218] Dietze, „Gesellschaftsrecht: "Verbundene Unternehmen" im Sinne der KMU-Empfehlung", (EuZW, 2014), p. 343; Hillemann/Ehls, Hillemann/Ehls, „Corona-Überbrückungshilfen: Verbundene Unternehmen allein aufgrund familiärer Strukturen", (DStR, 2023), p. 226.
[219] AktG, HGB.
[220] C, II, 1, pp.25, 26; C, II, 2, pp. 27-30.
[221] § 16 AktG.
[222] § 17 AktG.
[223] § 18 AktG.
[224] § 19 AktG.
[225] § 291, 292 AktG.
[226] § 15 AktG.
[227] § 15 AktG.
[228] § 271 HGB.

This requirement only becomes relevant in the context of the EU law being applied to national law.[229]

However, the Federal Finance Court of Germany held that the marriageable link between spouses was not sufficient enough for the same economic interests in light of the German tax law. Besides the marriageable link, economic and corporate relationships are essential for determination.[230] The decision of the Federal Finance Court of Germany was based on rulings of the Federal Constitutional Court of Germany which stated that the assumption of certain requirements of German tax law just because the spouses were/are married infringes Art. 3 (1) GG the principle of equal treatment and Art. 6 (1) GG the fundamental rights for marriage and family.[231]

During the Covid-19 pandemic, some in the legal literature argued that not only the marriageable link but the mere family link as well, would be discriminatory and consequently would infringe Art. 3 (1) GG. Entities or natural groups would be preferred in this approach because they need economic relations in order to be a linked enterprise. This is more complex, considers the actual circumstance and would not automatically lead to a linked enterprise. Therefore, families would be discriminated for just being a family. But not only the conflict with German Law was considered, also the fact, that the Commission in “NUW” and the ECJ in “HaTeFO” created these broad and unclear definitions and used not only a family, but economic relations between the enterprises to determine a linked company, caused criticism on the usage of a mere family link.[232]

The Covid-19 pandemic aid was granted by the states in the Federal Republic of Germany through their aid granting agencies. The rules for the Covid-19 pandemic aid were based on mere national regulations. Therefore, the question of a linked enterprise

[229] Dietze, „Gesellschaftsrecht: “Verbundene Unternehmen” im Sinne der KMU-Empfehlung“, (EuZW, 2014), p. 343; Hillemann/Ehls, Hillemann/Ehls, „Corona-Überbrückungshilfen: Verbundene Unternehmen allein aufgrund familiärer Strukturen“, (DStR, 2023), p. 226.
[230] BFH, Judgement of the Court of 27.11.1985, I R 115/85; Hillemann/Ehls, Hillemann/Ehls, „Corona-Überbrückungshilfen: Verbundene Unternehmen allein aufgrund familiärer Strukturen“, (DStR, 2023), p. 226.
[231] BVerfG, Judgement of the court 0f 12.03.1085, 1 BvR 571/81.
[232] Hillemann/Ehls, Hillemann/Ehls, „Corona-Überbrückungshilfen: Verbundene Unternehmen allein aufgrund familiärer Strukturen“, (DStR, 2023), p. 226.

became an administrative one in Germany.[233] In Germany, the local and regional administrative courts are competent for questions and matters arising from aid notification grants, but they can only review the discretionary power of the aid granting agency.[234]

According to German law, a regulation only binds the agencies and administrative authorities of the state to the regulation and is therefore not directly applicable. Aid beneficiaries can only claim the aid when they fulfil the requirements, when there is enough budget left, and when the government agencies are themselves bound by the obligations and requirements laid down in the regulation, and grant the aid on these terms. This is called self-commitment of the administration, which shapes the administrative practice. If this is the case, the agencies have to grant the aid based on the equal treatment and prohibition of arbitrary action according to Art. 3 (1) GG. In these cases, the courts can just review the discretionary power and the correct application of the principles.[235]

The competent courts, which had to rule in the Covid-19 aid cases, based their judgment solely on the above-stated principles.[236] Therefore only the administrative practice of the aid granting agency mattered.[237] The courts, in particular, which had to decide on a linked company, did not see an infringement of the principle of equal treatment and the prohibition of arbitrary action. Moreover, they held this requirement in light of European state aid law, objectively necessary because the German Covid-

[233] Hillemann/Ehls, „Corona-Überbrückungshilfen: Verbundene Unternehmen allein aufgrund familiärer Strukturen“, (DStR, 2023), p. 226; Bundesverwaltungsgericht, Aufbau der Verwaltungsgerichtsbarkeit,https://www.bverwg.de/rechtsprechung/verwaltungsgerichtsbarkeit, accessed 26.12.2024.
[234] Bundesverwaltungsgericht, Aufbau der Verwaltungsgerichtsbarkeit, https://www.bverwg.de/rechtsprechung/verwaltungsgerichtsbarkeit/aufbau-der-verwaltungsgerichtsbarkeit, accessed 26.12.2024.
[235] Verwaltungsgericht Würzburg, Urteil vom 14.11.2022, W 8 K 22.1124; Hillemann/Ehls, „Corona-Überbrückungshilfen: Verbundene Unternehmen allein aufgrund familiärer Strukturen“, (DStR, 2023), p. 226; Worms/Figuccio, „Überbrückungshilfen&Co. Als staatliche Billigkeitsleistung“, (NJW, Issue 17, 2024), p. 113; Uwe Kischel in: Beck`scher Online-Kommentar, Grundgesetz, Art. 3, (58. Ed. 05.06.2024), paras. 112, 113, beck-online.
[236] Verwaltungsgerichtshof Bayern, Judgement of the Court of 14.10.2022, 22 ZB 22.212; Verwaltungsgericht Würzburg, Judgement oft he Court of 14.11.2022, W 8 K 22.1124.
[237] Verwaltungsgerichtshof Bayern, Judgement of the Court of 14.10.2022, 22 ZB 22.212; Verwaltungsgericht Würzburg, Urteil vom 14.11.2022, W 8 K 22.1124; Hillemann/Ehls, Hillemann/Ehls, „Corona-Überbrückungshilfen: Verbundene Unternehmen allein aufgrund familiärer Strukturen“, (DStR, 2023), p. 226; Worms/Figuccio, „Überbrückungshilfen&Co. Als staatliche Billigkeitsleistung“, (NJW, Issue 17, 2024), p. 113; Uwe Kischel in: Beck`scher Online-Kommentar, Grundgesetz, Art. 3, (58. Ed. 05.06.2024), paras. 112, 113, beck-online.

19 aid scheme was notified by the commission, and the aid needed to fulfill and align with these requirements for European state aid law as well.[238] Also, the administrative practice of the mere family link in combination with an adjunct market was upheld. The courts followed the arguments of the aid granting agencies, saying that it was easier for family-linked enterprises to overcome the problems caused by the Covid-19 pandemic because they could help each other. The family link in adjunct markets was the simplest and most effective way to determine a linked enterprise. Furthermore, families had the responsibility to help each other in times of crises. In this administrative practice, the courts did not see an infringement of the equal treatment and the prohibition of arbitrary action. The obliged responsibility of families in times of crises led also to a denial of a violation of the fundamental right of marriage and family of Art. 6 (1) GG, because this help and obliged responsibility between families was covered by Art. 6 (1) GG.[239]

The rulings on linked enterprises based in general and on the family link in particular are from 2024 and mostly from the courts of first instance. The German Federal Administrative Court or the German Federal Constitutional Court haven´t ruled on this matter yet. A final ruling on this question would take a few more years, but the unanimous path of the German aid granting agencies and courts is very clear. The aid granting agencies strictly applied for the granting of state aid under European state aid law, the definition of acting jointly, which the Commission had published with the “Users guide”. Through the appliances of the definition, it became the administrative practice of these aid granting agencies. These self-commitments of the aid granting agencies led to an entitlement for the aid beneficiaries. The courts could only determine the correct administrative practice on the principles of self-commitment, equal treatment, and prohibition of arbitrary action. They did not rule on European state aid law, but solely on the administrative practice in Germany. However, they found no infringements of these principles practically based on European law. Some courts also stated that the objectively necessary requirements.

