Governing the Interregnum: State Aid Rules and the COVID-19 Crisis

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This article focuses on the transformations and changes in the area of state aid control prompted by the COVID-19 pandemic. It attempts to provide a first assessment on the European Commission Temporary Framework on state aid measures to support the economy in the outbreak. It discusses whether the measures adopted have been effective and managed to guarantee on the one side the possibility of Member States to take swift and effective action as to ensure short and long term liquidity to undertakings affected by COVID 19 and on the other to preserve fair competition an respect of state aid rules control.

1. The COVID-19 Crisis.

The COVID-19 pandemic has been and still is an ongoing 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 instead as a process born and developed on the basis of previous weakness and contradiction. Its effects will be long lasting and will involve painful transformations which will not necessarily lead to positive outcomes. Antonio Gramsci, writing about the crises 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 born; in this interregnum a great variety of morbid symptoms appear.’ We are now once 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, 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, the North v the South, the West v the East. As for the European Union, it is almost a given that EU struggles with handling crises. And, if one looks at the 2008 financial crisis and the refugee crises, the EU’s track record indicates difficulty in formulating a coordinated response. However, after some hesitation the EU has albeit gradually, in my view, accepted the heavy burden

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† A. Gramsci, Selections from the prison notebooks, (New York: International Publishers), 1971, pag.276. I am indebted to M. Babic, ‘Let’s talk about the interregnum: Gramsci and the crisis of the liberal world order’ in International Affairs, Volume 96, Issue 3, May 2020, 767 that has provided much food for thought.
of dealing with such an unprecedented health crisis in a much more orderly fashion than some of its Member States and deserves credit for at least 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. With that said, the aim of this article is to mainly focus on those measures and policies adopted on the basis of pre-existing tools at the disposal of the EU and to analyse how they have been deployed. In particular, it will focus on the transformations and changes in the area of state aid control, an area of EU supranational competence *par excellence*. This was one of the areas of EU law immediately ‘called into action’ for the very obvious reason that the COVID-19 crisis had *instant* economic repercussions on virtually all economic sectors, thus requiring *instant* financial support from several if not all of the EU Members states (plus the UK of course). Crises are however not just a time for emergency management, but they are also a time to reflect on whether reliance on pre-existing rules, principles and regulations are enough or if new innovative solutions should be devised. State aid control, in the crises context, must deal more with the *interregnum*, whilst the *regnum* itself may necessitate further inventive and bold solutions. Perhaps, then, this article will be considered as just a first chapter.

2. The economic impact of COVID-19.

It is important to pause for a moment to dissect more in depth what exactly the specific economic repercussions of the COVID-19 pandemic are, which sectors have been most affected and the evidence that has been collected so far. In short, without sounding cynical, it is imperative that the need to support national economies is simply not taken for granted, but fully justified and also in identifying if the ‘legal’ response has been adequate. 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 has caused on general economic activities in a particular state or continent. For instance, electricity consumption during lockdown period 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 of time. There are also some specificities linked to the COVID-19 pandemic that must be taken into account: firstly the globalization of the pandemic, secondly the lack of plausible comparators and third being the different waves of the pandemic and their effects. Virtually no geographical areas have been spared by the pandemic making managing international supply-chains exceedingly complex and causing a generalized drop in the international flow of trade. According to a WTO estimate, trade is expected to fall between 13% and 32% as a result of COVID-19.³ As for possible comparators⁴, although some similarities can be drawn with the 2008 financial crisis there are notable differences. The 2008 financial crisis, despite its

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² S. Chen, D. Igan, N. Pierri and A. F. Presbitero, ‘Tracking the Economic Impact of COVID-19 and Mitigation Policies in Europe and the United States’, IMF Special Series on COVID-19, 2020.
³ WTO Director General Press release at 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 seemed in my view too different. See R Barro, J.F Ursua, and J. 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 (2020) 8166.
significance, had symmetrical effects on the financial markets and spread much later to the real economy, whereas the impact of COVID-19 has been brutal in wiping off certain markets such as a tourism, both immediately and with no 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 — and in trying to revive such a specific market, those institutions can hardly implement the same measures with comparable effects in relation to the shock caused by COVID-19 on the real economy. 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: whilst the first phase during lockdown periods impacted on the demand response (essential goods up, services down) or specific sectors such a hospitality and events or on companies size (SME as liquidity is always a concern), the second phase — cohabitation with virus — will have long term repercussions in terms of lower production, aggregate supply slump, a significant decrease in aggregate demand, productivity growth and possible generalised stagnation. Projections forecast a staggering contraction of economic activity in the EU that could reach between 5% and 10% and potentially even greater in case of a second wave of the pandemic.

