

Neutrality and Equality Aspects in the EU State Aid Temporary Framework 2020: The Case of the Airline Industry

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Abstract: Following the declaration of the COVID-19 pandemic, the restrictions imposed by the Member States (MSs) of the European Union (EU) led the tourism and commercial air transport industry to face serious financial difficulties that required airlines to apply for state support. In March 2020, the European Commission adopted a State Aid Temporary Framework (TF) for the COVID-19 period to simplify the process of granting aid, allowing the MSs rapid economic interventions. Claims regarding the approval of State aid to certain airlines reached the EU General Court (EGC), on the grounds of violation of the fair competition principle. It became clear that the processes enabled by the TF dispensed unequal treatment to airline companies and that the flexibility of the TF created competition imbalances. In spite of these events, little attention has been given to the way its application ignores the requirements of EU State aid control and other procedural justice and fairness principles, by failing to ensure neutrality and equality. This article addresses the matter using a standard legal interpretive approach to explain the imbalances created by the regulation. It presents a systematic review of the current regime, identifies the TF inefficiencies affecting competition principles, and argues for specific adjustments that could enhance its transparency. These contributions are useful to improve the existing framework and help prepare for a better management of future crises.

Keywords: *airline industry, COVID-19, European Union, fair competition principle, procedural justice, State Aid Temporary Framework, transparency*

1. Introduction

With the spread of COVID-19, and the declaration of the pandemic, the European Union (EU) faced economic struggles, especially those following quarantines and mobility restrictions imposed by the Member States (MSs). The closure of borders and limited economic activities involving direct human interaction impacted all economic sectors and industries (Goniewicz *et al.*, 2020). On March, 2020, as one of the expected responses, the European Commission (EC) enacted a temporary State aid legislation to contain the crisis (Communication 2020/C 91 I/0). The airline industry has been one of the most severely affected ones, with many undertakings ultimately ending their business activities (Salman *et al.*, 2020). Notwithstanding, it has been by far the biggest beneficiary of State aid in the EU (Van Hove, 2020, p. 30), and understandably so, given the services they provide and the market share of the EU aviation industry. According to Mordor Intelligence (2021), it amounted up to 37.78 billion US dollars in 2020. The implications of a more severe downturn of the sector would be devastating for the economy of the region.

Although it has been a lifesaver for many airlines (Trimarchi, 2021), the current regulatory approach has been the subject of controversy and court disputes. This is why, in this context, the State aid rules in general and the response implemented during the COVID-19 outbreak within the scope delimited by the TF has acquired high scientific and practical relevance. What is more, as scientists predict that viruses and climate disasters will become more frequent (El-Sayed & Kamel, 2020), the State aid regulation must be more resilient and continue to support fair competition and sustainable economic growth.

State intervention understood as state support of undertakings using MS funds (Tunali & Fidrmuc, 2015), is regulated by EU law in Articles 107–109 of the Treaty of the Functioning of the European Union (TFEU). Article 107 sections 107(1), 107(2)(b), and 107(3)(b) of the TFEU (2012/C 326/01) have received special attention during the COVID-19 pandemic. Article 107(2)(b), which aims at remedying serious disturbances in the economy of an MS

(Maczkovics, 2020), and applies to undertakings in natural disasters and exceptional occurrences, was validated by the EC for the granting of aid within the bounds of the TF in place. Several airlines have been beneficiaries of this regime under these grounds. For instance, on the 4th of May 2020, Air France received approximately 7 billion euros from the French Government (European Commission, 2020) and on the 27th of April 2020, the EC approved a measure of 550 million euros in the shape of a (German) state-guaranteed loan to compensate the German airline Condon for damages caused by the COVID-19 outbreak (European Commission, 2020).

A recent assessment of the TF's applicability and its impact on the EU internal market via market distortions concludes that the EC is responsible to ensure that all MSs' aid measures comply with the TFEU's provisions and the general principles of EU law (Maczkovics, 2020).

However, when observing the case-law concerning State aid approvals, the appraisal test applied to undertakings in the light of the COVID-19 pandemic shows serious imbalances. The EC's approach to EU State aid control within the scope of the TF and the measure of the incompatibility of State aid grants by the MS is especially problematic. The situation was highlighted in the appeals made by Ryanair (*Ryanair DAC v. European Commission* [2021a]) to the EGC. This article concentrates on issues of equality for being one of the fundamental principles enshrined as a requirement in the law, and of neutrality because it is a chief procedural justice concern seldom considered (Blader & Tyler, 2003).

