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Governing the Interregnum: State Aid rules and the COVID-19 Crisis*

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ABSTRACT: This article focuses on the transformations in the area of State aid control prompted by the COVID-19 pandemic and provides a first assessment on the European Commission Temporary Framework on State aid measures to support the economy. It discusses whether the measures adopted have been effective and have managed to guarantee Member States the possibility to take action as to ensure small undertakings affected by COVID 19 long-term liquidity and to preserve fair competition in what regards State aid rules control.

KEYWORDS: COVID-19 Temporary Framework, compatibility of State aid measures, direct grants, State guarantees, recapitalization

1. The COVID-19 Crisis

The COVID-19 pandemic has been a global tragedy of unprecedented scale, the gravest health crisis of our time. Yet, as with any other crisis, it cannot be considered an isolated and static event, but as a process born and developed on the basis of previous weaknesses and contradictions. Its effects will be long-lasting and will involve painful transformations that will not necessarily lead to positive outcomes. Antonio Gramsci, writing about the crisis of the liberal Italian State, famously wrote that "the crisis consists precisely in the fact that the old is dying and the new cannot be

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born; in this interregnum a great variety of morbid symptoms appear".[1] Presently, we are again in a moment of interregnum between the old and the new, whatever this may be. Morbid symptoms appear everywhere: borders are being raised again, and governments around the world are imposing more and more trade controls. Some of them are frankly repugnant measures, such as restrictions on imports of medical protective equipment. Bitter divisions and frictions have resurfaced, such as the North v. the South and the West v. the East.

As for the European Union, it is almost a given that the EU struggles with handling crises. If one looks at the 2008 financial crisis and the refugee crisis, EU's track record indicates difficulty in formulating a coordinated response. However, after some hesitation, the EU has, albeit gradually, accepted the burden of dealing with such an unprecedented health crisis in a much more orderly fashion than some of its Member States and deserves credit for attempting to come up with practical solutions. It is exactly in this precise moment that the European Union has the responsibility of governing in these difficult times. This being said, the aim of this article is to focus on the measures and policies adopted on the basis of pre-existing tools and to analyse how they have been deployed. In particular, it will focus on the changes in State aid control, a field of EU supranational competence *par excellence* immediately "called into action" for the very obvious reason that the COVID-19 crisis has had *instant* economic repercussions on virtually all economic sectors, thus requiring *instant* financial support from several, if not all EU Members States (plus the UK, of course). Crises are not just a time for emergency management, but a time to understand whether pre-existing rules, principles and regulations are enough or if new innovative solutions should be adopted. State aid control, in this context, must deal with the *interregnum*, whilst the *regnum* itself may need further inventive and bold solutions.

2. The economic impact of COVID-19

It is important to pause for a moment to dissect more in depth what exactly are the specific economic repercussions of the COVID-19 pandemic, which sectors have been most affected and what evidence has been collected so

[1] Antonio Gramsci, *Selections from the prison notebooks* (New York: International Publishers, 1971), 276. I am indebted to Milan Babic, "Let's talk about the interregnum: Gramsci and the crisis of the liberal world order", *International Affairs* 96, no. 3 (2020): 767, which has provided much food for thought.

far. In short, it is imperative that the need to support national economies is not simply taken for granted, but fully justified, and that the "legal" response to the pandemic is analysed in what respects its adequacy to the situation. As for the immediate, although it may be a bit too early to predict precise quantitative estimates, researchers are relying on a variety of high frequency indicators to measure the damage that several weeks of lockdown have caused on general economic activities. For instance, electricity consumption during lockdown in Europe was around 5% lower than in early March of 2019, and the drop accelerated to 15% during mid-April 2020.[2] According to this study, a 1% drop in electricity usage is associated with 1.3% to 1.9% lower output in real economy, which is an enormous figure for a relatively short period. There are also some specificities that must be taken into account: firstly, the globalization of the pandemic; secondly, the lack of plausible comparators; and, thirdly, the different waves and their effects. Virtually, no geographical areas have been spared, making the management of international supply-chains exceedingly complex and causing a generalized drop in the international trade flow. According to a WTO estimate, trade is expected to fall between 13% and 32% as a result of COVID-19.[3] As for possible comparators[4], although some similarities can be drawn with the 2008 financial crisis, there are notable differences. The 2008 financial crisis, despite its significance, had symmetrical effects on financial markets and spread much later to the real economy, whereas the impact of COVID-19 has been brutal in wiping off certain markets immediately and without warning. Whilst, during the financial crisis, central banks and other monetary institutions were at least able to address the primary source of the shock – the cracks in the financial market and the demand crisis – those institutions can hardly implement the same measures with comparable effects in relation to the shock caused by COVID-19

[2] S. Chen et al, "Tracking the economic impact of COVID-19 and mitigation policies in Europe and the United States", *IMF Special Series on COVID-19*, 2020, https://www.imf.org/en/Publications/WP/Issues/2020/07/10/Tracking-the-Economic-Impact-of-COVID-19-and-Mitigation-Policies-in-Europe-and-the-United-49553.

[3] WTO Director General, "Trade forecast press conference", *World Trade Organization*, 2020, https://www.wto.org/english/news_e/spra_e/spra303_e.htm.