3. State Aid and the COVID-19 crisis.

Thus, the Coronanomics effects are beyond doubt and should not be underestimated. However, COVID-19 should not simply be relegated to the somehow comforting notion of black swan as it is instead much more useful to consider it as part of process ‘as a distinct phase of instability and uncertainty and not only as a transition between two stable periods’. The public spending measures adopted by Member States cannot therefore only be seen through the perspective of ‘medical urgency’, but also have to be placed within a wider economic cadre, its weakness, its transformations and also its potentiality. After a rapid chronological exposé of the new measures adopted by the EU in the area of state aid law, an attempt will be then made to discuss the specific new rules in such a wider context.

3.1. A new but temporary Framework: a short chronology

On the March 13th (possibly two weeks too late) the President of the European Commission von der Leyen declared ‘we will do whatever is necessary to support the Europeans and the European economy’. 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 16\textsuperscript{th}, Competition Commissioner Vestager sent to Member States for consultation, a draft proposal for a State Aid Temporary Framework to support the economy in the context of the COVID-19 outbreak. She declared on March 17\textsuperscript{th} that ‘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.’\textsuperscript{12} On March 19\textsuperscript{th}, the Commission duly adopted what was going to be the first version of the Communication of a Temporary Framework.\textsuperscript{13} The TF on one hand acknowledged the necessity of Member States to act swiftly while concurrently laying down the options available to the same Member States in term of compatibility of state support measures with EU law. The ‘temporary’ refers to the time limit of the TF, which will be in place 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 preserve the continuity of economic activity during and after the COVID-19 outbreak.

On April 4\textsuperscript{th}, a first amendment was introduced to enable Member States to do everything possible to support the research, testing and production of coronavirus relevant products.\textsuperscript{16} On May 13\textsuperscript{th}, a second amendment was agreed.\textsuperscript{15} This 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 need. Finally, on June 29\textsuperscript{th} the Commission adopted a third amendment excluding altogether from the TF scope of application, 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).\textsuperscript{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,\textsuperscript{17} the final Temporary Framework — for the time being — has provided the framework (pun intended) for the notification and approval of more than 190 and counting state aid measures.\textsuperscript{18}

\textsuperscript{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.

\textsuperscript{13} Temporary Framework to support the economy in the context of the coronavirus outbreak (OJ C 91I, 20.3.2020, p. 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.

\textsuperscript{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, p. 1–9).

\textsuperscript{15} Second amendment to the Temporary Framework to support the economy in the context of the coronavirus outbreak (OJ C 164, 13.5.2020, p. 3–15).

\textsuperscript{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, p. 3–8.

\textsuperscript{17} For the complete list see https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html.

\textsuperscript{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.
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 crises in January 2009, 16 on this occasion the Commission acted considerably quicker. To recap, the Temporary Framework, is then based on the following postulates: a) COVID-19 as well as being a major public health emergency also represents a major shock to both the global and 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) There still remains a need to have a coordinated effort which will make the measures adopted more effective and may even foster a quicker recovery. 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 also extending to recapitalization of affected undertakings. Finally, the Framework also emphasizes that this 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.

The EU system of control of state aid is essentially based on a *intercidire* first and *absolvere* then: Article 107(1) of the TFEU provides for a general prohibition imposed on Member States that ‘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 distinctly possible for Member States to show that measures involving even a degree of selective financial support are however fully justified in pursuance of the general interest. The Treaty, in its Article 108 TFEU, transferred the decision on the compatibility of aid measure to a supranational referee, the European Commission. One especially important facet of state aid control is that it is of course mainly *procedural*. Member States are under an obligation under Article 108 TFEU to notify the Commission of any new planned aid, and then 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