[238] Oberverwaltungsgericht Nordrhein-Westfalen, Judgement of the court of 06.03.2024, 4 A 1581/23; Verwaltungsgericht Köln, Judgement of the court of 13.09.2024, 16 K 5228/22.
[239] Verwaltungsgericht Würzburg, Judgement oft he Cort of 03.07.2023, W 8 K 23.52; Verwaltungsgericht Karlsruhe, Judgement of the cort of 11.07.2024, 1 K 2711/23.

While it has to be seen, if these path of Germany does fulfil the imaginations of the case-by-case approach of the ECJ in “HaTeFo”, it at least does fulfil the requirements of the Commission laid down in the “Users guide”, although it differs in this generality from their decision in “NUW”.

4. Data for determining a SME

In Art. 4-6, the SME definition data for the determination of SMEs is laid down. The reference period for the data of the staff headcount and the financial thresholds is governed in Art. 4 SME definition. Usually, the reference period is the last approved accounting period.[240] When the enterprise is newly founded and does not have an approved accounting statement, it has to be estimated in light of bona fide.[241] Art. 5 SME definition describes the basis for calculation of the headcount. It is based on the annual workforce. Basically, everyone who works for the enterprise has to be included, except students and apprentices. Everyone who hasn´t worked the whole year or not in full-time has been included as well, but only fractionwise. [242]

This calculation method differs from national law and from the known and used calculation methods.[243] This is also true for German law. While the German Commercial Code calculates the annual average employees by the amount of all employees of each quarter and divides the total amount through four,[244] German labor law determines the headcount of the employees proportionately to their working hours for the enterprise.[245]

Art. 6 SME definition states that all the relevant data for the SME determination should be assessed on the annual accounts. The provision also contains rules for how to assess and include the data of the partner or linked enterprises.[246]

[240] Art. 4 (1) SME definition.
[241] Art. 4 (3) SME definition.
[242] Art. 5 SME definition.
[243] Smucr, “SME Status- Threat or Opportunity?”, (EStAL, Issue 4, 2019), pp. 545-548.
[244] § 267 (5) HGB.
[245] § 23 (1) Kündigungsschutzgesetz.
[246] Art. 6 (1-4) SME definition.

The data used to determine a SME differs from international used methods and is therefore especially hard to asses for companies outside the EU or international enterprises, which also can be a SME.[247]

III. Conclusion

In this chapter, the need for a SME definition and the requirements according to the Commission Recommendation were described. The SME requirements were explained and compared to German law. Therefore, the first research question of the thesis can be answered:

What differences in the SME definition are there between EU and German law?

To begin with, there is only one SME definition under EU law. Thus, the definition is universally applicable. A common and united SME definition under EU law was established to effectively dispose of the unique set of issues and the structural barriers the SME faced. Different definitions on the EU law level would make it more complex and complicated to apply in different situations and fields of law. An effective disposal of the problems that SMEs face is not guaranteed. That is also why an EU-wide universally applicable definition was needed and issued by the Commission to ensure a common approach by the member states, especially when they granted aid. Otherwise, the competition between the member states and the internal market could be distorted. However, the definition itself is not the only one that is common and universally applicable. The single requirements are as well. Some are also based on established EU law and rulings of the ECJ like the definition of an enterprise, which is based on the landmark ruling “Höfner Elser” of the ECJ or the financial and shareholding requirements for linked enterprises in Art. 3 (1) SME definition, which is based on the annual account directive.
However, the SME Definition is foremost a recommendation for the member state, except for those fields of EU law, where the SME status is a requirement of another provision or regulation like the GBER.

[247] Smucr, “SME Status- Threat or Opportunity?”, (EStAL, Issue 4, 2019), pp. 545-548.

This approach is different from Germany.
Under German law, there is no common and universally applicable definition for SME or the needed requirements. Although German law has definitions for SMEs and conditions for the financial thresholds, they are only applicable and valid within the act, code or law in which it was stated or for which it was established. This approach should ensure the individual characteristics and goals of the different laws.

Unlike EU law, German law and lawmakers did not pursue an overall goal for or with SME, but considered the SME characteristics, where necessary and balanced them with the goals of the acts, codes or laws within the meaning of those in order to acknowledge the situations. This approach can be seen in every requirement and definition of an SME in Germany. § 267 HGB has for the creation of balance sheets its own financial thresholds and headcount for the assessment of a SME, while the German Federal Cartel Office does assess a SME for fusion control based on the relationship within the market, not by thresholds and headcount.

An undertaking is based on the same broad requirements but is differently applied and interpreted within the precise meaning of the actual law in which it is based. The same can be concluded of the calculation of headcount. This can best be seen in the German commercial code. The German commercial code has different goals and therefore needs different conditions in the assessment of the headcount, than the German job protection act.
This approach deviates from where EU law comes into play and has to be followed according to the principles of precedence, supremacy, and effectiveness. Otherwise, German law has to be interpreted in the same way as EU law.
This is the reason why the requirement of a linked enterprise is the same as that of the German commercial code: These requirements are based on the annual accounts directive, which Germany had to implement. Although Germany is not using the term acting jointly as an assessment of a linked enterprise under national law, it applied the definition and rules for it, when European state aid law is affected. This was especially shown during the Covid-19 pandemic.

To conclude, the differences in the SME definition between EU and German law are first and foremost the approach and the systematic. The EU aims for a universally

applicable common definition, and Germany tries to focus on the meaning of the individual provisions and, therefore, differentiates.
Besides the approach, German law is different in almost every aspect of the EU SME definition. The determination of an undertaking is different, and the same is true about the SME parameters like the financial thresholds and the headcount. The headcount is also calculated differently, and joint action is not used as an assessment for a linked enterprise. Therefore, the EU SME definition is much broader in that it applies to all of the EU laws. This broad application and the associated benefits of the SME status resulted in the fear of circumvention behavior. This led to a broad interpretation of the EU SME definition, in that sense, that enterprises are more likely not to be SME according to EU law and therefore not eligible for the benefits in contrast to national law.

Normally the SME recommendation is only a recommendation and therefore only binding to EU agencies. However, when the SME definition is a requirement for EU law provisions like the GBER, the definition becomes binding for everyone as part of the GBER, even when national law sees it differently. Thereof, the SME status is used to control the SME benefit under the GBER.

D. SMEs under the GBER

SMEs are the backbone of the European economy and the EU job market. However, they are facing uniquely challenging issues like market failures and structural barriers. These issues mostly affect SMEs.[248] These unique issues hinder the SME from investing and developing new technologies and unlocking new potential markets and customers for themselves.[249] This is the reason why the Commission firstly created the SME-block regulation and later included these privileges and categories into the GBER.[250]

[248] Recital 40 of the GBER; von Wallenberg/Schütte in: Grabitz/Hilf Nettesheim, Das Recht der EU, AEUV Art. 107, (83. Ed. Juli 2024), para.379; C, I, 1.
[249] Recital 40 of the GBER, von Wallenberg/Schütte in: Grabitz/Hilf Nettesheim, Das Recht der EU, AEUV Art. 107, (83. Ed. Juli 2024), para.379.
[250] Recital 40 of the GBER; Cremer in: Calliess/Ruffert, EUV/AEUV, Art. 107 AEUV, (6. Ed. 2022), para. 74.

