Will COVID-19 Make or Break EU State Aid Control? An Analysis of Commission Decisions Authorising Pandemic State Aid Measures

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I. Introduction

This article analyses Commission Decisions authorising State aid between March and December 2020 in order to explore their possible consequences on the internal market and the level playing field. The research is aimed at evaluating whether the relaxation of State aid control due to coronavirus disease 2019 (COVID-19) has produced disparities between the Member States and unfair advantages—or disadvantages—for EU companies. Even though final calculation of aid can only be finalised when undertakings actually receive the specific aid, however, the Commission’s decisions assessing State measures do give a clear indication of at least two phenomena—first, the geographical distribution of aid in the EU and second which policy objectives were favoured by the Member States in the period of time considered.

Recent studies have already highlighted the importance of carrying out a precise analysis on State aid during the pandemic. Indeed, the impact of aid measures on the competitiveness of EU undertakings and their likely consequences on the internal market are intertwined with the pivotal discussion about the application of the Temporary Framework for State Aid (hereinafter ‘TF’)

Key Points

• The relaxation of EU State aid control by the Temporary Framework for State Aid has already produced long-term distortions on the internal market.
• The analysis on Commission Decisions shows that the geographical distribution of aid in the EU has been uneven.
• Classical policy objectives of State aid measures such as environmental protection, regional aid, and R&D and innovation, have been set aside in order to aid undertakings in difficulty.

vis-à-vis the traditional EU State aid regime. On the one side, the TF—established by the Commission on 20 March 2020—aims to ensure sufficient liquidity to companies in difficulty as a result of the COVID-19 pandemic. On the other side, however, the unprecedented relaxation of EU State aid rules may undermine the functioning of the internal market and competition between companies. Indeed, the TF provides Member States for a wide range of instruments to counteract liquidity’s shortage. In addition to direct grants there

subsequent versions published in OJ C 112I, OJ C 164, OJ C 218, OJ C 340I and OJ C 34. References in this article are based on the informal consolidated version of the Temporary Framework of 28 January 2021, available at https://ec.europa.eu/competition/state_aid/what_is_new/TF_informal_consolidated_version_as_amended_28_january_2021_en.pdf.

Among the commentators, see Andrea Biondi, ‘Governing the Interregnum: State aid Rules and the COVID-19 Crisis’ (2020) 4:2 Market and Competition Law Review 17; Delia Ferri, ‘The Role of EU State aid Law as a “Risk Management Tool” in the COVID-19 Crisis’ (2020) 12:1 European Journal of Risk Regulation 176; Alfonso Lamadrid de Pablo, José Luis Buendía Sierra, ‘A Momentum of Truth for the EU: A proposal for a State Aid Solidarity Fund’ (2020) 11:1-2 Journal of European Competition Law & Practice 1; M Motta, M Peitz, ‘State Aid Policies in Response to the COVID-19 Shock: Observations and Guiding Principles’ (2020) 219 Interecomics.

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are other instruments, which have been particularly sought by the undertakings, i.e., deferrals of tax payments, suspensions of social security contributions, and wage subsidies for employees. Moreover, whereby the January 2021 amendment repayable instruments can be converted into direct grants. The TF has certainly been well-received by the Member States, so much that between 12 March and 31 December 2020, 428 Commission decisions authorised more than €1.5 trillion aid, mostly to compensate the economic losses suffered by businesses as a result of the COVID-19 crisis.9

Many commentators point out that the social and financial costs which derive from the COVID-19 crisis will be even higher than those borne in the EU after the 2008 financial crisis.7 The policy response to the current crisis has nevertheless diverged from the Member States’ and the EU’s reaction to the financial crisis. Indeed, whilst most aid during the financial crisis was aimed at ensuring that banks had sufficient resources, only a smaller proportion of aid was given as direct liquidity to businesses, mainly through the application of the 2009 Temporary Framework for State aid.8 Crisis measures implemented and reported by the Member States in 2008, 2009, and 2010 amounted to approximately €212.2 billion, €353.9 billion, and €1.1 trillion, respectively.10