[4] Possible comparisons with the Spanish Flu are certainly useful, but the political, social and economic context were in my view too different. See Robert Barro, José F. Ursua, and Joanna Weng, "The Coronavirus and the Great Influenza Epidemic – Lessons from the 'Spanish Flu' for the Coronavirus's potential effects on mortality and economic activity", *CESifo Working Paper Series*, no. 8166 (2020).

on the real economy.[5] Further variables within such asymmetry can also be detected as the economic effects of the pandemic varied according to the different "phases" of the response to COVID-19. The first phase of the pandemic impacted on demand response (essential goods up, services down), on specific sectors, such a hospitality and events, and on the size of companies.[6] Yet, the second phase – cohabitation with the virus – will have long-term repercussions, namely lower production, aggregate supply slump, a significant decrease in aggregate demand, and possible generalised stagnation.[7] Projections forecast a staggering contraction of economic activity in the EU of 5% to 10% and potentially even higher in case of a second wave of the pandemic.[8]

3. State Aid and the COVID-19 crisis

Coronanomics effects[9] should not be underestimated. However, COVID-19 should not simply be relegated to the somehow comforting notion of *black swan*, as it is much more useful to consider it as "as a distinct phase of instability and uncertainty and not only as a transition between two stable periods".[10] Public spending measures adopted by Member States cannot, therefore, be seen as mere "medical urgency". They must be placed within a wider economic cadre. After a rapid chronological exposé of the new measures adopted by the EU in the field of State aid law, an attempt will be made to discuss the specific new rules in such a wider context.

3.1. A new but temporary Framework: a short chronology

On March 13th (possibly two weeks too late), the President of the European Commission, von der Leyen, declared "we will do whatever is necessary to

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[5] See Jon Danielsson et al., "The coronavirus crisis is no 2008", *VoxEU CEPR*, 2020, https://voxeu.org/article/coronavirus-crisis-no-2008.

[6] Louis-Philippe Béland, Abel Brodeur and Taylor Wright, "The short-term economic consequences of COVID-19: Exposure to disease, remote work and government response", *IZA Institute of Labor Economics, Discussion Paper Series*, no. 13159, 2020, http://ftp.iza.org/dp13159.pdf.

[7] Suborna Barua, "Understanding Coronanomics: The economic implications of the coronavirus (COVID-19) pandemic", *MPRA Paper*, no. 99693, 2020, https://mpra.ub.uni-muenchen.de/99693/. See also the various contributions in Richard Baldwin and Beatrice Weder di Mauro, *Mitigating the COVID Economic Crisis: Act Fast and Do Whatever It Takes* (London: CEPR Press, 2020).

[8] See, for instance, https://www.oecd.org/economic-outlook/.

[9] Martin S. Eichenbaum, Sergio Rebelo and Mathias Trabandt, "The macroeconomics of epidemics", *NBER Working Papers*, no. 26882, 2020, https://www.nber.org/papers/w26882.pdf.

[10] Babic, "Let's talk about", 769.

support the Europeans and the European economy".[11] A long list of new initiatives was disclosed, the first of which being the announcement of new flexible rules on State aid. A few days later, on March 16th, Competition Commissioner Vestager sent Member States a draft proposal for a State Aid Temporary Framework to support the economy in the context of the COVID-19 outbreak, and declared "EU State aid rules provide a toolbox for Member States to take swift and effective action. We have two common goals: First, that businesses have the liquidity to keep operating, or to put a temporary freeze on their activities, if need be, and that support reaches the businesses that need it. Second, that support for businesses in one Member State does not undermine the unity that Europe needs, especially during a crisis. With this in mind, the Commission will enable Member States to use the full flexibility foreseen under State aid rules to tackle this unprecedented situation".[12] On March 19th, the Commission duly adopted what would be the first version of the Communication of a Temporary Framework.[13] The TF acknowledged the need for Member States to act swiftly, while concurrently laying down the available options in terms of compatibility of State support measures with EU law. "Temporary" refers to the time limit of the TF, which will last until the end of 2020. The first version of the TF was mainly devoted to ensuring that sufficient liquidity remained available to businesses of all types and to preserving the continuity of economic activity during and after the COVID-19 outbreak. On April 4th, a first amendment was introduced to enable Member States to do everything possible to support the research, testing and production of coronavirus-relevant products.[14] On May 13th, a second amendment was agreed.[15] This one contained rather new substantive provisions, as it dealt with possible long-term repercussions by allowing Member States to proceed with recapitalisations and subordinated debt to companies in

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[11] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_459.

[12] "Statement by executive vice-president Vestager on a draft proposal for a State aid Temporary Framework to support the economy in the context of the COVID-19 outbreak", Brussels, 17 March 2020 at https://ec.europa.eu/commission/presscorner/detail/en/Statement_20_479.

[13] Temporary Framework to support the economy in the context of the coronavirus outbreak (OJ C 91I, 20.3.2020, pp. 1-9) TF. Thereafter "TF". References in this script are based on the consolidated version of the Temporary Framework as amended on 3 April 2020, 8 May and 29 June 2020.

[14] Communication from the Commission "Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak", 2020/C 112 I/01 C/2020/2215 (OJ C 112I, 4.4.2020, pp. 1-9).

[15] Second amendment to the Temporary Framework to support the economy in the context of the coronavirus outbreak (OJ C 164, 13.5.2020, pp. 3-15).

need. Finally, on June 29th, the Commission adopted a third amendment excluding micro and start-up companies (undertakings with less than 50 employees and less than €10 million of annual turnover and/or annual balance sheet total) from the TF's scope of application.[16] Together with a dedicated phone number, e-mail address, an *ad hoc* template notification form (all can be done in English!) and a series of Commission orientations in the field of transport and tourism,[17] the final Temporary Framework has provided –for the time being – the framework (pun intended) for the approval of over 190 State aid measures.[18]

The whole "enterprise" took around two months, these being the months in which Member States were worst hit. Considering that the nationalization of Northern Rock occurred on February 22nd, 2008 and the European Commission adopted its first attempt to deal with the ensuing financial crisis in January 2009,[19]on this occasion the Commission acted considerably quicker. To recap, the Temporary Framework is based on the following postulates: a) COVID-19, besides being a major public health emergency, also represents *a major shock to both the global and the Union's economies.* b) Unlike any other past crises, the COVID-19 pandemic is having an impact on every single sector of the economy, from transport to SMEs, to retail, banking and so on. c) The money to support the economy at this stage will have to come mostly from the pockets of national governments. Thus, if *a*, *b*, and *c* stand as true, then State aid rules will have to be adapted to the unfolding reality, thus guaranteeing a quick and efficient procedure for State aid control. d) The need for a coordinated effort to make the measures adopted more effective and foster a quicker recovery still remains. The Framework therefore addresses an extensive range of possible State interventions: from sector-specific support, to more general measures to incentivise the flow of liquidity, access to credit, and recapitalization of affected undertakings. Finally, the Framework also emphasizes that this

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[16] Communication from the Commission Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, 2020/C 218/03 C/2020/4509 OJ C 218, 2.7.2020, pp. 3-8.