The Commission extended the aid categories for SMEs in the GBER towards investment aid and participation in fairs. With the amendment of the GBER[251], the existing categories and articles for SME were aligned with the SME strategy for sustainable and digital Europe,[252] and the revised guidelines on State aid to promote risk finance investment[253]. The thresholds were also adjusted.[254] Measures to mitigate the effects of the high and rising energy prices were also added.[255]

I. Categories and Articles for SME under the GBER

Aid towards SMEs, which fulfils the requirements of the GBER, aligns with Art. 107 (3) TFEU. The aid is compatible with the internal market and does not need a notification in the meaning of Art. 108 (3) TFEU. While this describes the general mechanism of the GBER, the SMEs enjoy privilege.[256] The privilege for SMEs under the GBER can

[251] Commission Regulation (EU) 2023/1315 of 23.05.2023 amending Regulation (EU) No. 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty.
[252] European Commission, "An SME Strategy for a sustainable and digital Europe", (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 10.03.2020), COM (2020) 103 final.
[253] European Commission, "Guidelines on State aid to promote risk finance investments", (21.01.2014), OJ, 2014/C 19/04, p.4.
[254] Recital 4, 5, 15 of Commission Regulation (EU) 2023/1315 of 23.05.2023 amending Regulation (EU) No. 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty.
[255] Council Regulation (EU) 2022/1854 of 06.10.2022 on an emergency intervention to address high energy prices; recital 10 of Commission Regulation (EU) 2023/1315 of 23.05.2023 amending Regulation (EU) No. 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty.
[255] European Commission, "An SME Strategy for a sustainable and digital Europe", (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 10.03.2020), COM (2020) 103 final.
[256] Recital 40 of the GBER, von Wallenberg/Schütte in: Grabitz/Hilf Nettesheim, Das Recht der EU, AEUV Art. 107, (83. Ed. Juli 2024), para. 379; Knott/von Donat, "Is state aid to start-ups and SMEs becoming illegal if the company is sold?", (Revista de direito commercial, 31.02.2021),pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 28.12.2024.

be divided into two groups.[257] The first group of privileges for SMEs contains their own categories and articles.[258]

In section 2 of the GBER "aid to SMEs" of the GBER "investment aid to SMEs" Art. 17 GBER, "aid for consultancy in favor of SMEs" Art. 18 GBER, "aid to SMEs for participation in fairs" Art. 19 GBER, "aid for costs incurred by SMEs participating in community-led local development projects" Art. 19a GBER, "limited amounts of aid to SMEs benefitting from community-led local development projects" Art. 19 b GBER, "aid to microenterprises in the form of public interventions concerning the supply of electricity, gas or heat" Art. 19 c GBER, "aid to SMEs in the form of temporary public interventions concerning the supply of electricity, gas or heat produced from natural gas or electricity to mitigate the impact of price increases following Russia's war of aggression against Ukraine" Art. 19 d GBER, **"**aid for cooperation costs incurred by SMEs participating in European Territorial Cooperation projects" Art. 20 GBER and in section 3 of the GBER "aid for access to finance for SMEs" of the GBER the "risk finance aid" Art. 21 GBER, "risk finance aid to SMEs in the form of tax incentives for private investors who are natural persons" Art. 21 a GBER, "aid for start-ups" Art. 22 GBER, "aid to alternative trading platforms specialized in SMEs" Art. 23 GBER and "aid for scouting costs" Art. 24 GBER are laid down. This list of aid considers market failures and structural barriers to SMEs, especially in the fields of sustainability, digitalization, geopolitical crisis, and access to funds. Therefore, these two categories are solely dedicated to the unique issues that SMEs face. The aid groups for supporting the SME themselves are compatible with the internal market and do not need a notification.[259]

The second group does not contain its own categories solely dedicated to SMEs and therefore does not have the disposal of SME issues as its main funding purpose. These categories have other funding purposes, such as environmental protection or CO2 reduction. Every enterprise can fulfil these purposes without being a SME. However,

[257] von Wallenberg/Schütte in: Grabitz/Hilf Nettesheim, Das Recht der EU, AEUV Art. 107, (83. Ed. Juli 2024), para. 379; Knott/von Donat, "Is state aid to start-ups and SMEs becoming illegal if the company is sold?", (Revista de direito commercial, 31.02.2021),pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 28.12.2024.

[258] von Wallenberg/Schütte in: Grabitz/Hilf Nettesheim, Das Recht der EU, AEUV Art. 107, (83. Ed. Juli 2024), para. 379

[259] Recital 40 of the GBER, von Wallenberg/Schütte in: Grabitz/Hilf Nettesheim, Das Recht der EU, AEUV Art. 107, (83. Ed. Juli 2024), para. 379.

these issues for SMEs do not only occur when the running of an SME is affected but also arise when the SME considers investing in other areas like CO2 reduction because these investments are very expensive. In order to facilitate these investments, an SME supplement was added to some articles. These SME supplements contain a higher aid intensity than an enterprise would normally receive under these articles, to consider the issues the SMEs are facing properly.[260]

These SME supplements exists in Art. 14 GBER "regional aid", Art. 25 GBER "aid for research and development projects", Art 26 a GBER, "investment aid for testing and experimentation infrastructures", Art. 31 GBER "training aid", Art. 36 GBER "Investment aid enabling undertakings to go beyond Union standards for environmental protection or to increase the level of environmental protection in the absence of Union standards", Art. 36 a GBER "investment aid for recharging or refueling infrastructure", Art. 36 b GBER "investment aid for the acquisition of clean vehicles or zero-emission vehicles and for the retrofitting of vehicles", Art. 38 GBER "investment aid for energy efficiency measures", Art. 38 a GBER "investment aid for energy efficiency measures in buildings", Art. 38 b GBER "aid for the facilitation of energy performance contracting, Art. 40 GBER "investment aid for high-efficiency cogeneration", Art. 41 GBER "Investment aid for the promotion of energy from renewable sources, of renewable hydrogen and of high-efficiency cogeneration", Art. 42 GBER "operating aid for the promotion of electricity from renewable sources", Art. 43 GBER "operating aid for the promotion of energy from renewable sources in small scale installations", Art. 45 GBER "investment aid for the remediation of environmental damage, the rehabilitation of natural habitats and ecosystems, the protection or restoration of biodiversity and the implementation of nature-based solutions for climate change adaptation and mitigation", Art. 46 GBER "investment aid for energy efficient district heating and/or cooling", Art. 47 GBER "investment aid for resource efficiency

[260] Recital 5, 15 of Commission Regulation (EU) 2023/1315 of 23.05.2023 amending Regulation (EU) No. 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty; Knott/von Donat, "Is state aid to start-ups and SMEs becoming illegal if the company is sold?", (Revista de direito commercial, 31.02.2021),pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 28.12.2024.

and for supporting the transition towards a circular economy“, Art. 49 GBER “aid for studies and consultancy services on environmental protection and energy matters”.