The following sections will give an overview on some preliminary data related to State aid during the current pandemic. Before examining the research’s outputs, Section II lays out the methodology for research, by describing the type of data which are included in this preliminary study, how the figures related to State aid are elaborated and calculated, and which type of outputs are extrapolated from such analysis. Then, the results on the geographical distribution of aid in the EU—plus the UK—are provided in Section III. It will be demonstrated that the disproportionate distribution of State aid might have increased disparities between Member States in the medium and long-term. Moreover, Section IV looks at the sectoral application of aid. This part will highlight that the classical goals of State aid in the EU, such as environmental policies, research & development and innovation (hereinafter ‘RDI’) and regional development, were set aside in order to aid companies which have experienced financial hardship. In addition, two specific policy objectives will be tackled—RDI and the aviation sector. To conclude, the research will take stock of the findings in order to assess whether the framework for State aid has been fit for purpose and eventually formulate normative recommendations.

II. The analysis of aid between March and December 2020: methodology explained

Several preliminary observations on methodology need to be made. Data were firstly collected from the official list of Commission Decisions regarding State aid during the pandemic, which has been regularly updated over the last months.11 This paper presents the results of a pilot conducted on decisions taken between 12 March and 31 December 2020, as this is the original timespan conceived for the TF. The data were organised following the structure of Commission’s decisions which embed the following information: date, country of aid implementation, amount of aid, type of undertakings, policy objectives, and legal basis under which the decision is taken. Finally, all inputs have been translated into an original database to which a number of filters have been applied. Final outputs were extrapolated from the database by using specific techniques in data processing, such as Pivot Tables. This

5 Temporary Framework for State Aid Measures to Support the Economy in the Current Covid-19 Outbreak (n 3).
6 In October 2020 the Commission announced that total aid amounted to €3 trillion. Such figure may represent the actual amount of aid used by Member States after the Commission authorised indefinite aid through eight measures. See the EU Commission Statement available at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1805. (Accessed on 27 July 2021).
7 Some predictions were given in Suborna Barua, ‘Understanding corononomics: The economic implications of the coronavirus (COVID-19) pandemic,’ MPRA Paper 99693; Khurram Shehzada, Liu Xiaoxing, Hayfa Kazouh, ‘COVID-19’s disasters are perils than Global Financial Crisis: A rumor or fact’ (2020) 36 Finance Research Letters Elsevier.
8 The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis [2008] OJ C 270; The recapitalisation of financial institutions in the current financial crisis: Limitation of aid to the minimum necessary and safeguards against undue distortions of competition [2009] OJ C 10; Communication on the Treatment of Impaired Assets in the Community Banking Sector [2009] OJ C 72; Communication on the application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis [2010] OJ C 329; Communication on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis [2011] OJ C 356; The Banking Communication [2013] OJ C 216.
9 Temporary framework for State aid measures to support access to finance in the current financial and economic crisis [2009] OJ C 83.
10 See Commission Staff Working Document accompanying the ‘Report From The Commission State Aid Scoreboard’ SEC(2009)1638, 8, available at https://ec.europa.eu/competition/state_aid/studies_reports/archive/annex_2009_autumn_en.pdf (Accessed on 27 July 2021); Commission Staff Working Document ‘Facts and figures on State aid in the Member States Accompanying the Report From The Commission State Aid Scoreboard’ SEC (2010)1462 final, 9, available at https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:52010SC1462&from=EN (Accessed on 27 July 2021); Commission Staff Working Paper ‘Autumn 2011 Update’ COM(2011)488 final, 8, available at https://ec.europa.eu/competition/state_aid/studies_reports/archive/2011_autumn_working_paper_en.pdf. (accessed on 27 July 2021).
11 List available at: https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html.
tool serves as a technique to create statistics and focus on relevant information.\textsuperscript{12}