16 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, p. 2–10.
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, p. 1–78.
phase should then enable the Commission to accurately assess if the conditions laid down in the Treaty have been satisfied 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 with there being a logical connection between the provision of aid and a change in the behaviour of the undertaking that receives the aid. It is also requires of the Member State to display that the measure will bring about the outcome the aid is intended to achieve, that the aid is limited to the minimum necessary to achieve the outcome and lastly, that it is intended to pursue a ‘common European goal’ and so on. The COVID-19 pandemic is inevitably testing on such a system as it applies pressure on the Commission to decide, and decide quickly with as few objections as possible. It is however, rather curious to read slightly empathetic 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 not called ‘temporary’ for nothing, its application has the specific and short deadline (although it can be extended) of December 31\textsuperscript{st} 2020. Secondly, the differentiated application of state aid rules in 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’ as compatible. 2) Article 107 (3) allows the Commission to authorize 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 but, to paraphrase a AG Wahl Opinion delivered with reference to the banking crisis, a recourse to Treaty 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’.\textsuperscript{21} It is not remarkably surprising then 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.\textsuperscript{22} The exceptional 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’\textsuperscript{23} or by the extremely broad definition of the reasons why state interventions in the form of recapitalization is in the EU common interest; these being as to ‘avoiding social hardship and market failure due

\textsuperscript{21} C-526/14, Kotnik and Others ECLI: EU: C: 2016:102, para. 33. On the meaning of serious disturbance see also T-132/96 and T-143/96, Freistaat Sachsen and Others v Commission EU: T: 1999:326, para. 167; upheld on appeal (judgment in Freistaat Sachsen and Others v Commission, C-57/00 P and C-61/00 P, EU: C: 2003:510, paras 97 and 98). As for Commission practice see Commission Decision in Case NN 70/07 Northern Rock (OJ C 43, 16.2.2008, p. 1), Commission Decision in Case NN 25/08 Rescue aid to Risikoabschirmung WestLB (OJ C 189, 26.7.2008, p. 3

\textsuperscript{22} For instance, as specifically provided for by the TF (para.14), it is still be possible for Member States to notify to the Commission of aid schemes to meet acute liquidity needs and support undertakings facing financial difficulties under Article 107 (3)(c) that is ‘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 Commission has so far authorised various schemes in nine different Member States under such a legal base.

\textsuperscript{23} TF, cit. above, para 9.
to significant loss of employment, the exit of an innovative company, the exit of a systemically important company, the risk of disruption to an important service, or similar situations’. 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 therefore 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 that any other soft law instruments can also 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 make it difficult to fully appreciate how much, in this instance, the Member States were involved. Although these criticisms are of course 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. There are, however, two principles questions which must still be tackled: that the pressure to authorize state measures as quickly as possible, may actually prevent the Commission for having enough time for a proper scrutiny and secondly, whether by regulating today softly for emergency times, the effects of the new rules may ‘harden’ later and produce lasting effects well beyond the context of a crisis. In short, whether the old saying ‘more haste less speed’ will be proved again to be right or not.

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 strongly based 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, taking into account the terms of long term viability of the European economy; and lastly, it attempts to steer state spending decisions towards the attainment of virtuous policies.

4.1 Not everything is a state aid.

It is worthwhile to remind ourselves that the EU does not have a specific competence to regulate healthcare. Article 168 TFEU specifically details that the responsibility for organising and delivering health services and medical care is under the authority of the Member State. EU health policy therefore serves to complement national policies, and to ensure health protection is considered in all EU policies. Within the context of state aid, although with some uncertainties, it is now widely accepted that it is a duty of a Member State to provide solidarity concerning healthcare towards its citizens in