[17] For the complete list, see https://ec.europa.eu/competition/State_aid/what_is_new/covid_19.html.

[18] For the update list of Commission decisions, see https://ec.europa.eu/competition/State_aid/what_is_new/State_aid_decisions_TF_and_107_2b_107_3b_107_3c.pdf.

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

is not the time for a harmful subsidies race. In the Commission's view, a coordinated and proportionate application of State aid rules could be vital in preserving at least some level of European solidarity.

3.2. The Temporary Framework and the EU system of State aid control

EU's system of State aid control is essentially based on an *interdicire first and absolvere then* process: Article 107(1) TFEU provides for a general prohibition imposed on Member States. It States: "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market". Article 107(2) contains a series of grounds that automatically render the aid compatible with EU law, while paragraph (3) lists a series of additional grounds in which aid would be compatible. Consequently, it is possible for Member States to show that measures involving selective financial support are fully justified in pursuance of the general interest. In its Article 108, the Treaty transfers the decision on aid measures' compatibility to a supranational referee, namely the European Commission. One especially important facet of State aid control is that it is of course mainly *procedural*. Under Article 108 TFEU, Member States are under the obligation to notify the Commission of any new planned aid and enter into negotiations to secure its approval. The initial step is akin to pre-trial discovery when facts, documents, and depositions need to be disclosed.[20] This phase should enable the Commission to accurately assess whether the conditions laid down in the Treaty have been met and then to "absolve" the Member State in question. In the Commission's decisional practice jargon, the Member State has to go through several hoops, which include showing that the aid is aimed at making a material improvement that the market alone is unable to deliver, there being a logical connection between the provision of aid and a change in the behaviour of the undertaking that receives the aid. Member States are also required to display that the measure will bring about the outcome the aid is intended to achieve, that the aid is limited to the minimum

[20] Even in those cases where notification is not required, Member States are still expected to be as transparent as possible. Member States are now required to publish all individual awards of aid that exceed EUR 0.5 million. See Commission Regulation (EU) No. 651/2014 (GBER) of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 TFEU, OJ L 187, 26.6.2014, pp. 1-78.

necessary to achieve the outcome and, lastly, that it is intended to pursue a "common European goal". The COVID-19 pandemic is inevitably testing such a system, as it pressures the Commission to decide quickly and with as few objections as possible. It is, however, rather curious to read slightly empathic reactions labelling the TF as an entire suspension of State aid control. There are two basic elements to take into account to counteract such a claim. First, the TF is called "temporary" for a reason – its application has the deadline (although it can be extended) of December 31st, 2020. Secondly, the differentiated application of State aid rules when dealing with emergencies is explicitly addressed within the founding Treaty itself in at least three provisions: 1) Article 107 (2)(b) requires *de jure* the European Commission to declare aid "to make good the damage caused by natural disasters or exceptional occurrences". 2) Article 107 (3) allows the Commission to authorise aid to remedy a serious disturbance in the economy of a Member State. Finally, Article 108 (2) provides that, on application by a Member State, the Council may *decide that aid can be considered to be compatible with the internal market* in derogation from the provisions of Article 107 *if such a decision is justified by exceptional circumstances.* These articles of the Treaty are there to help and support single Member States. Yet, to paraphrase AG Wahl's Opinion delivered with reference to the banking crisis, recourse to the Treaty's emergency-related legal basis "seems even more justified because several Member States were affected by a serious disturbance of their economy, which derived, to different degrees, from a global crisis".[21] It is not surprising that the Temporary Framework is based on Article 107(2)(b) and Article 107(3)(b), with its provisions relating to an exceptional event and aimed at governing such a phase, whilst the "ordinary" State aid rules continue to apply.[22] The excep-

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[21] Judgment of 30 September 2016, *Tadej Kotnik and Others v. Državni zbor Republike Slovenije*, C-526/14ECLI: EU: C: 2016:102, para. 33. On the meaning of serious disturbance, see also T-132/96 and T143/96, *Freistaat Sachsen and Others v. Commission* EU:T:1999:326, paragraph 167; upheld on appeal (Judgment of 30 September 2003, *Freistaat Sachsen (C-57/00 P) and Volkswagen AG and Volkswagen Sachsen GmbH (C-61/00 P) v. Commission of the European Communities*, C-57/00 P and C-61-00 P, EU:C:2003:510, paras 97 and 98. As for Commission practice see Commission Decision, *Northern Rock*, Case NN 70/07, OJ C 43, 16 February 2008, p. 1, Commission Decision, *Rescue aid to Risikoabschirmung WestLB*, Case NN 25/08, OJ C 189, 26 July 2008, p. 3.

[22] For instance, as specifically provided for by the TF (paragraph 14), it is still be possible for Member States to notify the Commission about "*aid schemes to meet acute liquidity needs and support undertakings facing financial difficulties*" under Article 107 (3)(c), that is, about "*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*". The

tional character of the TF is evidenced by the frequent references to the fact that "the outbreak poses the risk of a serious downturn affecting the whole economy of the EU, hitting businesses, jobs and households"[23] and by the extremely broad definition of the reasons why State interventions in the form of recapitalization are in the EU's common interest.[24] As discussed above, these assumptions are unfortunately proving to be correct. Still, this may arguably be a slightly naïve reconstruction, as the TF is yet another instrument of Commission soft law which did not go through the institutional and democratic guarantees of a legislative process. Thus, its content and provisions are exposed to the "traditional" concerns in terms of legitimacy, transparency and accountability other soft law instruments face. Furthermore, it has been noted that, especially regarding State aid law, soft law is generally issued following robust consultations. However, the scarce information contained within the Commission's press releases makes it difficult to appreciate how much, in this instance, Member States were involved.[25] Although these criticisms are well founded, it is also true that once again the adoption of the TF is predicated on the need to react to a real emergency, and, whilst some of the provisions contained in the TF can and must be criticized, the flexible adaptability that soft law instruments can guarantee seems to me to be essential. However, two principles questions must be tackled. Firstly, the pressure to authorise State measures as quickly as possible may actually prevent the Commission from having enough time for a proper scrutiny and, secondly, by regulating *softly* today for emergency times, the effects of the new rules may "*harden*" later and produce lasting effects well beyond the context of a crisis.