This article advances the extant literature, using a standard legal interpretative methodology based on official documents, doctrinal works on case studies and case-law. It will address the question of EU State aid regulations within the context of state intervention as follows: the second section reviews and explains the antecedents, the third provides an overview of the EU State aid law, the State aid control regulatory framework, and the importance of the procedural justice components. The fourth comments on the legal criteria related to the 2020 TF. In the fifth and sixth sections, the article outlines the inefficiencies pertaining to procedural justice with examples. The seventh makes proposals on the management of State aid resource allocation to contend future economic crises, and the last section briefly concludes the discussion.

2. Antecedents: comparison of the European Commission's Temporary Framework for State aid in 2020 versus 2008

The financial crisis in 2008 justified the formulation of a TF, with the same urgency as the one caused by the COVID-19 outbreak. After a long period of rapid credit growth, low-risk premiums, abundant availability of funds, and heavy investments into overpriced financial products, banks faced liquidity problems to roll over their short-term debts (Feldkircher, 2014). The MSs injected capital into banks and raised deposit guarantees to reassure the public and prevent runs on banks. At the time, the Commission intervened to ensure their measures were not discriminatory and distortive in the Internal Market (Nicolaidis & Rusu, 2010, p. 760).

The TF in 2008 was amended under Articles 87 and 88 of the EC Treaty (Articles 107 and 108 of the TFEU after the Lisbon Treaty), which allowed the Member States to tackle the effects of the credit squeeze and grant aid to all sectors. The framework was set out for the provision of public guarantees, recapitalization measures and impaired asset relief (Adler *et al.*, 2009). The temporary measures included aid up to 500,000 euros per company for two years following the crisis, state guarantees for loans at reduced premiums, subsidized loans (for the production of green products in particular), and risk capital aid up to 2.5 million euros per small and medium enterprise per year in cases in which at least 30% of the investment cost came from private investors (Nicolaidis & Rusu, 2010, p. 764). Two were the objectives pursued then: to unblock bank lending and make it possible for companies to make investments (Rosanò, 2020, p. 623). The TF in 2008 did not cover several economic sectors, and the aid benefited the financial sector only (Luja, 2009).

The main difference between the 2008 TF and the 2020 TF is that the latter gave more freedom to MSs to extend the aid to all sectors, responding to a modernized, perhaps more neutral State aid policy. For instance, Coppi (2011) explained there was a clear move toward a more legal and economic oriented approach, as he observed an attempt to reduce the political weight of the interventions and the need to develop more rigorous fit to purpose analysis during decision-making processes. In addition, in 2008, the temporary measures were specifically directed to ensure the stability of financial systems (Hemler, 2018; Palmigiano, 2021). Furthermore, in 2008, State aid could not be granted without the involvement of EU State aid control because the financial crisis was amplified by cross-border

externalities in which bank failures in one country may lead to bank failures in other countries (spillover effect), especially in a currency union or a financially integrated area (Mateus, 2009). It could nonetheless be argued that the crisis in 2008 was not as critical and did not require the EC to enforce temporary measures to speed up a general economic recovery.

With the implementation of measures based on the 2008 TF, the EC gained insights and learned its lessons about handling economic crisis situations. However, that did not prepare for facing the intensity and extent of the effects of the COVID-19 pandemic, and the numerous requests for State aid approvals from the airline industry alone.

3. Overview of the EU State aid law, State aid control, and procedural justice components

The overview of the legal framework in question is given from the perspective and within the context of the EU competition law, where it is assumed that the relevant regulatory arrangements aim to preserve and enhance the single market under equal conditions. It covers the equality, neutrality and fairness aspects to explore to which extent procedural justice standards have been observed. The development of modern State aid law started with the establishment of the Treaty of Maastricht, which launched a tighter State aid control by the Commission and the aid became more integrated with other areas of competition law (Pärn-Lee, 2020, p. 131). The rules were intended more as preserving the competition and preventing market failures, to the extent that these two aims became the cornerstones for compatibility analyses under Articles 107(2) and (3) of the TFEU (Pärn-Lee, 2020, p. 132). However, with the Treaty of Amsterdam, by which the Commission launched a State Aid Action Plan (SAAP), the target was to attain the common EU goals, and look at sectors rather than individual undertakings. After the Lisbon Treaty and standing for State Aid Modernization (SAM) reform in 2012, the policy added the sustainability criteria by focusing on the Commission's *ex ante* review of cases with the biggest impact on the internal market, while strengthening cooperation of the MSs in enforcement, regulating and expediting decisions (Pärn-Lee, 2020, pp. 132–133). In principle, the establishment of a true single market and a system of healthy competition prohibits the MSs granting aid liable to distort competition and affect internal trade (Bacon, 2017). Article 107(1)

of the TFEU prohibits interventions, with exceptions in sections 107(2) and 107(3), that allow the approval of particular categories of State aid when appropriate, justified, in the pursuit of a common interest, and, in sum, when deemed compatible with the market.