As regards the policy objectives, 25 categories result from the analysis of Commission’s decisions. Most of them attain to specific goals and policies, such as agriculture, fishery and forestry, food industry, hospitality, credit insurance, export, media, regional aid, transport, tourism and travel, aviation, retail, manufacturing, automotive industry, culture, the maritime sector, real estate, non-profit, sport, RDI, COVID-related RDI, healthcare, and aid having a social character and compensation for the cancellation of public events. However, the largest proportion of aid was given to one category only—aid to undertakings in financial hardship, regardless the size and the sector they operate in.

State measures may refer to more than one policy objective. For instance, a State may decide to grant aid to companies operating in a particular sector of the economy in a specific region of its territory. Thus, it could be classified under regional aid or sectoral aid. For instance, on 19 May 2020 Italy granted €70 million to undertakings ‘of the agricultural sector, of the fishery and aquaculture sector, of the buffalo livestock sector and of the floriculture sector’ operating in the Campania region.\textsuperscript{13} In such cases, the choice of policy objective depends on a prevalence criterion that I applied case by case, by looking at the primary objective contained in the Commission’s decisions. In this example, as a result, the measure was classified as aid referring to the ‘Agriculture, Fishery and Forestry’ category, rather than under regional aid.

As far as the country of aid implementation is concerned, 28 states are taken into consideration, i.e., all 27 EU Member States and the UK. Indeed, although the UK officially left the EU in January 2020, State aid rules continued to apply until December 2020—the end of the transition period. Therefore, aid granted by the UK until December 2020 might fall under the Commission's investigation, be brought before the CJEU and examined against EU State aid rules, including the TF. As provided under Article 93 of the Withdrawal Agreement,\textsuperscript{14} the Commission might open an investigation about aid granted before 31 December 2020 within a period of time of 4 years after the expire of the transition period.

Although the research is intended to be comprehensive and to elaborate all information given by the Commission through its decisions, there are two main caveats in terms of inputs. First, it should be noted that at this stage of the research some data are intentionally left out, for instance the form of aid. The form of aid refers to the specific instrument whereby aid is granted by the State of through State resources to the undertakings. Whilst in some cases the decisions clearly state the form of aid to be implemented (e.g., wage subsidies only or direct grants only), however, a large number of decisions embed complex schemes where grants, loans, subsidies, guarantees, or other instruments cannot be clearly distinguished.\textsuperscript{15}

Furthermore, aid authorised by eight Commission decisions between 22 March and 14 April 2020 could not be calculated towards the final amount of aid. Indeed, those eight measures lack a precise budget, thus they could not be counted towards the final amount. Indefinite aid was authorised four times to Germany to compensate national undertakings in difficulty,\textsuperscript{16} to Italy,\textsuperscript{17} and the UK\textsuperscript{18} to compensate small-medium enterprises (SMEs), to Belgium in order to tackle the economic difficulties of its airports\textsuperscript{19} and to Italy, again, to support the labour market by paying wages to companies and self-employed workers.\textsuperscript{20} For the purposes of the present analysis, such measures will be analysed qualitatively rather than quantitatively. On the one side, decisions without a specified budget limitation cannot be counted towards the total amount of aid, because their precise budget remains unknown. On the other side, such decisions might have served as a sign of the EU’s political willingness to reverse