Commission has so far authorised various schemes in nine different Member States under such a legal base.

[23] TF, paragraph 9.

[24] TF, paragraph 49(b). This is a point rightly noted by Massimo Merola, "Aiuti di stato e Covid 19 – webinar session", *Associazione Italiana Antitrust*, June 2020, https://www.associazioneantitrustitaliana.it/attivita/webinar/aiuti-di-stato-ai-tempi-del-coronavirus-parte-2-il-temporary-framework-della-commissione-europea-e-le-ricapitalizzazioni-in-equity/.

[25] Oana Stefan, "COVID-19 soft law: Voluminous, effective, legitimate? A research agenda", *European Papers* 5, no. 1 (2020).

4. Governing the pandemic: the four pillars of the TF

The TF is trying to govern the pandemic response process in four ways. First, it is founded on the multi-level economic model on which the EU is based upon, and reaffirms the national and supranational co-participation with regard to the allocation of spending powers. Secondly, it aims to regulate the economic repercussions in terms of short term liquidity. Thirdly, it considers the terms of long-term viability of the European economy. Lastly, it attempts to steer State spending decisions towards the attainment of virtuous policies.

4.1 Not everything is a State aid

The EU has no specific competence to regulate healthcare. Article 168 TFEU specifically details that the responsibility for organizing and delivering health services and medical care is under the authority of each Member State. EU health policy therefore serves to complement national policies. Within the context of State aid, although with some uncertainties, it is now widely accepted that it is MS's duty to provide solidarity concerning healthcare towards its citizens in need[26] and the predominantly non-economic character of healthcare services.[27] The public health rationale resurfaces in the Commission's decisions to approve COVID-19 State support measures. In several of them, the Commission has specifically declared that any financial support from national funds granted to health services or other public services to tackle the coronavirus situation falls outside the scope of State aid control, thus strongly reaffirming the non-economic character of health services. State aid does not apply to any State activity, nor does it prohibit MS from adopting economic measures (and it does not even require governments to "spend"). Horizontal expenditures (those applicable across the economic sectors) are not caught by State aid control, as they are deemed not to be anti-competitive *per se*. The TF acts as a "reminder" that national measures taken in response to COVID-19 are not caught by State aid rules.[28] The Irish government, for instance, introduced

[26] Judgment of 11 July 2006, *Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission of the European Communities*, C-205/03 P, ECLI:EU:C:2006:453, paragraphs 25 to 28 and Judgment of 11 June 2020, *European Commission and Slovak Republic v. Dôvera zdravotná poisťovňa, a.s.*, C262/18 P and C271/18 P, ECLI: EU:C:2020:450.

[27] See Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU C/2016/2946 OJ C 262, 19.7.2016, pp. 1-50, paragraph 2.4 and SA.39913 concerning compensation of public hospitals in the region of Lazio in Italy, 4.12.2017 C (2017) 7973 final.

[28] The De Minimis Regulation no. 1407/2013 is of course also applicable in this context.

new measures to provide financial support to workers affected by the COVID-19 crisis. The scheme is activated directly by employers through the payroll system (Temporary Wage Subsidy Scheme)[29] and is aimed at keeping employees "on the books" until business picks up again after the crisis. It is available to all employers whose business activities are being adversely impacted by the COVID-19 pandemic. Modifications to the initial scheme have widened its scope as to include, for instance, apprentices and training programmes. These policy choices — even the most socially innovative — are completely "indifferent" from the perspective of EU State aid law, and Member States are entirely free to pursue them. Any measures restricted to certain sectors, regions or types of undertakings involve an element of aid, as they are inherently selective.[30]

4.2 Damages must be compensated

Not surprisingly, the very first measures notified under the TF concerned a scheme devised by Denmark to compensate organizers for damages suffered due to the cancellation of events with more than 1,000 participants. The Commission, in less than 24 hours, authorized them.[31] The first options made available to Member States by the TF rely on Article 107 (2)(b), which provides that aid to rectify the damage caused by natural disasters or exceptional occurrences is *de jure* compatible with EU law. The COVID-19 outbreak, according to the Commission, qualifies *as an exceptional occurrence, as it is an extraordinary, unforeseeable event having a significant economic impact* and is not caused by a natural disaster. This is, in all likelihood, substantially correct, but it also has legal implications, as measures adopted to compensate for damage caused by natural disasters are now largely exempted from notification under Article 50 of the GBER.[32] The Commission's role under Article 107(2)(b) is essentially to verify that certain conditions are satisfied, namely that the damage for which the compensation is granted is a direct consequence of the natural

[29] See, for further details: https://www.revenue.ie/en/corporate/communications/covid19/temporary-covid-19-wage-subsidy-scheme.aspx.

[30] TF, paragraph 3.9.

[31] SA.56685. As for the 27th of June, 19 measure were notified and approved by the Commission – in my view, a rather surprisingly small number – and one may wonder whether the extreme flexibility granted under the other options did not simply 'channel' Member States' notifications under those broader categories, albeit under this other option, the Commission's discretion to evaluate the soundness of member State is a mentioned is much more intense.