II. Requirements

When an aid is an aid within the meaning of Art. 107 (1) TFEU and should exempt under the GBER, the requirements need to be fulfilled to achieve exemption without notification.[261] The general requirements as well as the special requirements of each suitable article have to be met in order to apply the GBER.[262]
The general requirements Art. 3 GBER “conditions for exemption”, Art. 4 GBER “notification thresholds”, Art. 5 GBER “transparency of aid”, Art. 6 GBER “incentive effect”, Art. 7 GBER “aid intensity and eligible costs”, Art. 8 GBER “cumulation”, Art. 9 GBER publication and information” have been explained above.[263] Besides the general requirements, the SME status needs to be fulfilled.

Although it would be beyond this thesis to go into detail with all SME specific articles because of their sheer quantity, the structure of the articles is similar. The specific requirement will be shown with Art. 17 GBER “investment aid to SMEs”, as an example for a solely SME category and Art. 31 GBER “trainings aid SME” as an example for the SME supplement.

Art. 17 (1) GBER states that investment aid to SMEs operating inside or outside the territory of the EU is exempt, when certain specific and general requirements are met. As already mentioned, the definitions for these terms are laid down in Art. 2 GBER.[264] For SMEs Art. 2 (2) GBER relegates to annex I of the GBER, which contains the SME definition. While the SME definition is normally a recommendation, through the relegation of Art. 2 (2) GBER and annex I of the GBER it became a requirement. Art. 17 (2) GBER states the eligible costs and divides them into tangible and intangible assets and employment costs. Art. 17 (3) GBER determines which investments are eligible. Art. 17 (4,5) GBER specifies tangible assets and employment projects and Art.

[261] B, II, pp.18-21; B, III, pp. 21-23.
[262] Art. 3 GBER; B, III, pp. 21-23.
[263] B, III, pp. 21-23.
[264] B, II, pp.18-21; B, III, pp. 21-23.

17 (6) GBER states the aid intensity, a maximum of 20% of the eligible costs for small enterprise and a maximum of 10% costs for a medium-sized enterprise.

Art. 31 GBER is of a similar structure to Art. 17 GBER. However, the SME status as an enterprise is not the main focus of the article. Art. 31 (1) exempts training aid, when the requirements are met. In paragraph Art. 31 (2) GBER, the scope of the provision is limited to training aid, which goes beyond the mandatory national standards for training. Art. 31 (3) GBER determines the eligible costs, and Art. 31 (4) GBER states that the aid intensity is 50%. This threshold can be exceeded to an absolute threshold of 70%. In order to unlock these extra percentages, the aid needs to fulfil certain requirements laid down in Art. 31 (4) GBER. Besides, workers with disabilities or disadvantages will increase the aid intensity by 10%, medium-sized enterprises will also increase the aid intensity by 10%, and small enterprises will increase it by 20%. Art. 31 (5) GBER exempts Art. 31 (4) GBER and increases the aid intensity to a full 100% when the aid is granted in the maritime transport sector.

Therefore, these additional percentages in aid intensity, which require an SME status and go beyond the designated aid percentage for this aid under “normal” (e.g. not exempt) circumstances, can be determined as the SME supplement. For these supplements the general and special requirements have to be met, as well as the SME status.

To sum up, for exemption under the GBER the general and the specific requirements must be met. For aid which is solely dedicated to SMEs, the SME status is a must in order to be funded. This is different from the SME supplement. The aid can be granted and exempt without the SME status, but to a lower aid intensity.

The SME status is therefore vital for small and medium-sized enterprises under the GBER.

III. Loss of the SME status

The GBER provides these SMEs with many privileges. However, these privileges depend on the SME status. The period or duration of an aid can be long. During that time, an enterprise can grow, merge with another enterprise, or be subject to an acquisition. What happens when the SME status gets lost during aid granted under GBER based on the SME privileges? Which point in time matters for the SME status, and how long does it last? As already mentioned at the beginning of this thesis, these constellations can happen in state aid funding.[265]
The answers to these questions can deviate between EU and German Law.

1. EU law

Neither the GBER nor the SME Definition are containing provisions on the timing or the duration of the SME status. The ECJ and the Commission haven´t had the need to comment or rule on these constellations yet.[266]
In the absence of any clear jurisprudence on this matter, two German attorneys addressed the problem and presented their own solution for the problem.[267]

In their view, the GBER requires any condition only at the time of granting, because two provisions, Art. 5 “transparency of aid” and Art. 7 “aid intensity and eligible costs” GBER, would refer accordingly. The timing of granting is defined in Art. 2 (28) GBER as the day when the aid grant notice gets final. Any changes after that point are not relevant to the GBER in their view. They also concluded in reverse on the basis of Art. 14 GBER “regional investment”, which contains for investments and permanent jobs

[265] Knott/von Donat, “Is state aid to start-ups and SMEs becoming illegal if the company is sold?”, (Revista de direito commercial, 31.02.2021), pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 28.12.2024.
[266] Knott/von Donat, “Is state aid to start-ups and SMEs becoming illegal if the company is sold?”, (Revista de direito commercial, 31.02.2021), pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 28.12.2024.
[267] Knott/von Donat, “Is state aid to start-ups and SMEs becoming illegal if the company is sold?”, (Revista de direito commercial, 31.02.2021), pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 28.12.2024.

holding periods, that the SME status does not need to be maintained after the time of granting, because there are no provisions and rules that postulate that.[268] Furthermore, they expressed the opinion, that by maintaining the SME status after the time of granting would not serve the goals in overcoming the SME difficulties of SMEs but only be formal and "perpetuating the SME status"[269], because the aid should enable the possibility for projects and therefore be an incentive in the meaning of Art. 6 GBER "incentive effect". They stated further, that the control after the time of granting of an incentive effect can only be hypothetical.

It cannot be known if an enterprise that merged with another enterprise and became a large enterprise "might not have needed the support"[270].
They came to the conclusion that there is no legal basis in the GBER for maintaining the SME status after the time of granting.[271]

These arguments are not convincing.

To begin with, Art. 5 (2 (b)) GBER contains the element "time of granting" for the calculation of interests for loans. Also Art. 7 (3) GBER uses the timing of an aid being granted to determine the value of an aid, which is granted in several instalments, for the assessment of the eligible costs. Both provisions use the timing of an aid for calculation purposes only. They do not ascertain the requirements with the timing of an aid.[272] The other general requirements do not use the time of grant as a condition.[273] Art. 3 GBER, which determines the conditions for the exemption, does not

[268] Knott/von Donat, "Is state aid to start-ups and SMEs becoming illegal if the company is sold?", (Revista de direito commercial, 31.02.2021), pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 28.12.2024.
[269] Knott/von Donat, "Is state aid to start-ups and SMEs becoming illegal if the company is sold?", (Revista de direito commercial, 31.02.2021), p. 134, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 28.12.2024.
[270] Knott/von Donat, "Is state aid to start-ups and SMEs becoming illegal if the company is sold?", (Revista de direito commercial, 31.02.2021), p. 135, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 28.12.2024.
[271] Knott/von Donat, "Is state aid to start-ups and SMEs becoming illegal if the company is sold?", (Revista de direito commercial, 31.02.2021),pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 28.12.2024.
[272] Art. 5, 7 GBER.
[273] Art. 3,4,6,8,9 GBER.

state the timing at all. Thus, Art. 2 (28) GBER defines the time of grant; it is a definition that does not stand by its own but needs another provision to comply with, as shown in the structure of the GBER above.[274] In chapter 1, it is used together with Art. 5, Art. 7 GBER for the calculation of interests or the value of aid paid in installments.