24 TF. cit. above, para. 49(b). This is a point rightly noted by M.Merola, ‘Aiuti di Stato e Covid 19’, Webinar Session, Ass.Italiana Antitrust, June 2020.
25 O. Stefan, ‘COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda’, in European Papers, 2020.
need and the predominantly non-economic character of healthcare services. The public health rationale resurfaces in the Commission’s decisions to approve COVID-19 state support measures. In several of them, the Commission, without being prompted to do so, 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. It is worth reminding ourselves here that state aid does not apply to any state activity nor does it prohibit Member States from adopting economic measures (and incidentally does not even require governments to ‘spend’). Horizontal expenditures (those applicable across the economic sectors) are not caught by state aid controls as they are deemed not to be anti-competitive per se. The TF acts then as a ‘reminder’ that a vast array of national measures taken in response to COVID-19 is not caught by state aid rules. One can take the example of the Irish emergency legislation. The Irish government introduced new measures as to provide financial support for workers affected by the COVID-19 crisis. The scheme is activated directly by employers through the payroll system (Temporary Wage Subsidy Scheme). The entire scheme is aimed at keeping all employees ‘on the books’ up until a time when business picks up again after the crisis. Irish Revenue will then reimburse employers. Significantly, the scheme is available to employers from all sectors ‘whose business activities are being adversely impacted by the COVID-19 pandemic.’ Modifications to the initial scheme 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. Needless to say — and the TF timely reminds Member States this as well — that any measures albeit general on their surface such as deferrals of payment of taxes and/or of social security contributions, if they are restricted for to certain sectors, regions or types of undertakings, involve instead an element of aid as they are inherently selective.

4.2 Damages must be compensated.

Not surprisingly, the very first measures notified under the TF concerned a scheme devised by Denmark to compensate organisers for damages suffered due to the cancellation of events with more than 1,000 participants. The Commission, in less than 24 hours, authorized it. The first options made available to Member States by the TF is then to 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

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26 C-205/03 FENIN P, ECLI: EU: C: 2006:453, paragraphs 25 to 28 and Cases C-262/18 P and C-271/18 P European Commission and Slovak Republic v Dôvera zdravotná poisťovňa, a.s. 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, p. 1–50, para 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.
29 See for further details: https://www.revenue.ie/en/corporate/communications/covid19/temporary-covid-19-wage-subsidy-scheme.aspx
30 TF cit. above, para 3.9.
31 SA.56685. As for the 27 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 these other option, the Commission discretion to evaluate the soundness of member state is a mentioned is much more intense.
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 has also 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. 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 must be a direct consequence of the natural disaster and the aid cannot result in overcompensation for damage, with the aid being 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 to damages not directly suffered as a result of the event in question. Thus, it is for the Member State to provide as in any tort law scenario 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 those companies that suffered a decline in their revenues of more than 40 % as a result of the coronavirus outbreak in the period from March 9th to June 9th 2020. 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 would be applied in relation to the Rescue and Restructuring Guidelines. According to the Commission, the principle of ‘one time last time’ which follows that rescue and restructuring aid can be granted only once over a period of 10 years would not apply to aid declared compatible under Article 107(2)(b) TFEU. The practical consequence of this specification is that Member States can still compensate the damages directly caused by the COVID-19 outbreak to undertakings that have already received aid under the R&R Guidelines. 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 in favour of the regional charter airline Condor has been singled out as particularly problematic. 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 as it was affected but the collapse of the Thomas Cook Group to which Condor belonged. As stated by the Condor management itself, 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 of the original loan. The quantification of the damages has been postponed until after the end of COVID-19 crisis and will be based on the airline's operating accounts for the year 2020 with a

32 Cit. above.  
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, p. 1–28.  
36 SA.56867.  
37 Media reports suggests that the new loan was also needed as the contractually agreed new owner PGL (Polish Aviation Group) withdrew because of Covid-19.
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, that makes aid to ‘to remedy a serious disturbance in the economy of a Member State’ compatible with EU law. The Communication makes it very clear from the outset 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 and not in the R&R Guidelines. The Framework, by relying on a series of macro-economic indicators, lists five types of aid, which would be deemed compatible:

a) 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.

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

c) Loans to companies; Member States will be able to grant loans with favorable interest rates to companies.

d) 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 ordinary applicable to STEC.

e) Measures to ensure that banks can continue to guarantee liquidity to the real economy. The Framework ‘transforms’ such aid into aid directly granted to the 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 would still be 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 thus direct grants and the cheap option of state guarantees.