[32] Cit. above.

disaster. The aid cannot result in overcompensation for damage as well, and it is meant to solely rectify the damage caused by the natural disaster. These conditions still need to be proven by Member States, and not simply presumed. In the past, the Commission sanctioned any attempts by national governments to artificially widen the scope of compensation measures by applying them to damages not directly suffered as a result of the event in question.[33] Thus, it is for MS to provide a clear causal link between the aid and the subsequent occurring damage. Within the TF, the Commission found the causality chain satisfied in the case of €5.4 billion granted by Denmark, as this was restricted to companies that had suffered a decline in their revenues of more than 40 % as a result of the coronavirus outbreak from March 9th to June 9th 2020.[34] It may however not always be so straightforward to determine how and when certain damages have occurred. In this respect, the TF further specifies how COVID-19 related measures should be applied in relation to the Rescue and Restructuring Guidelines.[35] According to the Commission, the principle of "one time last time" which sets that rescue and restructuring aid can be granted only once over a period of 10 years does not apply to aid declared compatible under Article 107(2)(b) TFEU. This means that Member States can still compensate undertakings that have already received aid under the R&R Guidelines for the damages directly caused by the COVID-19 outbreak. The dividing line between the pre and post COVID-19 economic situation of an undertaking may be trickier to determine than expected. For instance, the green light given to a €550 million loan granted by Germany to regional charter airline Condor has been singled out as particularly problematic.[36] The damages sustained were caused by the cancellation or re-scheduling of airline flights as a result of the imposition of travel restrictions, but the peculiar aspect is that the Commission authorized, just last October, a €380 million rescue loan to Condor when it was affected but the collapse of the Thomas Cook Group, to which it belonged. As Stated by Condor, the second loan will be used to repay the previous one, so one can only speculate whether this measure is targeting specific damages suffered by the airline because of COVID-19 or if it is just a second tranche

[33] Aid to Italian Regions hit by natural disasters OJ L 43, 18/2/2016.

[34] SA.56774.

[35] Communication from the Commission – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty OJ C 249, 31.7.2014, pp. 1-28.

[36] SA.56867.

of the original loan.[37] The quantification of the damages has been postponed until after the end of the COVID-19 crisis and will be based on the airline's operating accounts for the year 2020, with a lower likelihood of rigorous checks on whether the measure did actually overcompensate the beneficiary.

4.3. Short Term Liquidity

Most of the Temporary Framework, however, is devoted to the possible use of Article 107(3)(b) TFEU, which makes aid "*to remedy a serious disturbance in the economy of a Member State*" compatible with EU law. The Communication makes it clear that a strict interpretation of any exceptional provision such as Article 107(3)(b) TFEU is necessary, and that only those measures which are appropriate and proportionate to remedy a serious disturbance in the economy of the Member State concerned will be deemed compatible. All measures are available to beneficiaries that were not in difficulty before the outbreak (December 31st 2019), although this time the reference benchmark is the one contained in Article 2(18) the GBER, not in the R&R Guidelines.[38] The Framework lists five types of aid deemed compatible:

Direct grants, selective tax advantages and advance payments – Member States will be able to set up schemes to grant up to €800,000 to a company to address its urgent liquidity needs.

State guarantees for loans taken by companies from banks – Member States will be able to provide State guarantees to ensure credit access.

Loans to companies – Member States will be able to grant loans with favourable interest rates to companies.

Short-term export credit insurance (known as STEC) for risks which are normally shouldered by private insurance companies, but which are temporarily unavailable in the market due the COVID-19 pandemic. This is a derogation from the rules applicable to STEC.

Measures to ensure that banks can continue to guarantee liquidity to the real economy. The Framework "transforms" such aid into aid directly

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[37] Media reports suggest that the new loan was also needed, as the contractually agreed new owner PGL (Polish Aviation Group) withdrew because of Covid-19.

[38] The two definitions are of course similar, whilst not identical, and the scope of application is also different. The R&R Guidelines are horizontally applicable to all sectors, whilst the GBER rules are delimited by the scope of the Regulation itself. There is no real explanation in the TF as to why a different reference point has been employed.

granted to banks' customers, not to the banks themselves, and provides some guidelines on how to ensure minimal distortion of competition between banks.

Apart from these *ex ante* general categories, it is possible for Member States to notify the Commission of "aid schemes to meet acute liquidity needs and support undertakings facing financial difficulties, also due to or aggravated by the COVID-19 outbreak".

All the types of measures are aimed at providing support in dealing with short-term repercussions.

4.4. Long-term Liquidity

As highlighted above, COVID-19 economic repercussions are likely to be long-term. Thus, in its second amendment, the TF allows Member States to notify the Commission of measures involving the recapitalization of undertakings in essentially all forms: pure equity forms (capital injections, new shares) and hybrid capital instruments (unsecured bonds, profit participation rights). Recapitalization, however, can only be granted to beneficiaries that were not in difficulty before the outbreak (December 31st 2020). Again, the benchmark for reference is the one contained in Article 2(18) of the GBER. Eligible companies must also be unable to find financing from the market on affordable terms. The TF – in line with the Commission's practice – lays down some basic principles, such as that recapitalization should be in the common interest, aid must not go beyond the minimum level as to restore the beneficiary's viability, and so on. If there is an aid exceeding €250 million, the Commission must be separately notified of this. The detailed rules provide mechanisms to ensure that the State shall receive appropriate remuneration for the investment – the closer the remuneration to market terms, the lower the potential competition distortion caused by State intervention. The TF also provides that the State will be incentivized to allow the beneficiary to return to normal market conditions. Each form of recapitalization is also subject to specific economic parameters designed to ensure that the intervention conforms to market criteria.[39]

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[39] For equity, injections by the State must be based on a price that does not exceed the average share price of the beneficiary over the 15 days preceding the request for the capital injection. If the company is not listed, an estimate of its market value should be established by an independent expert or by other proportionate means. Furthermore, any recapitalisation measure shall include a step-up