\begin{itemize}
\item \textsuperscript{12} For an overview on the methods, see Scott Pardo, Statistical Analysis of Empirical Data. Methods for Applied Sciences (Springer International Publishing 2020).
\item \textsuperscript{13} Commission Decision of 19 May 2020 in Plan for the socio-economic emergency in the Campania region—Aid measures in favour of the undertakings of the agricultural sector, of the fishery and aquaculture sector, of the buffalo livestock sector and of the floriculture sector (SA.57349).
\item \textsuperscript{14} Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C 384I.
\item \textsuperscript{15} For instance, Commission Decision of 2 April 2020 in Umbrella Scheme—National Temporary Framework for State aid in the form of direct grants, repayable advances, tax advantages, guarantees on loans and subsidised interest rates for loans to support the economy in the current COVID outbreak (SA.56851) [2020]; Commission Decision of 28 April 2020 in Germany—COVID-19—Federal Framework ‘Aid for Covid-19 related R&D, investments in testing infrastructures and production facilities’ (Bundesregelung Forschungs-, Entwicklungs- und Investitionsbeihilfen) (SA.57100).
\item \textsuperscript{16} Commission Decision of 22 March 2020 in Germany—COVID-19 measures (SA.56714); Commission Decision of 24 March 2020 in COVID-19: Bundesregelung Bürgschaften 2020 (SA.56787); Commission Decision of 2 April 2020 in Germany—COVID-19—Federal framework for subsidised loans 2020 (SA.56863); Commission Decision of 11 April 2020 in COVID-19: Änderungsnotifizierung zu den bestehenden Bundesregelungen (a) Kleinbeihilfen 2020, (b) Bürgschaften 2020 und (c) Beihilfen für niedrigverzinsliche Darlehen 2020, auf der Grundlage des Temporäre Regelung (C(2020) 1863 final vom 19.3.2020) (SA.56974).
\item \textsuperscript{17} Commission Decision of 25 March 2020 in State guarantees to support debt moratorium by banks to SME borrowers (SA.56690).
\item \textsuperscript{18} Commission Decision of 25 March 2020 in UK COVID 19 measure CBILS Guarantee (SA.56792).
\item \textsuperscript{19} Commission Decision of 11 April 2020 in COVID19—Mesures de soutien en faveur des aéroports wallons—Moratoire sur les redevances de concession (SA.56807).
\item \textsuperscript{20} Commission Decision of 13 April 2020 in Guarantee scheme under the Temporary Framework for State aid measures to support the economy in the current COVID-10 outbreak (SA.56963).
\end{itemize}
the sentiment against State support which had been popular during the financial crisis.

III. Analysis on the geographical distribution of State aid

The analysis reveals an uneven distribution of aid during the pandemic. Germany granted the largest amount of aid, circa €619,276,000,000 (41 per cent of the total amount of aid in Europe). France follows with €377,394,000,000 (25 per cent of the total). Thus, Germany and France together granted 66 per cent of aid in Europe. The other 26 States share the remaining 34 per cent. Among them, Spain granted €81 billion (5.3 per cent), the UK €73.5 billion (4.8 per cent), whereas Italy and Austria around €40 billion (2.6 per cent). Poland and Belgium spent almost the same €61 and €65 billion, respectively (4 per cent and 4.3 per cent). Aid of the other Member States represents only smaller percentages (Figures 1 and 2).

It has to be analysed whether the new rules might have enhanced the growing disparities in the Member States’ fiscal capacities—the so-called ‘deep pocket distortions’—whose eradication is actually one of the main goals of the EU State aid regime. In this respect, in addition to all data already recalled above, two more inputs were inserted in the database: the population of Member States and their GDP, as represented by EUROSTAT in 2019. Those figures are necessary to draw appropriate comparisons between Member States so that to evaluate the full impact of State aid. First, the examination covers the quantity of State aid implemented by each country. Second, similar countries in terms of their populations will be compared. The results will show how much State aid Member States have implemented when compared to their national GDPs and finally the distribution of aid per capita in each Member State.

The Commission appears to have given up on the even distribution of aid throughout the territory of the Union by implementing the TF. On the one side, Member States with a larger fiscal capacity spent more on aid, resulting in an advantage to national companies vis-a-vis the European competitors. On the other side, it could be argued that Member States with a greater fiscal capacity also have a larger population and therefore more or bigger companies to aid. For instance, Germany is the biggest Member State in terms of population, 83 million inhabitants.22 Its GDP in 2019 was €3121 billion.23 From March

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21 Joaquín Almunia, ‘Doing More with Less—State Aid Reform in Times of Austerity: Supporting Growth Amid Fiscal Constraints’ (King's College London, London 11 January 2013).