State aid as such is conceived as the last resort to assist, rescue or recapitalize undertakings facing bankruptcy. Article 107(1) of the TFEU states that “save as otherwise provided in the Treaties, any aid granted by MS or through state resources in any form, shall be incompatible with the internal market” (TFEU, 2012/C 326/01). Moreover, the Commission views State aid as subsidies that can be endorsed only if they can remedy market imperfections, provided that the process of granting support is controlled and monitored by strict rules (Pärn-Lee, 2020). It is necessary to differentiate State aid from Services of General Economic Interest (SGEI) (Nicolaidis, 2003, p. 184) and Public Service Obligations (PSO) (Hromádka, 2017), which are not within the scope of Article 107(1), if the conditions of the *Altmark* judgement are met (*Altmark Trans GmbH v. Nahverkehrsgesellschaft Altmark GmbH* [2003]).

In practice, all state support is somewhat distortive of the market. Incompatible aid is favourable and selective with other undertakings that are in a legal and factual situation that is comparable in the light of the objective pursued by the measure (John *et al.*, 2013, pp. 1288–1289). Thus, in general, aid must be of an economic nature (it is either offered as subsidies or by way of tax benefits and loan guarantees), it must imply actual or potential use of public resources and be directed specifically at a certain undertaking or type of goods (Pošćić, 2017, p. 490). In its 2014 Annual Report, the Directorate General for Competition also suggested a seven-step analysis for the control of State aid (Federico *et al.*, 2015, pp. 415–419). Whereas the EC, in close cooperation with all MSs, controls State aid schemes (Federico *et al.*, 2015, p. 493), it is understood by the courts that to show that the aid actually caused distortion is not necessary. Instead, it is more important to demonstrate that the position of an undertaking has been reinforced, and it would have not been possible without the intervention. This suggests that a stronger emphasis shall be placed on monitoring the impact of the aid in restricting competition (Federico *et al.*, 2015, p. 491). This corresponds to the importance of strict Commission control.

Broadly, the EU control processes are carried out in four stages: (1) Notification, (2) Initial decisions, (3) Formal investigation, and (4) Final decision (Finke, 2021). Under the Treaty law, MS governments must notify

the EC of their State aid plans for approval before they are implemented, which is considered a “stand-still” obligation (Druenen *et al.*, 2021). After this, if the EC has doubts about the compatibility of the notified State aid measure, it has an obligation to open a formal investigation procedure resulting in approval, conflict or compliance (Finke, 2020). Therefore, if the EC does not issue an approval, the MS can choose whether to conform with the negative ruling or dispute it. In such events, it would fall under the jurisdiction of the EGC and the Court of Justice of the European Union (CJEU). Although this may seem simple, meeting the conditions for the exception to apply does not involve just a formal check. Legal, economic and political criteria play equally important roles in determining the approval of a State aid request. Procedural justice and fairness principles would add legitimacy to the processes of applying for state support, and approving the requests, as well as to the scrutiny of State aid decisions and the disputes that could arise. Generally, procedural justice involves four elements (Solarte-Vasquez & Hietanen-Kunwald, 2020). The first is voice; the disputants must have the opportunity to present and substantiate their case and to be heard. The second and third are impartiality, or the perception of neutrality, and trustworthiness, as assessed by the parties. In this context these would be a byproduct of a balanced and well instituted State aid system overall. The fourth relates to the sense of respect and consideration that pursues a general benefit, equivalent to one of the compatibility criteria mentioned above—“in the pursuit of a common interest”.

Procedural fairness principles are of high order, but clearly reflected in the fair competition notion. Failures of these principles often derive from laws that impose burdens or confer benefits upon some to the exclusion of others (Lucy, 2011, p. 417). Policies and regulations must not be discriminatory or place anyone at a disadvantage. This is especially important when refining the incentives and restrictions of the State aid regulation, because interventions are the main cause of market distortions, even when lawful.