4.4. Long term Liquidity.

As highlighted above, the economic repercussions of the COVID-19 are likely to be long-term. Thus, in its second amendment, the TF allows Member States to notify the Commission, those measures that would involve the recapitalization of undertakings in essentially all forms: pure equity forms (capital injections, new shares) and hybrid capital instruments (unsecured bonds, profit participation rights). Recapitalisation

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 and whilst the GBER rules are delimited by the scope of the Regulation itself. There is no real explanation in the TF why a different reference point has been employed.
however can only be granted to beneficiaries that were not in difficulty before the outbreak (December 31\textsuperscript{st} 2020) and would otherwise encounter serious difficulty maintaining operations. Again, the benchmark for reference is the one contained in Article 2(18) the GBER and not in the R&R Guidelines. Eligible companies must also be unable to find financing from the market on affordable terms. The TF — in line with Commission practice — lays down some basic principles such as that the recapitalization should be in the common interest, the aid must not go beyond the minimum level as to restore the beneficiary viability and so on. If there is an instance of aid exceeding €250 million, the Commission must be separately notified of this. The detailed rules provides mechanisms to ensure first, that the state shall receive appropriate remuneration for the investment and as a given, the closer the remuneration is to market terms, the lower the potential competition distortion as caused by the state intervention is. The TF also provides that the state will be incentivised to redeem its involvement and to allow the beneficiary to return to normal market conditions. Each form of recapitalization is also subject to specific economic parameters designed ensure the intervention conforms to market criteria.\textsuperscript{39}

5. Haste v Speed.

At the time of writing, the Commission has received and approved 270 measures, with most being approved within 48 hours. According to the StateAid Hub website, Belgium, Czech Republic, Denmark, Italy & Poland have implemented 15 or more COVD-19 related measures, whilst the average number of measures per Member State is 9.6.\textsuperscript{40} Impressive numbers definitively. As mentioned, there is the risk that the necessity of a speedy process may result in excess haste. On March 20\textsuperscript{th}, for instance, Germany notified the Commission two measures for loans with subsidised interest rates for any type of undertakings that require liquidity for their business. The aid can be granted to undertakings that are not in difficulty and/or to undertakings that were not in difficulty on 31 December 2019, but that faced difficulties or entered into difficulty thereafter as a result of the COVID-19 pandemic. The aid was to be granted either directly by KfW — the German state-owned development bank — or through other credit institutions. On March 22\textsuperscript{nd}, the Commission approved the scheme.\textsuperscript{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 as 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 — the analysis and assessment by the Commission is still present\textsuperscript{42} and nearly all the

\textsuperscript{39}For equity, injection 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 or if the company is not listed, an estimate of its market value should be established by an independent expert or by other proportionate means. Further any recapitalisation measure shall include a step-up mechanism increasing the remuneration of the State, to incentivise the beneficiary to buy back the State capital injections. TF cit. above paras 60 and 61.

\textsuperscript{40}Update on TF at https://www.lexxion.eu/en/state-aid-blog/ (consulted 1 Sept.2020).

\textsuperscript{41}SA.56714.

\textsuperscript{42}See for instance SA 56841 (UK Umbrella Scheme).
Commission’s decisions are published on its website (with some notable exceptions) with all being challengeable and judicially reviewable. This is not to say that all the decisions are going to prove correct and there are already some puzzling decisions where few details have been released but to simply reiterate that, despite the emergency, the basic tenets of the system of state aid control have been kept in place. Another major concern is in ensuring that a framework devised to tackle an emergency should 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, in my view, 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 for SMEs — some of the worst affected types of businesses. It however specifies that aid granted by Member States, both under Article 107(2)(b) and under (3)(b) TFEU, does not have the objective of preserving or restoring the viability, liquidity or solvency of the banks. It is difficult not to imagine that such a vast deployment of state guarantees will still benefit the 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 the Directive 2014/59/EU (so called the BRRD), and would also not be assessed under the strict state aid rules — bail-in rules, for example, applicable to the banking sector. Arguably this seems correct as, for instance, even in the Notice 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.’

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 an 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 maximum of 80% for self-employed workers and SMEs, and of 70% for larger enterprises. This ensures that support is swiftly available with favourable conditions and is 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.