5. Haste v. Speed

Up until now, the Commission has received and approved 270 measures, most of them approved within 48 hours. According to the State Aid Hub website, Belgium, Czech Republic, Denmark, Italy and Poland have implemented 15 or more COVID-19 related measures, whilst the average number of measures per Member State is 9.6.[40] Impressive numbers! As mentioned, there is the risk that the necessity of a speedy process may result in excess haste. On March 20th, for instance, Germany notified the Commission of two measures for loans with subsidised interest rates for any type of undertakings requiring liquidity. The aid was to be granted either directly by KfW — the German State-owned development bank — or by other credit institutions. On March 22nd, the Commission approved the scheme.[41] Cynics may say that two days is not enough time to assess the full complexity of the German scheme. This is a fair point of concern. However, Germany carefully constructed the measures in the form of subsidised interest rates for loans, in line with the specific rules on applicable interest rates/duration/amounts laid down in the Framework. Furthermore, the Commission paid specific attention to rules intended to ensure that banks were only "conduits" to underlings, for instance, by defining maximum interest rates for the loan contracts between the credit institutions and the final beneficiaries. Even when confronted with so-called "umbrella schemes" – that is to say, very broad State schemes encompassing a variety of support measures – analysis and assessment by the Commission are still present[42], and nearly all the Commission's decisions are published on its website (with some notable exceptions), all being judicially reviewable. This is not to say that all decisions are going to prove correct, and there are already some puzzling decisions where few details have been released. Yet, despite the emergency, the basic tenets of the system of State aid control have been kept in place. Another major concern is ensuring that a framework devised to tackle an emergency does not develop into the new normal. Once again, contrary to the situation the Commission found itself in during the financial crisis, where it had to learn by error,[43] in my view,

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mechanism increasing the remuneration of the State to incentivise the beneficiary to buy back the State capital injections. TF, paragraphs 60 and 61.

[40] Update on TF at https://www.lexxion.eu/en/State-aid-blog/.

[41] SA.56714.

[42] See, for instance, SA 56841 (UK Umbrella Scheme).

[43] See *inter alia* Joana Gray, Francesco de Cecco, "Competition, stability and moral hazard: The tension between financial regulation and State aid control", in *Research Handbook on State Aid in*

the TF is very alert to the present problem at hand. Let us take two examples. As far as the State can guarantee, the TF logically attributes a crucial role to banks in the implementation of COVID-19 related measures, particularly by facilitating credit to SMEs — some of the worst affected types of businesses. It specifies, however, that aid granted by Member States, both under Article 107(2)(b) and (3)(b) TFEU, does not have the objective of preserving or restoring banks' viability, liquidity or solvency. It is difficult not to imagine that such a vast deployment of State guarantees will still benefit banks. However, the TF seems to imply that such indirect aid may have to be accepted. Consequently, such aid would not qualify as extraordinary public financial support under Directive 2014/59/EU (so called the BRRD),[44] and would therefore not be assessed under strict State aid rules, such as bail-in rules, for example, applicable to the banking sector.[45] Arguably, this seems correct as, for instance, even in the Notice on the notion of aid the Commission acknowledges that "a mere secondary economic effect (...) can be found where the aid is simply channelled through an undertaking (for example a financial intermediary) which passes it on in full to the aid beneficiary."[46] Still, the *quid pro quo* is that the Framework requires that "credit institutions or other financial institutions should, to the largest extent possible, pass on the advantages of the public guarantee or subsidised interest rates on loans to the final beneficiaries". Banks will therefore be under the obligation to show that they can effectively implement mechanisms to ensure that aid is passed on and, by failing that, strict aid to banks rules will be applicable. For instance, Spain guarantees operating loans according to maturity and size. The measures adopted also limit the risk by the State to a maximum of 80% for self-employed workers and SMEs, and of 70% for larger enterprises. This ensures that support is swiftly available

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the Banking Sector, ed. François-Charles Laprévote, Joanna Gray and Francesco de Cecco (United Kingdom: Edward Elgar Publishing, 2017), 20.

[44] OJ L 173, 12.06.2014 p. 190-348.

[45] Conversely, in case of the banks experiencing liquidity shortage, BRRD rules will continue to apply. The TF is based on a fingers-crossed assumption that the economic crisis will not lead to such a disastrous consequence of eventually affecting banks' liquidity. Still in that scenario, the TF now provides that extraordinary public support measures required by COVID-19 related problems are not going to be subject to the strict requirement of burden sharing by shareholders and subordinated creditors. TF, paragraph 7. For an in-depth discussion, see Phedon Nicolaides, "The Corona Virus can infect banks too: The applicability of the EU banking and State aid regimes", *European State Aid Law Quarterly* 19, 1 (2020).

[46] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, pp. 1-50, Footnote 181.

with favourable conditions and limited to those who require it in these unprecedented circumstances. Although the new measure still provides that the actual granting of loans and financing will be determined by the internal proceedings of the bank, the new scheme contains some safeguards to ensure that the aid is effectively channelled to the beneficiaries in need. An example of one of these safeguards is that new loans and renewals will be maintained within the costs applied before COVID-19 and commitments undertaken by banks, such as revolving credit facilities to their clients before the outbreak, will be fulfilled.[47] Turning now to recapitalizations and other more "permanent" measures, it has quickly become evident that the "affordability" of those measures may vary considerably from one Member State to another, not all of them being capable of providing the same degree of support to their undertakings. Some commentators and EU institutions immediately identified the risk of creating market distortions. As noted by Motta and Petz, when public money is used to go beyond the provision of liquidity, "a firm that is generously funded by its home country becomes artificially more competitive, to the detriment of other equally or more efficient rival companies" in less rich Member States.[48] These concerns have been largely addressed in the second amendment of the TF. There are indeed a series of stringent criteria imposed both on beneficiaries and governments. As for beneficiaries of COVID-19 aid, they will be prohibited from advertising for commercial purposes. Most importantly, if at least 75% of the COVID-19 recapitalization measures are not redeemed, beneficiaries will be prevented from acquiring a more than 10% stake in competitors or other operators in the same line of business, including upstream and downstream operations. Before the full redemption of COVID-19 recapitalization measures, beneficiaries cannot make dividend payments or non-mandatory coupon payments, nor buy back shares other than in relation to the State. There are also several constraints on management, such as on remuneration, and a

[47] Resolución de 25 de marzo de 2020, approved by the EC with SA.56803.