In terms of procedural justice (Gumbis & Petkeviciene, 2017), the interested parties—in most cases beneficiaries of the aid measure—enjoy the very limited set of rights established in Council regulation 2015/1589 (Pošćić, 2017). Article 24 outlines two: (1) the right to submit comments to the Commission after the decision to initiate the formal investigation procedure, and (2) the right to obtain a copy of the Commission’s decisions (Oka, 2017). They minimize the applicants’ opportunities to be heard and provide very little assurance of the impartiality and trustworthiness of the procedures because of the lack of transparency. The EC and the MSs’ governments appear to be

the main parties to the State aid proceedings; thus, undertakings have very little access and influence on the outcomes. Article 108(1) of the TFEU and Article 21 of the Procedural Regulation allow some room for participation, but the wording refers to the EC and the MSs only when it says that they can cooperate to obtain the necessary information for the review of an aid measure (Council Regulation 2015/1589EC). The time frame of the pre-notification period, when the EC requests all necessary information, normally extends 2 months until the EC decides if the formal investigation is required. There is no time limit for a formal investigation to come to an end, but it may take up to 18 months (Einarsson & Kekelekis, 2015), which adds uncertainty to the process because no aid can be disbursed prior to the Commission's authorization. The State Aid Modernisation Programme, launched in 2012, introduced procedural adjustments with features that affect justice and fairness elements as a General Block Exemption Regulation involving an *ex-ante* approval to State aid schemes without requiring notification (European Commission, 2014, p. 50).

In contrast, Lovdahl Gormsen (2016) argues that provisions of State aid are concerned with fair, equal competition and aim to maintain fair conditions *between undertakings* and protect them from market distortions. Thus, aid that places certain undertakings at an advantage is prohibited. Article 107(1) of the TFEU lays down the criteria to test the lawfulness of State aid: (1) an advantage is conferred on the recipient, (2) the aid is granted by an MS or using state resources, (3) the aid distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods, and (4) there is an effect on Inter-State trade (Kubera, 2020, p. 80).

4. State aid regulation and legal criteria for approval of aid measures after the COVID-19 outbreak

As said, the current State aid policy seeks to help stabilize the EU economy and respond to the COVID-19 emergency, but it has caused tremendous legal challenges to the EU and the MSs that will probably require many years to sort out. The main applicable instrument is a TF that has been amended several times, to “refine” the conditions for the Commission to screen and declare aid “compatible”.

The negative impact of the pandemic on healthy undertakings was mitigated with state support, and economic activities were maintained at a great

effort, but the kind of restrictions adopted by the MSs put air travel on hold, and the Commission had to act quickly. The EC allowed the MSs to grant aid without the involvement of State aid controls (Communication 2020/C 91 I/0), like it did to respond to the financial crisis of 2008. It suspended the proper application of the Article 108 of the TFEU, which regulates its enforcement and guarantees the compatibility and fairness assessment of aid measures.

Airlines were compensated for financial difficulties mostly with rescue aid covering operating costs for a period of six months or restructuring aid by setting up a long-term viability plan demonstrating that they can return to normal operations under normal market conditions within a reasonable time (Derenne, 2020). In accordance with Article 107(2)(b), and Article 107(3) (b), COVID-19 is both an exceptional occurrence and a serious economic disturbance (Nikolaides, 2020) but it is suggested that for a Member State to notify the Commission about their aid measures on the basis of Article 107(2) (b) is easier because in that case the EC has narrower assessment discretion. The applicability of Article 107(3)(b) is wider. The provision defines well that aid can be both retrospective and prospective (reactive and proactive), that is, granted to remedy the actual effect of a serious disturbance and to prevent the worsening of the disturbance in the future (Nikolaides, 2020, p. 238). In these cases, some undertakings receive more or less aid because the TF only sets limits in absolute terms: either minimum rates or maximum amounts to be given to beneficiaries (Nikolaides, 2020, p. 238). It does not allocate resources considering what the beneficiary really needs to be able to sustain its business activity. Thus, when the support is available and granted to some airline companies, market distortions take place. The ones with lower market share and operating capacity may well be doomed to go bankrupt.

When the World Health Organization (WHO) declared the COVID-19 a pandemic on March 11, 2020, the EC determined that the virus outbreak affects all MSs and that government-imposed restrictions had an impact on all undertakings (Cucinotta & Vanelli, 2020). According to the Framework, it was justified to temporarily grant State aid to firms under Article 107(3) (b) of the TFEU to ensure that the disruptions would not undermine their viability (Communication 2020/C 91 I/0).