While only Art. 5 (2 (b)) GBER and Art. 7 (3) GBER use the time of grant for calculation purposes only and the other provisions do not use the criterion at all, it can be argued in reverse that the time of grant is not relevant for the existence in maintaining of the requirements, at least for the general requirements. It therefore cannot be stated, that the GBER refers to the timing of grant as a condition for the eligibility requirements.

However, it is true that only Art. 14 GBER contains holding periods; hence, it cannot be concluded that these holding periods are not relevant to the GBER. The GBER has to be understood in the European state aid law system.
Art. 107 (1) TFEU prohibits state aid. In order to grant an aid, it has to be exempt. The GBER is one possibility to exempt the aid from the prohibition of Art. 107 (1) TFEU. In order to do so, the general and specific requirements of the GBER have to be fulfilled. When the requirements aren´t met, the aid becomes an unlawful aid in light of Art. 1 (f) Regulation (EU) 2015/1589. This system does not automatically lead to an obligation to maintain the SME status. [275]
However, the ECJ has already ruled in several cases that an aid can become an illegal state aid, even after the aid was granted, when it was later detected through an ex-post analysis that at least some general requirements of the GBER were not fulfilled.[276]
In the case “Eesti Pagar” years after the granting, the Estonian authorities detected that the criterion “incentive effect” was never fulfilled. The ECJ confirmed the decision of the Estonian authorities and held that the authorities of the member states are obliged to check and recover unlawful state aid later on. The Court did not ascertain

[274] B, II, pp. 18-21.
[275] B, I, 1, pp. 7-11; B, I, 3, pp. 16-18; B, II, pp. 18-21; B, III, pp. 21-23.
[276] ECJ, Judgement of the Court of 21.07.2016, C-493/14, “Dilly´s Wellnesshotel”; ECJ, Judgement of the Court of 05.03.2019, C-349/17, “Eesti Pagar”; Achleitner, “Interplay between the Commission, National Authorities and Courts: An Attempt to Cut the Gordian Knot”, (EStAL, Vol. 21, Issue 2, 2022), pp. 173-180; Egger, “Judikatur, EuGH , C-493/14, Dilly´s Wellnesshotel GmbH Gegen Finanzamt Linz, Urteil vom 21.06.2016”, (Berliner Rechtszeitschrfit-BRZ, Issue 3, 2016), pp. 117-123.

itself on the timing and did not limit the ex-post control of the member states agencies.[277]
Although the "incentive effect" as a requirement was never fulfilled in this case, its absence was detected after the granting. This indicates the need for the duration of the requirements and at least an obligation of the member state for an ex-post-control.[278] Otherwise a control would not be necessary.

However, there are other ways to exempt state aid as well. The foreseen process according to Art. 108 TFEU is to notify the Commission when an aid is granted. A subsidy which is determined as an aid in the meaning of Art. 107 (1) TFEU, has to be notified under the rules of Art. 108 TFEU.[279] Art. 108 TFEU deviates between existing aid and new aid. New aid needs to be notified by the Commission. In these constellations, the General Court and the ECJ held that for the determination of an existing or new aid in the meaning of Art. 108 (3) TFEU, the timing of actual payment is the relevant factor, because then the aid is put into effect. The granting of the aid is not sufficient enough.[280] Furthermore, the courts held that when the actual but relevant requirements for aid deviate from the requirements obliged in the notification, the aid has to be notified yet again; otherwise, it would be illegal.[281]

However, the GBER is not an existing aid, but an aid "sui generis".[282] It differs from the usual state aid exemption process in that aid is exempt, but the requirements are not notified when the requirements are fulfilled by the regulatory system of Art. 108 TFEU in exempting state aid, because the GBER is based on Art. 108 TFEU.[283] While at least some of the requirements of Art. 108 TFEU cannot be applied to the GBER because of its own nature, it still exists within the exemption system of Art. 107 (3), Art. 108 (3) TFEU.[284]

[277] ECJ, Judgement of the Court of 05.03.2019, C-349/17, "Eesti Pagar"; Achleitner, "Interplay between the Commission, National Authorities and Courts: An Attempt to Cut the Gordian Knot", European state aid law Quarterly, Vol. 21, Issue 2, 2022, p. 173-180.
[278] ECJ, Judgement of the Court of 05.03.2019, C-349/17, "Eesti Pagar"; Achleitner, "Interplay between the Commission, National Authorities and Courts: An Attempt to Cut the Gordian Knot", (EStAL, Vol. 21, Issue 2, 2022), pp. 173-180
[279] Art. 108 TFEU.
[280] European Cort of Justice, Judgement of the Court of 22.04.2016, C-369/16, "Ireland and Aughinish Alumina Ltd v Commission", para. 25; General Court, Judgement of the Court of, T-50/06, "RENV II".
[281] General Court, Judgement of the Court of 21.09.2022, T-95/21, "Portugal v Commission".
[282] B, I, 1, pp. 7-11; B, I, 3, pp. 16-18.
[283] B, I, 1, pp. 7-11; B, I, 3, pp. 16-18.
[284] B, I, 3, pp. 16-18.

This is also illustrated by the fact that all aid that has been granted under the GBER needs to be notified again by the Commission regarding the meaning of Art. 108 (3) TFEU, when the GBER is not extended.[285]

Therefore, the GBER has to fulfil the significant meaning of Art. 108 TFEU which governs the exemption and notification of state aid. As stated above, the timing of when aid becomes aid, which has to be exempt and/or notified, is therefore extremely relevant for European state aid. Otherwise, it does not underlie the European state aid law and control.[286] When aid becomes only relevant by putting it into effect in the meaning of Art. 108 TFEU, it can be argued, that this principle has to be applied on the GBER as well. Otherwise, the question of state aid would only be a theoretical one. GBER itself could not be applied. In this system, only at the moment the aid is put into effect can it be exempt because then it is an aid; otherwise, it is just hypothetical.[287] There are no clues for different handlings when an aid is put into effect.

Besides this argument, the possible void of the GBER in determining the timing and duration of the requirements, has to be filled by the primary law, Art. 108 TFEU, when competent rules exist.[288] An own handling of the GBER, which itself is only secondary law, can infringe primary law. [289]

Therefore, the general principles forming and determining this system of exemption and rules have to be applied and transferred from Art. 108 TFEU into the GBER, when an infringement is imminent.[290]

However, it can also be argued that the divergences are intended because of the broad scope, space, and discretionary power the Commission was given, and these rules align with the intended purpose of the SME definition within the GBER.[291]

It is the intention of the Commission to support SMEs by overcoming their many difficulties, because they are the backbone of the European economy. In order to overcome these difficulties and issues, the Commission had established privileges in

[285] B, I, 3, pp. 16-18.
[286] B, I, 1, pp. 7-11; B, I, 3, pp. 16-18.
[287] B, I, 3, pp. 16-18.
[288] B, I, 3, pp. 16-18.
[289] ECJ, Judgement of the Court of 19.09.2000, C-156/98, “Bundesrepublik Deutschland v Kommission”.
[290] ECJ, Judgement of the Court of 19.09.2000, C-156/98, “Bundesrepublik Deutschland v Kommission”.
[291] Knott/von Donat, “Is state aid to start-ups and SMEs becoming illegal if the company is sold?”, (Revista de direito commercial, 31.02.2021),pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 02.01.2025.