22 EUROSTAT, data available at https://ec.europa.eu/eurostat/databrowser/view/pso0001/default/table/lang=en. (Accessed on 27 July 2021).

23 EUROSTAT, ‘GDP at current market prices, 2009 and 2017–2019’ available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=GDP_at_current_market_prices,_2009_and_2017-2019_FP20.png. (Accessed on 27 July 2021).
to December 2020 Germany spent about 19.8 per cent of its GDP in State aid (Figure 3). State aid amounted to about €7,461 per person.

However, a closer look at the data reveals a different picture. Indeed, countries with a similar population could grant different quantity of aid. The examples are
numerous. For instance, France, Italy and Spain have about 66,000,000, 60,360,000 and 47,000,000 inhabitants, respectively. France granted around €377 billion, Italy €40 billion, and Spain €80 billion. It should be added that French GDP in 2019 was €2214 billion, whereas Italy’s €1785 billion and Spain’s €1331 billion. It could be observed that France spent 17 per cent of its GDP during the pandemic, whereas Italy and Spain less, around 2.2 per cent and 6 per cent, respectively. The second figure is even more significant. The disproportionate distribution of aid has enhanced disparities among citizens. Indeed, France could distribute circa €5.632 per person, Spain €1.715, and Italy €665 only (Figure 4).

A second example concerns medium-size countries—Belgium with a population of about 11,460,000 and Greece with its 10,700,000 inhabitants. Despite the similar size, their implementation of aid differed by a large extent. Belgium spent approximately €65 billion, whereas Greece only €14 billion. Their GDPs differ as well: in 2019, the Belgian GDP amounted to €420 billion, whereas the Greek one to €225 billion. Their State aid implementation during the pandemic had a diverse outcome. Indeed, Belgium spent 15 per cent of its GDP and gave around €5.731 per citizen, whereas Greece spent 6.3 per cent of its already lower GDP and that resulted in about €1.321 per person (Figure 5).

The last comparison addresses the discrepancies in aid implementation between Austria and Bulgaria which have a population of 8,860,000 and 7,000,000 inhabitants. The Austrian GDP in 2019 was €351 billion and the Bulgarian GDP €115 billion. As for State aid, Austria spent €40 billion, whereas Bulgaria only €1.5 billion. It derives that while Austria spent 11.5 per cent of its GDP and applied an average €4.564 per person, Bulgaria spent 1.33 per cent of its GDP and transferred €218 pro capite (Figure 6).

### IV. Analysis on the sectoral distribution of State aid

The analysis on the sectoral distribution of aid should take into account data available from previous years. Before the outbreak of the COVID-19 pandemic, there was a clear positive trend in State aid policy. Member States had consistently redirected aid towards horizontal objectives. For instance, in 2016 Member States spent €105.9 billion and the reported primary objectives were environmental policies, regional aid and RDI. In 2017, a
As shown in Figure 7, the largest proportion of aid was granted to undertakings in difficulty, regardless the size and the sector which they operate in. On such objective Member States spent around €1.3 trillion (85 per cent of total aid). In addition, some measures specifically targeted SMEs, micro-companies and start-ups which received a dedicated amount of €59 billion as well. The figures appear to be coherent with the TF’s main goal, which is ensuring liquidity in order to keep businesses afloat. As SMEs, micro companies and start-ups—which have less than 50 employees and less than €10 million of annual turnover and/or annual balance sheet total—are considered particularly hit by the harshness of the crisis, the Commission extended emergency aid to such companies in July 2020. On the same occasion, more safeguards were put in place for those undertakings. Indeed, although larger companies are only entitled to receive aid if they were not in difficulty before the outbreak of the pandemic, yet micro and small companies can benefit from aid even in case they were already in difficulty before 31 December 2019.