[48] Massimo Motta and Martin Petz, "EU State aid policies in the time of COVID-19", *VoxEU CEPR*, 2020, *https://voxeu.org/article/eu-State-aid-policies-time-covid-19*; see also Alfonso Lamadrid and José Luis Buendia, "A moment of truth for the EU: A proposal for a State aid solidarity fund", *Chilling Competition*, 2020, https://chillingcompetition.com/2020/03/31/a-moment-of-truth-for-the-eu-a-proposal-for-a-State-aid-solidarity-fund/. As for the EU, see "Von der Leyen warns State aid 'unlevelling the playing field' in Europe", *The Guardian*, 13 May 2020, https://www.theguardian.com/world/2020/may/13/ec-president-warns-State-aid-is-unlevelling-the-playing-field-in-europe, and "EU's Vestager: Discrepancy in State aid distorts single market, hampers recovery" Reuters, 18 May 2020, https://www.reuters.com/article/us-health-coronavirus-eu-Stateaid/eus-vestager-discrepancy-in-State-aid-distorts-single-market-hampers-recovery-idUSKBN22T0OU.

total ban on bonuses. There must be a clear exit strategy, which the beneficiary must submit to their government, which will in turn submit it to the Commission. Finally, for the measures above €250 million, "Member States must propose additional measures to preserve effective competition in those markets. In proposing such measures, Member States may in particular offer structural or behavioural commitments".[49]

The cumulative effect of all these conditions is particularly burdensome, to the point of possibly having a discouraging effect, as companies may prefer to rely on other types of support aid because having the State as a shareholder may make life more difficult. After all, the TF itself clearly suggests that recapitalization measures should be considered an instrument of last resort. The new rules brought in by the TF have been tested in the form of recapitalization measures for the aviation sector, a perennial problematic segment of the market now particularly hit by the pandemic. Once again, the Commission was quick to act, displaying both adaptability and resilience. The first measure notified and approved by the Commission on June 10th dealt with a €285 million recapitalization of Finnair, whose majority shareholder is the Finnish State. The Commission was swayed by the fact that capital was expected to rise to €500 million. The difference was assured by several market investors, whilst State participation remained the same in terms of shares. Curiously, the Commission Stated that certain governance commitments intended to provide incentives for redemption of the State aid as soon as possible were not appropriate or necessary in these circumstances.[50] In other words, if the State is already present, there is no need to provide for an exit strategy, despite the fact that the company does eventually strengthen its position in the market. How and whether the TF was going to operate with respect to public or partially public undertakings was clearly a lacuna uncovered by the Finnair decision, a lacuna promptly filled by ad hoc change of the TF that now specifies the rules applicable, thus distinguishing the situations in which the State is, and is not, a stakeholder. The second notification also dealt with airlines: on June 25th, the Commission authorised a €6 billion recapitalization of Lufthansa. Germany submitted a business plan containing plans of redemption by 2026. In line with the TF rules, Lufthansa is subject to bans

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[49] TF, paragraph 72. These will need to be laid down in line with the Commission Notice on remedies acceptable under the Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004.

[50] SA.56809. The decision has been challenged by Ryanair.

on dividends and share buyback and limits on remuneration of their management, including a ban on bonus payments. Finally, until at least 75% of the recapitalization is redeemed, Lufthansa will be prevented from acquiring a stake of more than 10% in competitors or other operators in the same line of business. Lufthansa is also the first example of a recapitalization measure above €250 million applied to a company that definitively holds significant market power in its relevant market. The Commission decided to impose structural remedies consisting mainly in the divestment of up to 24 slots/day at Frankfurt and Munich hub airports and some related additional assets. Germany was also required to re-notify a restructuring plan for Lufthansa if the exit of the State were to be in doubt six years after receiving the recapitalization aid, thus making "ordinary" State aid rules applicable again. Reactions have been mixed, with competitors launching legal proceedings against the Commission. One decision may not be sufficient to identify what the pervading attitude of the Commission will be. A closer analogy would be with the Commission's practice regarding R & R. The guidelines make the granting of aid conditional upon several factors, including the imposition of compensatory measures such as reduction of capacity, withdrawal from certain market segments and sale of assets. Large undertakings are those mainly affected by R & R aid, and the Commission's preferred type of compensatory measure is reduction of capacity. It may be argued that, as the premise of granting such aid is the pandemic, the Commission might be inclined to adapt a less strict attitude. Furthermore, the magnitude and extent of the COVID-19 impact may make the level and intensity of the conditions vary significantly from sector to sector, depending on a variety of factors. It may also widen the opportunity for a further use of behavioral conditions because of their flexibility, their attitude to shape the future[51] of economic entities, and their non-discriminatory open-access nature.[52]

[51] EU Remedies Notice, para. 17.

[52] See Ariel Ezrachi, "Behavioural remedies in EC merger control, scope and limitations", *World Competition* 29, no. 3 (2006): 459. Behavioral remedies have been used for instance in guaranteeing access to key technology, infrastructure and supply obligations – all sectors possibly relevant in a COVID-19 scenario. See, in the merger context, European Commission Decision of 18 January 2018, *Qualcomm/NXP Semiconductos*, Case M.8306.