43 See inter alia F De Cecco, ‘Competition, Stability and Moral Hazard: the tension between financial regulation and State aid control’, in F Laprevote, J.Gray and F De Cecco (eds), Research Handbook on State Aid in the Banking Sector, Elgar, 2017, 20.
44 OJ L 173, 12.06.2014 p. 190-348.
45 Conversely in case of the banks themselves experiencing liquidity shortage the BRRD rules will continue to apply. The TF somehow is based on a fingers crossed assumption that the economic crisis would not lead to such a disastrous consequence to eventually affect the banks liquidity as well. 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 the requirement of burden sharing by shareholders and subordinated creditors. TF cit. above, para. 7. For an in-depth discussion see P.Nicolaides ‘The Corona Virus Can Infect Banks Too: The Applicability of the EU Banking and State Aid Regimes’, in European State Aid Law Quarterly 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, p. 1–50, Footnote 181
An example of one of these safeguards is that new loans and renewals will be maintained within the costs applied before the COVID-19 and that commitment 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, with not all being capable of providing the same degree of support to their undertakings. Some commentators and EU institutions alike immediately identified the risk of creating market distortions. As noted by Motta and Petz, when public money is used to go beyond just 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 other 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 alike. 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 recapitalisation measures have not been redeemed, beneficiaries would 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 full redemption of COVID-19 recapitalisation measures, beneficiaries cannot make dividend payments, nor non-mandatory coupon payments, nor buy back shares, other than in relation to the State. There are also several constraints on management. For instance, on remuneration and a total ban on bonuses. There should be a clear exit strategy which the beneficiary should submit to their government that would in turn need to submit 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 as an instrument of last resort. The new rules brought in by the TF have been immediately tested, not surprisingly, by recapitalization measures for the aviation sector, a perennial problematic segment of the market now particularly hit by the pandemic. Once again, although it is still early days, the Commission was quick to act, displaying both adaptability and resilience. As for adaptability, the first measure notified and approved by the Commission on June 10\(^{th}\) 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 raise to €500, the difference contributed by several market investors whilst state participation

\(^{47}\) Resolución de 25 de marzo de 2020, approved by the EC with SA.56803.

\(^{48}\) M. Motta and M. Petz, ‘EU state aid policies in the time of COVID-19’ (18 April) https://voxeu.org/article/eu-state-aid-policies-time-covid-19; see also J.Buendia Sierra and A.Lamadrid. ‘A Moment of Truth for the EU: A Proposal for a State Aid Solidarity Fund’, Chilling Competition. As for the EU, U. Von der Leyen warns state aid ‘unleveelling the playing field’ in Europe (The Guardian, 13 May) and M. Vestager: Discrepancy in state aid distorts single market, hampers recovery (Euractiv.com and Reuters, 18 May).

\(^{49}\) TF cit. above, at para 72. These will need to be laid down in line with Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.
remained the same in terms of shares. Curiously, the Commission stated that certain governance commitments intended to provide incentives for an exit by the state and redemption of the State aid as soon as possible, are not appropriate or necessary to the same extent in these circumstances. 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 two distinct situations when the state is an existing stakeholder and when the state is not an existing stakeholder. The second notification also dealt with airlines: on June 25th, the Commission authorized a €6 billion recapitalisation of Lufthansa. Germany submitted a business plan, containing plans of redemption by 2026. In line with TF rules, Lufthansa is subject to bans 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 to a company that definitively holds significant market power in its relevant markets. 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, if the exit of the state will be in doubt six years after receiving the recapitalization aid, to re-notify a restructuring plan for Lufthansa, thus making ‘ordinary’ state aid rules applicable again. Reactions have been mixed with competitors already 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 or 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 adopt a less strict attitude. Further, 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 and may also widen the opportunity for a further use of behavioral conditions because of their flexibility and their attitude to shape the future of economic entities and their non-discriminatory open access nature.