A variety of instruments were used by the Member States, including direct grants,35 State guarantees,36 subsidised interest rates for loans,37 rent compensations,38 payments deferrals,39 exemptions from social security payments40 or wage subsidies.41 In reality, many measures

32 EUROSTAT, State Aid Scoreboard 2018, available at https://ec.europa.eu/competition-policy/system/files/2021-04/state_aid_scoreboard_2018.pdf (accessed on 27 July 2021).
33 State Aid Scoreboard 2019, available at https://ec.europa.eu/competition/state_aid/scoreboard/state_aid_scoreboard_2019.pdf. (accessed on 27 July 2021).
Figure 7. Prime policy objectives reported from aid authorised by the Commission in the EU, plus the UK.

... embed complex legal architectures. For instance, on 2 April 2020 the Commission authorised Spain to implement €3.65 billion in direct grants, repayable advances, tax or payment advantages, guarantees on loans and subsided interest rates to undertakings in difficulty. Furthermore, France chose to grant €3.7 billion in State guarantees on loans and credit lines through a publicly financed body called Bpifrance Financement S.A. The Italian measure to support SMEs, mid-caps, and self-employed workers—Fondo di garanzia per le PMI—provided a budget of €1.7 billion through guarantees on loans and grants covering the value of the premiums on those guarantees available for such undertakings.

Unsurprisingly, data pertaining to Germany are coherent with the main percentages shown at the EU level, as Germany represents 41 per cent of total aid granted in Europe between March and December 2020 (Figure 8). Germany focused on few sectors and granted 89 per cent of aid to its national companies affected by the COVID-19 crisis. Further allocation of aid to different policy objectives is as follows: 7 per cent regional aid, 1 per cent to the aviation sector, COVID-related RDI, credit insurance, and transport.

These preliminary findings suggest that aid measures implemented during the pandemic might have caused distortions of competition within the internal market, as pandemic aid departs from the traditional policy objectives which had been encouraged by the Commission. There are in particular two case studies which flag specific issues and possible consequences on trade and competition in the EU. The first focus will be on RDI, an important policy of the Union promoted by Article 179 TFEU and recognised as a key driver for achieving a smart, sustainable and inclusive growth.

45 In this respect, RDI is mostly dealt with at the national level through State resources, although it has become one of the essential objectives of the Union’s industrial policy since Horizon 2020 Programme and in Horizon Europe which sets to replace the former. Due to its relevance for the EU industrial strategy and the Member States’ economic...
development, one can wonder if a disproportionate distribution of RDI aid among Member States or, in the alternative, an overall small implementation of it during the pandemic, will produce systemic deficiencies in the EU economy.

The second policy concerned is the aviation sector, i.e., the sector where the majority of Rescue & Restructuring aid (hereinafter ‘R&R aid’) has taken place. Notwithstanding the Commission’s caution on State intervention in the economy, the COVID-19 crisis has brought exceptional consequences on some sectors of the economy, such as the air operators. Multiple lockdowns and several bans on movement within and outside Europe has caused the worst air crisis of history which many Member States have decided to address by investing in national air companies. Nevertheless, R&R aid is one of the most distortive aid on the internal market. Therefore, a reflection on the criteria set out by the TF should be drawn.

A. The evolution of RDI during the pandemic

Whereby the first amendment to the TF research activities, testing systems and production of PPE were included among the activities which are entitled to obtain aid from the Member States.48 If we consider companies engaging with pure RDI activities alongside those carrying out COVID-related research and production, RDI represents however nearly 1 per cent of total aid, although the figures approximately equate those of 201849.