the GBER for SMEs. This is the aim of the SME definition as well as the GBER, as described above.[292] Knott and von Donat argue in their article that this goal is already achieved, when a SME application for a subsidy is granted and the SME status exists until the time of granting. Maintaining the SME status afterwards would not achieve the goals, but only perpetuate the status.[293]

The Commission has identified market failure and structural barriers as a main problem for SMEs. This was the reason for a common SME definition to determine those SMEs who need support and divide them through the tools of headcounts and financial thresholds from those who should not need special support.[294] The categories of partner and linked enterprises should reflect the economic realities of enterprises by assessing them more accurately. The closer the relationship with another enterprise, the more the headcount and financial thresholds of the other enterprise need to be considered. Enterprises which are closely tied together have more resources and a different standing within the market, so they can overcome more easily the market failures and structural barriers which affect SMEs.[295] These results from recital 9 and 12 of the recommendation for the SME definition were confirmed by the Commission in “NUW” and the ECJ in “HaTeFo”.[296]

When two or more enterprises merge together or the enterprise just grows and the SME status is lost through these activities, it is easier for this or these enterprises to overcome the SME difficulties. The special support is not necessary anymore. It can be stated that the goals of the SME definition and privileged are undermined by a change of the SME status. The goals and efforts of the SME definition and the GBER would help the wrong enterprises. Maintaining the SME status during the time of the aid, would consequently not be the perpetuation of the mere SME status, but to ensure the aims and goals of the SME support. It is covered by the meaning of the provision.

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[292] Recital 40 of the GBER; D; D.I.

[293] Knott/von Donat, “Is state aid to start-ups and SMEs becoming illegal if the company is sold?”, (Revista de direito commercial, 31.02.2021),pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 02.01.2025.

[294] European Commission, “User guide to the SME Definition”, (2020), p. 14.

[295] Commission Decision of 07.06.2006, C 8/2005, “Nordbrandenburger Umsteuerungswerke”, para. 49; recital 12 of Recommendation 2003/361; Kainer in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 2, X, C, (6. Ed. 2022), para. 13; C, II, 3, pp. 47-49.

[296] ECJ, Judgement of the Court of 27.02.2014, C 110/13, “HaTeFo”, paras. 35, 36; Commission Decision of 07.06.2006, C 8/2005, “Nordbrandenburger Umsteuerungswerke”; Dietze, „Gesellschaftsrecht: “Verbundene Unternehmen” im Sinne der KMU-Empfehlung“, (EuZW 2014), p. 343.

The importance of the mere meaning of the SME support was demonstrated by the Commission and the ECJ several times. In “Pollmeier,”[297] the Commission held that the fulfillment of the formal requirements of an SME is not enough, but typical SME issues like market failure and structural barriers need to be addressed as well.[298] The Commission introduced this broad interpretation of the mere meaning of the SME definition in order to prevent fraudulent and circumstantial behavior. This decision was later confirmed by the ECJ and another Commission decision. [299] However, the ECJ and the Commission chose a case-by-case approach to assess and prevent fraudulent and circumstantial behavior.[300]

Besides the case-by-case assessment, the interpretation of the mere meaning of the SME definition is another and strong indicator for duration of the SME status, otherwise the fraudulent and circumstantial behavior could be enabled through the loss of the SME status based on a late, planned merger, after the receipt of the granted aid.

It could be a first step towards a solution.

However, even if this is the path to a solution, this would only affect the mergers and acquisitions, not the simple growth of an enterprise.

The Commission has stated in their “Users guide” that the SME status can be lost when the headcount and the financial thresholds have risen above the determined parameters for two accounting periods. It can also be received again, when the headcount and the financial thresholds fall below the parameters. A duration is not limited or given.[301]

It can be argued that the Commission was aware of the possibility of the change of the SME status and did not limit it. This points further in the direction of a duration of the SME status.

[297] Commission Decision of 15.01.2002, 2002/821/EG, „Pollmeier GmbH”, para. 84.
[298] Commission Decision of 15.01.2002, 2002/821/EG, „Pollmeier GmbH”, para. 84.
[299] ECJ, Judgement of the Court of 29.04.2004, C 91/01, „SolarTech“; ECJ, Judgement of the Court of 27.02.2014, C 110/13, „HaTeFo“; Commission Decision of 15.01.2002, 2002/458/EG, „ Klausner Nordic Timber GmbH&Co.KG”; Kainer in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 2, X, C, (6. Ed. 2022), paras. 23-25.
[300] ECJ, Judgement of the Court of 29.04.2004, C 91/01, „SolarTech“; ECJ, Judgement of the Court of 27.02.2014, C 110/13, „HaTeFo“; Commission Decision of 15.01.2002, 2002/458/EG, „ Klausner Nordic Timber GmbH&Co.KG”; Kainer in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 2, X, C, (6. Ed. 2022), paras. 23-25.
[301] European Commission, “User guide to the SME Definition”, (2020), p. 14.

The argument that the incentive effect was fulfilled at the beginning and an ex-post control, which could come to the conclusion that the aid wasn´t needed, could only be hypothetical in nature,[302] is in conflict with the "Eesti pagar" and "BMW" rulings of the ECJ which obliges even the member states to do an ex-post control on the formal requirements of the first chapter of the GBER, as described above.[303] Secondly, recitals 9 and 12 SME definition recommendation and established case law of the ECJ and the Commission conclude the opposite, as stated before.[304] Thirdly, the "incentive effect" is a general requirement in the meaning of the GBER and not a requirement of the SME definition. The "incentive effect" is eligible for every aid recipient in the GBER, the requirements for the SME definition are universally applicable only for SMEs in every field of EU law. Therefore, the "incentive effect" is unsuitable for structural and systematic reasons to determine a SME.[305]

Furthermore, only the Commission can assess, examine, determine and allow state aid.[306] The whole reason for the GBER is that the Commission does not need to notify and exempt every aid by itself, but can control later on by ex-post control.[307] The right and the obligation for an ex-post control were confirmed by established case law of the ECJ.[308]

The previously presented arguments indicate the maintenance of the SME status after granting. These arguments are convincing. In a systematic and structural assessment, the arguments that stated that the SME status did not matter after the time of granting have been rebutted.

The most compelling arguments are the references towards Art. 108 TFEU handled the problem under the normal exemptions process because it was based on a systematic approach within European state aid law and on established case law and

[302] Knott/von Donat, "Is state aid to start-ups and SMEs becoming illegal if the company is sold?", (Revista de direito commercial, 31.02.2021),pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 02.01.2025.
[302] Recital 40 of the GBER; D, I, pp. 45-47.
[303] ECJ, Judgement of the Court of 05.03.2019, C-349/17, "Eesti Pagar"; ECJ, Judgement of the Court of 29.07.2019, C-654/17, "BMW".
[304] D, III, 1, p. 51.
[305] Art. 3 SME definition; B, II, pp. 18-21; B, III, pp. 21-23; C, II, pp. 27-41; D, II, pp. 47-49.
[306] Art. 108 TFEU.
[307] B, I, 1, pp. 7-11; B, I, 2, pp. 12-16.
[308] ECJ, Judgement of the Court of 05.03.2019, C-349/17, "Eesti Pagar"; ECJ, Judgement of the Court of 29.07.2019, C-654/17, "BMW".

the mere and therefore purely systematic meaning of the SME status. Followed by a case-by-case approach to prevent circumstantial and fraudulent behavior, which was also covered by established case law of the ECJ and the Commission.