The EC concluded that MSs had to be allowed to act swiftly in various circumstances outside the scope of EU State aid control and without the involvement of the Commission for the support to be most effective. It was decided that, on the basis of Article 107(2)(b) of the TFEU, MSs can

compensate undertakings in sectors that have been harmed the most by the crisis, including tourism, and the airline industry within the same scope. MSs may intervene only if the financial difficulties of the undertaking have resulted directly from the COVID-19 outbreak (Communication 2020/C 91 I/0). The companies that do not comply with this condition, or struggle to demonstrate why they do, are especially affected by the disturbances to the economy in the EU. Their situation may have been under control, and their problems overcome were it not for the political and legal reaction of the governments to the pandemic, such as the severe restrictions that ensued. Furthermore, business organizations and their strategies differ in ways that make it too complex to perform a proper assessment. For instance, a group of companies that are linked together or belong to a troubled holding could still be deserving of support, and the other way around. A parent company could be stable in spite of some of its subsidiaries having been in trouble (Honoré, 2020, p. 112).

On 13 October 2020, the EC adopted a fourth amendment to the TF, establishing that undertakings should only be recapitalized when there is no other appropriate solution to support their liquidity. Within the scope of TF, recapitalizations are mostly screened according to Article 103(7)(b) of the TFEU, in which governments are not allowed to support beneficiaries that were in difficulties before the outbreak (Biondi, 2020). The recapitalizations should not go above the minimum needed to ensure the viability of the company or beyond restoring the capital structure of the beneficiary to the level it had before the COVID-19 crisis (Communication 2020/C 91 I/0).

5. Perceived inefficiencies in the 2020 TF from the procedural justice perspective

The chief concerns related to the efficacy of the TF are about the lack safeguards to limit distortion to competition through State aid control. They arise from the very nature of a TF, and the narrow extent to which it can be transparent and “ensure” neutrality and equal treatment. The purpose of instituting the EU State aid control is to observe that the negative consequences of intervening the market are minimized, starting from the test of compatibility and legality, and providing the same opportunities to all the market participants without biases (Stojanović *et al.*, 2013, p. 165). The EU State aid control and the procedure under Article 108(3) of the

TFEU must never produce a result that is contrary to the provisions of the Treaty or the general principles of EU law, while the principle of equality holds that similar circumstances should receive the same treatment, unless a differentiation is objectively justified (Voss, 2014, p. 150). If the aid measure is granted without the involvement of State aid control, but within the boundaries of the amended TFs, does the equality principle become justifiably derogated? Is the principle a constraint on the regulatory choices that can be made by the administration in times of crises? What are the existing criteria to decide that the authorities have reasoned their actions appropriately? (Voss, 2014, p. 158) A TF providing that aid measures can be approved by MS without monitoring or control mechanisms does not ensure the protection of these fundamental principles of EU law. The failure to provide legal protection would infringe the Treaties and can be challenged under Article 263 of the TFEU (Rzotkiewicz, 2013, p. 474). Moreover, the TF does not strictly define the extent to which the EC requires checks for market failures, appropriateness and proportionality of aid measures. It does not include requirements for identifying the actual loss suffered by the companies or a prohibition against overcompensation (Honoré, 2020, p. 113). The Framework, therefore, lacks strict or predictable procedural guidelines directly affecting the legitimacy of the due process.

If the Commission's stance is that State aid tradeoffs are acceptable on the basis of a rigorous procedure—as mentioned above, provided certain conditions and strict controls—that the State aid regulations amended in the TF are subject to approval without appropriate monitoring, or the involvement of the Commission, also disregards the fair competition principle. Unfair competition is in itself a procedural justice and fairness problem that has become especially clear when disputes arise, but not only. It is a desirable feature of any administrative process. It has never been so important in a jurisdiction like the EU to take into account its two dimensions: (1) substantive fairness and (2) procedural fairness that presupposes compliance with the due process (Solarte-Vasquez & Hietanen-Kunwald, 2020, p. 192). In the absence of procedural fairness, delivering an acceptable solution would not be possible (Solarte-Vasquez & Hietanen-Kunwald, 2020, p. 193). Even though the first test to every decision has to be objective (validity, lawfulness and other essential legal requirements), the subjective elements add to the respectability and sustainability of any decision-making system. Solarte-Vasquez and Hietanen-Kunwald (2020, p. 193) have explained why substantive fairness is achieved if and when the procedural aspects are explainable, predictable and free of arbitrariness,

thus, producing legitimate outcomes for the parties even if unfavorable to their interests. In the case of the TF and its amendments, the disbalance is marked by the bias towards efficiency rather than procedural fairness. During a pandemic or similar crises, expeditious governmental and institutional responses are expected, but in spite of their importance the risk of legal tensions and political instability has to be factored in. The legal framework is the gatekeeper that both delays justice but protects fundamental rights and values—concretely, the provisions of EU State aid law. The aim of EU procedural law is to guarantee respect by administration (Barents, 2014, p. 1445). Proper control over State aid approvals ensures that measures are compatible and court disputes are avoided.