Most RDI aid during the pandemic was obviously COVID-related. Member States spent €11.5 billion on such objective (Figure 9). For example, Italy granted €50 million to undertakings which would ‘set up new facilities for the production of equipment and devices […]’, expand the production of their existing structures producing such equipment, or convert their production line to that effect.50 Furthermore, Poland51 invested €449 million and Ireland52 €200 million in COVID-relevant research, including antivirals, vaccines, relative products and treatments, PPE and equipment.

Similarly, Germany aided companies aimed at ‘supporting research and development activities and testing and upscaling infrastructures that contribute to develop COVID-19 relevant products, as well as to support investments into the production of products needed

48 Temporary Framework for State aid (n 3).

49 State Aid Scoreboard 2019 (n 33).

50 Commission Decision of 22 March 2020 in Production of medical equipment and masks (SA.58786).

51 Commission Decision of 18 June 2020 in Poland: R&D aid for Covid-19 relevant research and development, investment aid for the construction and upgrade of relevant testing and upscaling infrastructures, and investment aid for investments into production facilities for the production of C (SA.57519).

52 Commission Decision of 3 June 2020 in Scheme to facilitate COVID-19 relevant research and development, to support construction and upgrade of testing and upscaling facilities of COVID-19 relevant products and to support investments into the production of COVID-19 relevant products (SA.57453).
to respond to the COVID-19 outbreak. However, its investment was greater—€5 billion in direct grants, repayable advances and tax advantages. The same €5 billion budget was invested by France in June 2020 as to support COVID-19 relevant RDI activities, testing and upscaling infrastructures that contribute to develop COVID-19 relevant products, as well as investments into production capacities for products needed to respond to the COVID-19 outbreak. It should be noted that French and German aid considered together is €10 billion out of the total €11.5 billion spent by all the States.

The Dutch case is yet peculiar. The Commission authorised the Netherlands to grant €100 million to social support services, healthcare services and youth care for the purchase, leasing, licensing, and implementation of e-health applications. Two observations could be drawn on the application of such aid. First, it could be wondered whether such aid falls within the category of RDI with the purposes of COVID-research or on the contrary whether it is simply aimed at helping national companies to develop a specific technology framed within the national industrial strategy. It then must be acknowledged that the development of the national healthcare systems along with investments on affordable treatments and medicines is already at the centre of the brand-new proposal for a €9.5 billion EU4Health Programme.

By fostering the healthcare systems, the EU4Health Programme aims to enact digital transformation. Updated systems mean faster procedures, which could impact positively on the access to healthcare services by individuals and on business opportunities. Another goal set out by the programme is the creation of reserves of medical supplies for crises. Indeed, at the outbreak of the pandemic, Europe was heavily relying on overseas medical supplies. Yet, in order for the Union to create its own reserves of medical supplies, it shall organise a net of businesses and develop its own industrial strategy.

Fewer Member States invested on RDI projects other than COVID-related. Among them, Hungary spent €88 million in wage subsidies to undertakings, which employ researchers and developers. However, the measure is aimed at supporting the labour market in the field, rather than investing on new projects. On the contrary, a suitable example of classical RDI aid is represented by a Slovakian measure granting €25 million to innovative companies which have a scalable innovative product or service with potential for significant growth and penetration on international markets.

These preliminary findings demonstrate that RDI aid has been facing a process of adaptation to the pandemic in a twofold manner. First, most RDI was COVID-related in the period of time concerned. Therefore, RDI has served as a tool of investment for Member States to counteract the health crisis caused by the pandemic. Second, although RDI is considered horizontal aid, as it often produces positive spillovers in many sectors of the economy and it could result in an overall improvement in the country’s economic performance and competitiveness through for instance technology, nevertheless, during the pandemic ad hoc measures were also applied in the field of RDI. For instance, Austria granted €840,000 to Apeptico and €1.2 million to Panoptes, which are both biotech companies engaging with COVID-related research. The Netherlands granted €6.5 million to Apeptico—emergency call for the research of COVID-19 (SA.57430) and

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53 Commission Decision of 28 April 2020 in Germany—COVID-19—Federal Framework ‘Aid for COVID-19 related R&D, investments in testing infrastructures and production facilities’ ("Bundesregelung Forschungs-, Entwicklungs- und Investitionsbeihilfen") (SA.57100).