However, these arguments did only rebut the other arguments, they did not contain their own solution, but they are suitable for the development of a solution.
As a result of these arguments, a solution for the loss of the SME status can be formulated as follows:
The SME status and every other requirement has to be maintained until the aid is paid in full. When in this time frame, the requirements needed for the GBER have changed or are lost, the exemption power of the GBER is no longer applicable. This results from the analog transferal of the established case law of the timing of Art. 108 TFEU and the fact that the aid under the GBER is not an existing aid. Because the aid is usually not paid in full but in installments,[309] it can be argued that the aid becomes illegal, at that point in time, when the requirements are lost or changed. Before that, they are fulfilled at every installment. Furthermore, it can be argued that the mere meaning of the SME definition is fulfilled until the loss of the SME status. However, the case-by-case analysis of the Commission and the ECJ can be applied to prevent fraudulent and circumstantial behavior. [310]

This solution would mean various outcomes for the different settings: A SME aid needs to be suspended and notified, when the SME status changes, because it is an unlawful or misuse of aid at this moment and these types of aid have to be suspended or recovered according to Art. 13 (1), Art. 16 (1) and Art. 20 of Regulation (EU) 2015/1589.[311] When an aid recipient gets, besides his/her normal aid, an SME supplement, this supplement would have to be suspended as well. The determination

[309] Knott/von Donat, “Is state aid to start-ups and SMEs becoming illegal if the company is sold?”, (Revista de direito commercial, 31.02.2021),pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 02.01.2025.
[309] Recital 40 of the GBER; D, I, pp. 45-47.
[310] ECJ, Judgement of the Court of 22.04.2016 , C-369/16, “Ireland and Aughinish Alumina Ltd v Commission”, para. 201; General Court, Judgement of the Court of, T-50/06, “RENV II”.
General Court, Judgement of the Court of 21.09.2022, T-95/21, „Portugal v Commission“; ECJ, Judgement of the Court of 29.04.2004, C 91/01, „SolarTech“; ECJ, Judgement of the Court of 27.02.2014, C 110/13, „HaTeFo“; Commission Decision of 15.01.2002, 2002/458/EG, „ Klausner Nordic Timber GmbH&Co.KG”; Kainer in: Immenga/Mestmäcker, Wettbewerbsrechts, Vol. 5, 2, X, C, (6. Ed. 2022), paras. 23-25.
[311] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.

of the loss of the SME status could be considered easier, when two companies merge together. It could be problematic in these cases, when the enterprises just grow (through the aid) and the aid is granted for a longer period, because, as mentioned above, the growth of an enterprise becomes only relevant after two years.[312] In these constellations, cases-by-case analyses should be applied, to assess if the meaning of the SME definition and the aid are met. This approach should also be applied, in these cases, when enterprises considered on their own fall below the SME thresholds, but exceed the SME thresholds when merged together, because these particular mergers have the same dynamic like a mere growth of the enterprise and are therefore comparable.

However, one could argue that this solution would violate the "principle of legitimate expectations"[313], when an originally legal aid becomes later on but during the aid granting period illegal. The ECJ held in its established case law, also regarding state aid, that this principle only applies when the European agencies have given clear and unambiguous assurances towards this activity.[314] In the GBER, a clear and unambiguous assurance by the European agencies cannot be seen, because the requirements have to be met and the aid is granted by national authorities individually. Usually, the European agencies are not involved in the granting of aid under the GBER, which is the goal of the GBER.[315]

On the basis of this solution, the second question of this thesis, "Becomes a granted aid, which is exempt through the GBER, illegal when the SMU status during the granted period is lost?" should be answered with "yes, but only from the time of the loss".
While this thesis has provided an academic solution for this problem, the practical uncertainty for practitioners like enterprises or aid grant agencies remains unchanged until the Commission or the ECJ has decided on this matter.

[312] European Commission, "User guide to the SME Definition", (2020), p. 14.
[313] ECJ, Judgement of the Court of 13.06.2013, C-630/11, "Regione autonoma della Sardegna et. Al v. European Commission".
[314] ECJ, Judgement of the Court of 13.06.2013, C-630/11, „Regione autonoma della Sardegna et. Al v. European Commission", paras. 131-137.
[315] Knott/von Donat, "Is state aid to start-ups and SMEs becoming illegal if the company is sold?", (Revista de direito commercial, 31.02.2021),pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 02.01.2025.

2. German Law

In Germany, individual aid is granted by an administrative act.[316] § 35 VwVfG defines an administrative act as “any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect”[317].[318] § 35 VwVfG does not state a direct timing for the existence or duration of the conditions and requirements, however, it is the general understanding of § 35 VwVfG and § 43 VwVfG that the legal situation and facts are important and relevant at the time of the issuing of the administrative act. A change of the facts, requirements, or legal situation usually doesn´t matter after that time because the agencies base their decision for an administrative act on the facts laid before them at that moment.[319] However, that is only the case, when the administrative act is a permanent one. For the permanent administrative acts, the time frame but not the exact timing is relevant. For example, a permit like the driver's license is a permanent administrative act.[320] Although the aid is usually paid in installments, the entitlement of the act arises at the time of issuing the administrative act. The mere payment of the aid is not an administrative act at all.[321] Therefore, an aid grant notice is not a permanent administrative act. Changes after the time of granting are usually not relevant.[322]

[316] Worms/ Figuccio, „Überbrückungshilfen&Co. Als staatliche Billigkeitsleistung“, (NJW, Issue 17, 2024), p. 113; Uwe Kischel in: Beck`scher Online-Kommentar, Grundgesetz, Art. 3, (58. Ed. 05.06.2024), paras. 112, 113, beck-online; Knott/von Donat, “Is state aid to start-ups and SMEs becoming illegal if the company is sold?”, (Revista de direito commercial, 31.02.2021),pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 02.01.2025; C, II, 3.

[317] English version of § 35 VwVfG: https://www.bmi.bund.de/SharedDocs/downloads/EN/gesetztestexte/VwVfg_en.pdf?__blob=publicationFile&v=1, accessed 03.01.2025.

[318] § 35 VwVfG.

[319] Knauff in: Schoch/Schneider, Verwaltungsrecht, § 35, (5.Ed., Juli 2024), para. 177; Rennert, „Der maßgebliche Zeitpunkt der richterlichen Verwaltungskontrolle und die Funktion der Verwaltungsgerichtsbarkeit“, (Vortrag beim Deutschen Anwalts-Institut e.V. (DAI), 25.01.2019, Leipzig), https://www.bverwg.de/medien/pdf/rede_20190126.pdf, accessed 03.01.2025.

[320] Riese in: Schoch/Schneider, Verwaltungsrecht, § 113 VwGO, (45.Ed., Januar 2024), paras. 264, 265; Knauff in: Schoch/Schneider, Verwaltungsrecht, § 35, (5.Ed., Juli 2024), para. 177

[321] Gmeiner, „Leistungserbringung als Verwaltungsakt“, (ZVR-Online, Dok. 9/2019, 30.12.2019), paras. 6-9, 21, https://www.zvr-online.com/archiv/2019/ausgabe-3/2019-dezember/robert-gmeiner-leistungserbringung-als-verwaltungsakt, 03.01.2025.