The TFEU stating that the EC shall review aid schemes not only grants the EC discretionary power but also imposes a legal obligation to carry out these reviews (Muñoz de Juan, 2018, p. 486). Consequently, with the urgent amendment of TFs, the EC did not fulfill its obligation and could be said to have overstepped its discretionary powers and obligations.

Airline companies are aided under Article 107(2)(b) of the TFEU and recapitalization schemes. The normal requirements of assessing the applicability of Article 107(2)(b) of the TFEU are strict, and the Commission is afforded little discretion (Agnolucci, 2021, p. 12). If aid is granted based on that provision, there must be an exceptional occurrence that affected the beneficiary's business activities or imposed limitations. Also, the given MS must forward to the Commission a detailed analysis of the compensation request for damages incurred by the beneficiary and confirm the conditions established regarding the COVID-19 outbreak having to do with the losses and burdens of the undertaking. This is an obligation to demonstrate the causal links between the pandemic, the restrictions affecting the activities of the beneficiary, the damages, and the compensation granted (Agnolucci, 2021, p. 12). These procedures do not take place without complications. Sciskalová and Münster (2014, p. 224) argue that the EC is not always in a position to obtain complete and accurate information from the applicants, which may prolong procedures unduly.

Because public sector support is distortive, the TF states that aid must be given for a short period of time (Communication 2020/C 91 I/0). But commonly, MS have exercised broad discretion in how the aid schemes are implemented, incrementing risk of having a negative impact on the market. The EC issued approvals to airline companies as well as other undertakings rather quickly, and this did not give time to fully consider the measures in

accordance with the overall Framework (Riedel *et al.*, 2020, p. 119). Confusion about the assessments led to a general distrust about whether the market failures and interventions were adequately appraised and addressed.

It has also been discussed how unequal are the budgets of the MSs and how dissimilar their management. In this light, giving too much freedom to the governments may not seem equitable and rational within unions of states like the EU. The countries with more resources can apply the TF easily and satisfy more aid requests (Maczkovics, 2020, p. 279), but it has to be acknowledged that if the aid is funded by the taxpayers of those countries, it could not be otherwise. Some claim, in contrast, that the airline industry, being a major stakeholder in trade, needs to be specially sheltered from harmful subsidy races and that State aid rules should prevent the excessive distortions at the cross-border levels (Costa-Cabral *et al.*, 2020, p. 4), but these biases should be discussed in better times, when the economic crisis is not pressing. Better balance between freedom in grants of State aid and clear—transparent, coherent—regulatory boundaries in line with fair competition and equal treatment would help. How to achieve that goal is a complex and interdisciplinary matter, but procedural fairness adjustments could certainly smooth the application of substantive rules and principles of competition law.

The amendments of the 2020 TF did not reduce the uncertainties of the pandemic, and the fact that the EC only estimated the proportionality of State aid *ex ante* based on long-standing practice and the experience of the financial crisis in 2008, is questionable. The flexibilization intended in the Frameworks, although justified by the exceptional circumstances, is a communication that does not produce legal effects in the terms of Article 288 of the TFEU. The MSs must notify the Commission of interventions and demonstrate that they are necessary, proportional and appropriate. To state that the current frameworks are proportionate and suitable to ensure the state interventions are proportionate and non-distorting of competition is not possible at the moment (Ferri, 2020, p. 185). At the very least, it would be premature. The effects of these mechanisms and the convenience of the decisions taken over the past years will be better evaluated in the long run. From a legal perspective, the most convenient approach would be to stick to the rules and create fewer distortions. However, as most commentators have acknowledged, the EC had little time to decide on the applicability of the State aid rules in 2020, or understand the actual impact, and implications of the TF for the market over such an extended period of time.

The cases T-643/20 and T-465/20 *Ryanair DAC v. Commission*, partially illustrate the claims that denounce the importance of the State aid control and monitoring by the EC in the airline sector, and the perceived shortcomings of the TFs.

6. Ryanair's appeals against the Commission's State aid approvals

Ryanair, a company registered in the Republic of Ireland (Numanoğlu, 2020), has made 16 applications to the European General Court (EGC) and the European Court of Justice (CJEU) by the completion of this manuscript. They are based on violations of the principle of equal treatment and possible market distortion (Trimarchi, 2021). Two recent appeal decisions upheld by the General Court that annulled EC decisions are especially relevant.