6. The TF and EU public policies.

50 SA.56809. The decision has been challenged by Ryanair.
51 TF, cit.above, para 78 bis and 78 ter.
52 EU Remedies Notice, para. 17.
53 See A. Ezrachi, ‘Behavioural Remedies in EC Merger Control, Scope and Limitations’, World Competition 2006, 459. Behavioral remedies have been used for instance in guaranteeing access to key technology or infrastructure or supply obligations – all sectors possibly relevant in a COVID-19 scenario. See in the merger context Qualcomm/NXP Decision of 18 January 2018, Case M.8306.
As discussed so far, the main aim of the TF, in my view, 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 an ambition to look at the future of the European economy. Through its rules, the TF is attempting to ensure that the state measures are devised in a way that meets the EU’s general policy objectives, specifically relating to consumer protection and both the green, and digital transformation of the EU economy. It is not sufficiently clear to see 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.\textsuperscript{54} The General Block Exemption Regulation (GER) is after all just a recognition that if public spending is targeted at growth-promoting policies that fulfil common European objectives such as research, development and innovation, risk capital, broadband, regional aid, energy and environment;\textsuperscript{55} these state support measures are considered as ‘good’ economic policies as they are seen as conducive to the achievement of the aims listed above, and thus do not need not be notified to the Commission. Under the category of ‘the good aid’, many provisions of the TF are thus devoted, for instance, to public spending in the area of Research & Development (R & D). 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 into relevant process innovations for an efficient production of the required products’.\textsuperscript{56} 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 system of bonus if more than one Member States 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 knowledge spillovers (that is to say even the smartest of producers cannot completely prevent others from using the new knowledge) so tax incentives or direct grants can at least ‘alleviate’ a possible loss, in times of crises, other rationales become more prominent such as the true need to stimulate business to invest more in public policies such as health care.\textsuperscript{57} The TF does exactly that and goes further, as it requires that the industry benefitting from the aid needs to commit to grant non-exclusive licenses under non-discriminatory market conditions to third parties within the EU. Furthermore, during the COVID-19 crisis, the Commission has been extremely clear in telling Member States that voucher based compensation 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, but relying on the TF, such as in setting up a guarantee fund for the possible refunds.\textsuperscript{58} Finally, by excluding micro-companies and startups — in the

\textsuperscript{54}M Blauberger, ‘Of ‘Good’ and ‘Bad’ Subsidies: European State Aid Control through Soft and Hard Law’, \textit{West European Politics} 32(4), (2009), 719.

\textsuperscript{55}Commission Regulation (EU) No 651/2014, cit.above.

\textsuperscript{56}Id. para 3.6.

\textsuperscript{57}See B. R. Martin ‘R&D policy instruments – a critical review of what we do and don’t know’, in \textit{Industry and Innovation}, (2016) 23:2, 15.

\textsuperscript{58}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, p. 10–16.
third amendment — from the application of the TF and even those which were already in difficulty before the COVID-19, the Commission gave its blessing to public spending measures intended to foster innovative start-up companies, identified as ‘crucial’ for the economic recovery of the Union. 59 On the minus side, the TF also makes a specific reference for the need to ‘tailor’ state support to more general EU polices such as digitalization and the EU Green deal agenda and environment protection. Certain Member States’ spending decisions received considerably good press, most notable of them being France’s decision to make aid available to Air France conditional to reductions in internal flights. Some skepticism here is advisable. In the case of Air France, the full decision at the time of writing has not been published yet and we have only press statements by the government.60 EU state aid, of course, encourages Member States to spend green but it is always a requirement that the aid must have an ‘incentive effect’, that it is it must effectively encourage the beneficiary to invest in a more environmentally friendly option.61 A reduction in CO2 emissions in terms of internal flights is hardly impressive as it is a solution that does not truly innovate and the decision could have been taken regardless, on other grounds.62 Although much discussed, these possible conditionality clauses63 pertain more to the next phase, 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 peste 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.

6. A 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 life story of state aid control is one of resilience and adaptation, as state aid law has been constantly evolving and adapting with the transformation of the EU, its market and its rules.64 The TF is yet another chapter in such a 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 coming up with possible workable solutions. The TF largely managed to govern the interregnum and to fight the most morbid of symptoms, and possibly more. A segment buried in the third amendment of the TF is Article 16ter that

59 TF, Third amendment, cit.above, para.7.
60 https://www.france24.com/en/20200524
61 Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01) and GBER, cit.above.
62 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.
63 Another example is the measures adopted by Denmark and Poland to refuse to grant aid to those undertaking register in tax heavens which is commendable but that does not of course address any possible distortive effect within the internal market. See further R Federico ‘Aiuti di stato e concorrenza fiscale tra Stati: la crisi della sovranità nazionale durante l’emergenza Covid-19’, in Concorrenza e Mercato, 2020, 1.
64 A Biondi & E Righini ‘An evolutionary theory of state aid control’ in A. Arnell & D. Chalmers, The Oxford Handbook of European Law, OUP, Ch. 12, 2015.
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 then also manifest the optimism of the will, believing that the world can be better place and that it can face new challenges and overcome crises even of magnitude rarely experienced.

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