[322] Knott/von Donat, “Is state aid to start-ups and SMEs becoming illegal if the company is sold?”, (Revista de direito commercial, 31.02.2021),pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 02.01.2025

However, the granting authority can withdraw an unlawful administrative act[323] or revoke a lawful administrative act[324]. Consequentially for the determination of an unlawful administrative act the time of the grant is relevant.[325]
Because the SME status is lost after the granting, the administrative act is not unlawful. This assessment would differ if the aid was granted under fraudulent and circumstantial behavior of the aid recipient at the time of the granting. Under these circumstances, a withdrawal of the aid could be possible.[326]

A lawful administrative act which provides a continuing payment can be revoked, when the "payment is rendered, it is not put to use, or is not put to use either without undue delay or for the purpose for which it was intended in the administrative act"[327] or "if the administrative act had an obligation attached to it which the beneficiary either fails to satisfy or does not satisfy within the stipulated period"[328].

As described above, the intended purpose of the SME status is failed or not archived, when the SME status is lost, because bigger or combined enterprises are more likely to overcome the unique issues of market failure and structural barriers, when they are facing these issues together or they do not occur at all.[329] In the meaning of § 49 (3 (1)) VwVfG, the SME status of the aid recipient needs to be the purpose of the aid. This could only be the case when the aid is especially granted as an SME aid. The existence of the SME status needed to be especially stated in the grant notice. Even if this is the case, the principle of protection of legitimate expectation could be infringed, because the aid recipient trusted the legitimacy of the aid grant notice.[330]

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[323] § 48 VwVfG.
[324] § 49 VwVfG.
[325] § 48 (2) VwVfG.
[326] § 48 (2 (1,2)) VwVfG; Knott/von Donat, "Is state aid to start-ups and SMEs becoming illegal if the company is sold?", (Revista de direito commercial, 31.02.2021),pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 02.01.2025
[327] English version of § 49 (3 (1)) VwVfG: https://www.bmi.bund.de/SharedDocs/downloads/EN/gesetztestexte/VwVfg_en.pdf?__blob=publicationFile&v=1, accessed 03.01.2025.
[328] Englisch version of § 49 (3 (2)) VwVfG: https://www.bmi.bund.de/SharedDocs/downloads/EN/gesetztestexte/VwVfg_en.pdf?__blob=publicationFile&v=1, accessed 03.01.2025.
[329] D, III, 1, pp. 50-59.
[330] Knott/von Donat, "Is state aid to start-ups and SMEs becoming illegal if the company is sold?", (Revista de direito commercial, 31.02.2021),pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 02.01.2025.

In the other constellation, the SME supplement, the main reason for an aid is not the SME status.[331] § 49 (3 (1)) VwVfG is therefore not applicable. Usually, the SME status is not attached as an obligation to the administrative act. Therefore § 49 (3 (2)) VwVfG is not applicable as well.[332]

Nevertheless, the ECJ already ruled in a German case "Aclan"[333] that the national law cannot hinder the recovery of an unlawful aid and therefore has to be interpreted accordingly. It held that the hindering provision, which violates EU law, is therefore incompatible with the internal market.[334] The Federal Administrative Court of Germany followed the ruling and suspended and interpreted the hindering provisions of § 48 VwVfG in the particular case. It also denied the aid recipient the principle of protection of legitimate expectation. The aid recipient cannot claim that principle, because the aid is unlawful and therefore infringes EU law. This is not protected by the principle of protection of legitimate expectation. Furthermore, the Court also found no transgression of the ECJ in infringing the German law by issuing the earlier judgement.[335] The Federal Constitutional Court of Germany confirmed the judgement of the Federal Administrative Court and the ECJ. The court could not find infringements of the German constitution and the individual fundamental rights of the aid recipient.[336] From these different rulings, it can be extracted that unlawful aid, which automatically infringes European state aid law, can be recovered under German administrative law. §§ 48, 49 VwVfG have to be interpreted accordingly.

As explained above, after the loss of the SME status, the aid has to be terminated. According to the just stated case law, the aid grant notice has to be revoked in the meaning of § 49 VwVfG for the remaining aid.

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[331] D, III, 1, pp. 50-59.
[332] Knott/von Donat, "Is state aid to start-ups and SMEs becoming illegal if the company is sold?", (Revista de direito commercial, 31.02.2021),pp. 121 -152, https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/60169639f444774bdfc92812/1612092985944/2021-03+-+0121-0152.pdf, accessed 02.01.2025.
[333] ECJ, Judgement of the Court of 20.03.1997, C-24/95, "Aclan"; Federal Administrative Court of Germany, Bundesverwaltungsgericht, Judgement of the Court of 23.04.1998, 3 C 15/97, „Aclan"; Federal Constitutional Court of Germany, Bundesverfassungsgericht, Judgement of the Court of 17.02.2000, 2 BvR 1210/98, "Aclan".
[334] ECJ, Judgement of the Court of 20.03.1997, C-24/95, "Aclan".
[335] Federal Administrative Court of Germany, Bundesverwaltungsgericht, Judgement of the Court of 23.04.1998, 3 C 15/97, „Aclan".
[336] Federal Constitutional Court of Germany, Bundesverfassungsgericht, Judgement of the Court of 17.02.2000, 2 BvR 1210/98, "Aclan".

The third question of this thesis, “How is the situation of losing the SME status based on German administrative law, especially in light of possible recovery?” can therefore be answered as well: When the SME status is based on European state aid law, German administrative law aligns with the European state aid law.

E. Overall Conclusion

This thesis answers the question using a systematic approach to European state aid law.:

1) What differences occur in the SME definition between EU and German law?

The main differences are systematic in nature, while German law has an individual approach for the SME definition and the requirements for the SME definition, which considers the unique regulatory structure, goals and meaning of each code, provision and law, the SME definition of EU law fulfils its own purpose by supporting SMEs in the EU. Therefore, it is universally applicable and very broad.

2) Does a granted aid, which is exempt through the GBER, become illegal when the SME status during the granted period is lost?

To answer the question, an analysis of European state aid law, especially the handling of this problem in light of Art. 108 TFEU, the assessment of the structure and nature of the GBER and the meaning and purpose of the SME definition was necessary. This approach helped to determine the timing and the duration of the conditions and requirements. A solution for this problem was developed, which would mean various outcomes for the different settings: an SME aid needs to be suspended, when the SME status changes. When an aid recipient gets an SME supplement besides his/her normal aid, this supplement would have to be stopped as well. The determination of the loss of the SME status could be considered easier or simpler for these cases, when two companies merge together. It could be problematic in these cases, when the

enterprises just grow (through the aid) or merged enterprise only together exceed the thresholds and the aid is granted for a longer period, because, as mentioned above, the growth of an enterprise becomes only relevant after two years. In these cases, a case-by-case analysis should be applied to assess whether the meaning of the SME definition and the aid are met. Through this systematic approach and development of the solution, this thesis came to the answer yes, but only at the time of the loss of the SME status.

3) How is the situation of losing the SME status based on German administrative law, especially in light of possible recovery?

German law has to be interpreted within the meaning of European Law, when there is a conflict of laws. Therefore, the result is the same, when the SME status is lost under European state aid law. However, when just national law is applicable, the relevant timing is the issuing of the administrative act.

SMEs under the GBER are a vital part of European state aid law, this thesis has shown that. Both have their own special purposes. While the GBER's goal is to simply and standardize the exemption of smaller aid, the SME definition fulfils its duties as a universally applicable common definition in order to support SMEs Europe-wide, which are the backbone of the EU. Both the SME definition and the GBER support each other by determining and applying state aid, because the GBER by applying the SME definition recognizes the difficulties SMEs are facing and enables the possibilities to achieve aid through the GBER.

That is what the GBER and the SME have in common, a common, standardized and universally applicable approach in order to achieve a simple, but effective support for SMEs, in order to maintain the competition in the internal market.

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