The first is case T-643/20. The EC approved aid from the Netherlands to KLM in the amount of 3.4 billion euros on 13 July 2020. This was given as a guarantee and a state loan (the measure at issue) and was intended to provide the airline with liquidity to deal with the adverse effects of the pandemic, preventing the exacerbation of the disturbances that had already afflicted the economy. The EC decided that the intervention was compliant with the TF conditions and it was meant to support the economy during the crisis. Three months later, on 23 October 2020, Ryanair brought action before the EGC, challenging the decision, and presented five pleas pursuing an annulment. (Notably, the size of the business activities of Ryanair make it the third largest airline in the Netherlands, and places it in direct competition with KLM.) The first asserted that the Commission wrongly eliminated the aid granted to Air France from the scope of the contested Decision C(2020) 2983 final on State aid SA.57082 (2020/N)—France—COVID-19; Air France and KLM are two subsidiaries of the holding company Air France-KLM. The second invoked an infringement of the principles of non-discrimination, free provision of services and freedom of establishment. Emphasis was placed on the third and fourth pleas, claiming that the approval of State aid to KLM resulted from misapplication of Article 107(3)(b) of the TFEU and that the Commission failed to initiate a formal investigation procedure (Bacon, 2017), respectively. Both pleas highlight infringements of procedural rights. The last refers to objective procedural justice and the due process. It was argued that the Commission breached its duty to reason (Article 296 of the

TFEU) because it did not justify the decisions and/or include information as to why the aid granted to Air France was incompatible, but it was compatible in the case of KLM. In practice, the Commission must assess the links between various subsidiaries of the group to determine whether they form one economic undertaking acting as a single beneficiary or if there is concern about detrimental effects on competition (*Ryanair DAC v. European Commission* [2021b]).

On 19 May 2021, the General Court annulled the Commission's decision of 13 July 2020 because it was vitiated for having lacked reasoning (*Ryanair DAC v. European Commission* [2021b]). Article 108(3) of the TFEU states that the Commission shall without delay initiate a formal procedure if there may be a doubt of whether the measure at hand will be compatible with the internal market based on Article 107.

The second case is T-465/20. On 10 June 2020, the Commission approved a Portuguese loan for TAP Air Portugal (TAP) of 1.2 billion euros under the Guidelines on State aid for rescuing and restructuring undertakings in difficulty. Ryanair brought an annulment action on 22 July 2020 with pleas including incorrect application of Article 108(2) of the TFEU, violation of Article 107(3)(c) of the TFEU, and failure to present adequate reasoning, in this event, regarding the compatibility assessment when not considering the relevance of TAP's membership in a group. Point 22 of the Guidelines on aid to undertakings in difficulty states that states that

a company belonging to or being taken over by a larger business group is not normally eligible for aid under these guidelines, except where it can be demonstrated that the company's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself (European Commission, 2014).

According to *Ryanair DAC v. Commission* ([2021b], p. 32), Ryanair claimed that the Commission did not assess whether the beneficiary's difficulties were too serious to be resolved by the group itself.

The General Court, by only assessing the plea related to inadequate reasoning, found that the Commission had neither verified nor specified whether the beneficiary was a part of a group and only provided details on the financial situation and the difficulties caused by the COVID-19 pandemic. The intra-group relationships between TAP and its shareholder companies were not taken into consideration. (*Ryanair DAC v. Commission* [2021b])

In the light of these judgements, it becomes evident that the EC had a very limited period to assess the cases in depth, which has resulted in inadequate reasoning about the State aid decisions. In times of an urgent economic situation and disputes arising from ambiguous TFs, undertakings have become under pressure; hence stricter control measures are needed. The examples have shown that procedural justice does not prevail in the expedited approvals permitted by the TFs and do not serve the purpose of preventing further market distortions by not assessing aid measures case by case. Ryanair also presented appeals based on the EC's failure to initiate formal investigation procedures, which further indicates a disregard of procedural justice and fairness pertaining to voice, trustworthiness, neutrality and respectful treatment (Meyerson *et al.*, 2021, p. 22).