6. The TF and EU public policies

As discussed so far, the main aim of the TF is to guarantee a system which is as fair and efficient as possible to govern the emergency phase of the COVID-19 crisis, although it does also cast light upon the ambition to look at the future of the European economy. Through its rules, the TF is attempting to ensure that State measures are devised in a way that meets EU's general policy objectives relating to consumer protection and both the green and digital transformation of EU economy. It is not sufficiently clear how such an ambition will translate into practice. On the plus side, especially after the transformations State aid control has been through in the last ten years, "horizontal" does not need to be equated with economy wide. National policies can be tailored to specific sectors if these are proven to foster good business practice and competitiveness.[53] The General Block Exemption Regulation (GBER) is, after all, just a recognition that if public spending is targeted at growth-promoting policies that fulfil common European objectives,[54] these are considered "good" economic policies for contributing to the aims listed above and do not need to be notified to the Commission. Under the category of "good aid", many provisions of the TF are devoted to public spending in the area of Research & Development (R&D), for instance. Although the legal basis is Article 107(3)(c) and, thus, measures need to be notified, the TF *de facto* exempts and thus favours any grant linked to R&D projects carrying out COVID-19 and other antiviral-relevant research related "to vaccines, medicinal products and treatments, medical devices and hospital and medical equipment, disinfectants, and protective clothing and equipment, and […] relevant process innovations for an efficient production of the required products".[55] The thresholds are particularly generous as, for instance, eligible aid is up to 100% for fundamental research, 80% for industrial research and industrial development, plus a bonus system if more than one Member State supports the projects or if there is cross-border collaboration. As in times of non-crisis, the rationale for governments to support R & D is, in reality, to simply stop acknowledging spillovers (that is to say, even the smartest of producers cannot completely prevent others from using the new knowledge), and so tax incentives or direct grants can at least "alleviate" a possible loss. In

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[53] Michael Blauberger, "Of 'good' and 'bad' subsidies: European State aid control through soft and hard law", *West European Politics* 32, no. 4 (2009): 719.

[54] Commission Regulation (EU) No 651/2014, cit. above.

[55] Ibid., paragraph 3.6.

times of crisis, other rationales become more prominent, such as the true need to stimulate business to invest more in public policies, such as health care.[56] The TF goes even further, as it requires that the industry benefitting from the aid commits to granting third parties within the EU non-exclusive licenses under non-discriminatory market conditions. Furthermore, during the COVID-19 crisis, the Commission has been extremely clear in telling Member States that voucher-based compensations instead of refunds for travel and tourism are not effectively protecting passenger rights. Thus, in a separate Communication, it invites Member States to support operators, yet relying on the TF.[57] Finally, by excluding micro-companies and start-ups – in the third amendment – from the application of the TF, and even those which were already in difficulty before the COVID-19, the Commission has given its blessing to public spending measures intended to foster innovative start-up companies identified as "crucial" for the economic recovery of the Union.[58] On the minus side, the TF also makes a specific reference to the need to "tailor" State support to more general EU polices such as digitalization and the EU Green deal agenda and environment protection. Certain MS's spending decisions received considerably good press, the most notable thereof being France's decision to make aid available to Air France conditional to reductions in internal flights. Some scepticism here is advisable. In the case of Air France, at the time of writing, the full decision has not been published yet, and we have only press Statements by the government.[59] EU State aid, of course, encourages Member States to spend green, but it is always a requirement that the aid must effectively encourage the beneficiary to invest in a more environmentally friendly option.[60] A reduction in CO2 emissions in terms of internal flights is hardly impressive, as it is a solution that does not truly

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[56] See Ben R. Martin, "R&D policy instruments – a critical review of what we do and don't know", *Industry and Innovation*, 23, no. 2 (2016): 157.

[57] Commission Recommendation (EU) 2020/648 of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic, C/2020/3125 OJ L 151, 14.5.2020, pp. 10-16.

[58] TF, Third amendment, cit. above, para.7.

[59] See https://www.france24.com/en/20200524-air-france-must-slash-domestic-traffic-in-exchange-for-State-aid-minister-says.

[60] Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01) and GBER, cit. above.

innovate.[61] Although much discussed, these clauses[62] pertain more to the next phase, namely the recovery of the EU economy, and asking the TF to provide an answer is both ungenerous and also probably not "legally" justifiable, as the decision on how the *regnum* will be transformed and changed by this contemporary pest belongs to the full constitutional and regulatory framework under which the EU operates. The current debate about the Commission proposal on the so-called Next Generation EU is an encouraging sign for the future.

7. Conclusion: the pessimism of the intellect and the optimism of the will

Some time ago, Elisabetta Righini and I wrote an article where we argued that the story of State aid control is one of resilience and adaptation, as State aid law has been constantly evolving and adapting to the transformation of the EU, its market and its rules.[63] The TF is another chapter in such story. To go back to Gramsci and one of his other most famous dicta, State aid control is also (and perhaps mostly) about the pessimism of the intellect, as it forces us to look at the world as it is, trying to probe its dynamics and come up with possible workable solutions. The TF has largely managed to govern the interregnum and fight the most morbid of symptoms. A segment buried in the third amendment of the TF is Article 16, which provides that aid "shall not be conditioned on the relocation of a production activity or of another activity of the beneficiary from another country within the EEA to the territory of the Member State granting the aid. Such condition would appear to be harmful to the internal market". Such a strong and perhaps unprecedented stance against localism and purely national interests in this time of crisis may also manifest the optimism of the will, believing that the world can be a better place and that it can face new challenges and overcome crises of rarely experienced magnitude.

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[61] See for instance the Commission investigation on aid granted by Spain to Air Nostrum as to enable the company to renew its fleet. The Commission has doubts on whether that support has a real incentive effect, SA.50707.

[62] Another example are the measures adopted by Denmark and Poland. See R. Federico, "Aiuti di stato e concorrenza fiscale tra Stati: la crisi della sovranità nazionale durante l'emergenza Covid-19", *Concorrenza e Mercato* 2020, I (2020).

[63] A. Biondi and Elisabetta Righini, "An evolutionary theory of State aid control", in *The Oxford Handbook of European Law*, eds. Damian Chalmers and Anthony Arnull (Oxford: Oxford University Press, 2015).

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