7. Approach for a more compliant management and allocation of State aid resources

More neutral and transparent management of EU State aid regulations for the airline industry would be not only efficient, but also responsive to the needs of the air carrier companies. The solution needs to be principled, to contribute to the substantive and procedural justice and fairness in terms of neutrality, thus equal treatment and fair competition. The EC could achieve this by amending specific and temporary State aid measures without losing its control and involvement in the process within the meaning of Article 108(1) of the TFEU. In any future TFs, the EC should include a clause that MS governments should establish control mechanisms in the face of monitoring State aid bodies both before pre-notifications of aid measures (*ex ante*) to the EC and *ex post* to ensure compliance with State aid legislation under the primary EU Treaty Law. This could guarantee that all aid measures reported to the EC would have already been supervised and compliant.

Acknowledging that temporary measures are often driven by urgent economic needs, the EC must be nonetheless expected to enforce State aid control and formal investigations of temporary processes within a shorter time frame. General but refined criteria could be determined beforehand, with respect to the principles mentioned above. The current pre-notification period lasts around two months, and in case the EC decides to open a formal investigation procedure, it should amend future TFs with a temporary pre-notification period that lasts approximately two weeks and a required formal

investigation procedure that would be concluded within one month. It is impossible to create a regime that fits every crisis and prevents all possible distortions that will inevitably arise from the application of any future TF, while guaranteeing respect for procedural justice principles. Nevertheless, it is worthwhile to address the evident shortcomings that exist at the moment and pursue a more predictable set of rules for the scope, processing and approval of state interventions.

The EC should make any future TF conditional on the provision of compensation for market distortions that it may create. In part, this coincides with the proposal for a *State Aid Solidarity Fund* (de Pablo & Buendía, 2020). Compensation can be given as support for companies in difficulty and in need of State aid in other MSs and could be equivalent to a percentage of public resources committed to the measure at hand. Each MS would have an opportunity to propose ways to channel contributions to minimize market distortions, and thus, the EC could assess their applicability before the aid measure is approved. This way it will be more likely that that compensation is received by deserving undertakings. These steps add a minimum of checks that increase equal treatment assurances. In the airline industry, it would help to avoid unproductive and expensive disputes, and for those with lower market share and budget, it could make compensation available to keep functioning and avoid bankruptcy. In some sectors, these adjustments may be a matter of survival.

8. Conclusions

The legal interpretive assessment completed in this article explained some of the imbalances created by the State aid regulatory approach of the EU, after the COVID-19 outbreak resulted in an unprecedented crisis in terms of its duration and complexity. It presented a classical review of the current regime and explains the identified inefficiencies of the most recent TF, affecting competition principles. It argues for procedural adjustments that could enhance its neutrality and increase transparency. These contributions are useful to call for the improvement of the existing framework and help prepare for a better management of future crises by focusing on procedural justice and fairness aspects. To upgrade the formal and objective dimensions of the system is as important as to strengthen the legitimacy of the economic and political decision making under exceptional circumstances.

The provisions included in the review were the closest related to the EU State Aid regulation, whereas the principles referred to are of wider applicability. Procedural justice and procedural fairness are important at the international and at the EU level. The article claimed that these are akin to the fair competition principle upheld in the EU. The discussion on the imbalances was developed and illustrated in the context of the transport and tourism sectors, most precisely, the airline industry. But to draw comparisons, it briefly examined measures adopted during the financial crisis in 2008 and contrasted the justification of the amended Frameworks. It considered selected case-law that exemplified most clearly the importance of procedural integrity.

As anticipated, the inconsistencies between the EC TFs amended in the outbreak of COVID-19 and the principles mentioned were manifest. It clarified that the EC's approach to TFs for EU State aid goes against the primary discretionary power and obligation of the EC State aid control and monitoring by creating a very fast and flexible way for MSs to easily grant State aid also to airline companies. Especially critical is that the involvement of the EU State aid control is not required, which causes confusion about the compatibility of substantive and procedural State aid rules. The primary benefit of EU State aid is the remedy of market failures but under the condition that measures and interventions are subject to a strict Commission control. The case-law produced, following Ryanair's appeals, offer important insights deserving of more extensive academic research.

In the meantime, for a more rational management of the EU State aid regulatory framework, the EC's approach to refine the State aid regulatory framework from the perspective of the principles of neutrality and equal treatment, in close connection to procedural justice adjustments of the due process, transparency and fair competition, is recommended. In addition, the amendments must include assessing the compatibility of aid granted to beneficiaries in the expedited processes established in the legislation; otherwise, market distortions would be exacerbated in urgent economic circumstances. Finally, in future TFs, a compensation condition could be added in case the effects of interventions cause severely detrimental distortions. Each MS could propose ways to channel these contributions to minimize or mitigate the said distortions, and the EC could assess their suitability before approving the aid measure.

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