54 Commission Decision of 5 June 2020 in Aid for COVID-19 relevant R&D projects, investment into relevant testing and upscaling infrastructures, and investment into COVID-19 relevant production capacities (SA.57367).

55 Commission Decision of 3 April 2020 in Direct grant scheme for e-Health services at home under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (SA.56915); Commission Decision of 16 July 2020 in Covid-19: E-Health at home 2.0 (SA.57897).

56 The Commission’s proposal is available at https://eur-lex.europa.eu/resource.html?uri=cellar:9b76a771-a0c4-11ea-9d2d-01aa75ed71a1.0001.02/DOC_1&format=PDF. (accessed on 27 July 2021).

57 Commission Decision of 17 April 2020 in COVID-19 Scheme to provide aid in form of wage subsidies for employees in research and development (SA.57007).

58 Commission Decision of 10 August 2020 in COVID-19: ESFI liquidity support state aid scheme for innovative companies with limited access to credit facilities (SA.58054).

59 Jacques Pelkmans, ‘European industrial policy’ in Bianchi, Labory (eds), International Handbook of Industrial Policy (Edward Elgar Publishing 2006) 67.

60 Commission Decision of 3 July 2020 in COVID-19: Individual aid to Apeptico—emergency call for the research of COVID-19 (SA.57430) and
InnoGenerics, a pharma company which deals with the production of generic medicines, as to remedy a lack of liquidity.\textsuperscript{61}

B. Selective aid during the pandemic: the case of the aviation sector

From March to December 2020, several carriers, air companies and airport operators have been forced to stop their flights and ground activities or highly reduce them. Thus, Member States have implemented many \textit{ad hoc} measures and aid schemes, amounting to circa €24.6 billion. Germany and France outreached the other states on aid granted to the aviation sector as well—about €7.9 billion and €7.1 billion, respectively (see Figure 10).

Overall, most aid has been given to compensate damage suffered as a consequence of the crisis and the restrictions on global movements. Moreover, there have been several rescue and restructuring measures to aid undertakings operating in the aviation sector. Aid has been granted not only to air carriers, but also to airport operators. For instance, the Commission authorised illimited aid to Belgium, in the form of suspension of royalties due by owners of airports in the Walloon region.\textsuperscript{62}

As compensation for damage is concerned, the examples are numerous due to the harsh consequences of the COVID-19 crisis. For instance, Alitalia has been aided twice by the Italian government in the period of time concerned, with €199.45 million in September 2020 and €73 million in December 2020.\textsuperscript{63} Other undertakings were compensated for their losses, such as SAS\textsuperscript{64} by Denmark and Sweden with €137 million each, Condor\textsuperscript{65} by Germany with €550 million, Corsair\textsuperscript{66} by France with €30.2 million, Austria Airlines\textsuperscript{67} with €150 million, and

\textsuperscript{61} Commission Decision of 11 November 2020 in COVID-19 Planned aid in favour of InnoGenerics (SA.59021).

\textsuperscript{62} Commission Decision of 11 April 2020 in COVID19—Mesures de soutien en faveur des aéroports wallons—Moratoire sur les redevances de concession (SA.56807).

\textsuperscript{63} Commission Decisions of 4 September 2020 in Alitalia damage COVID 19 (SA.58114) and Commission Decision of 29 December 2020 in Alitalia COVID-19 Damage Compensation II (SA.59188).

\textsuperscript{64} Commission Decision of 26 April 2020 in COVID 19—Support for Condor (SA.56867).

\textsuperscript{65} Commission Decision of 26 April 2020 in COVID 19—Support for Condor (SA.56867).

\textsuperscript{66} Commission Decision of 11 December 2020 in Corsair—Compensation for the damage caused by the COVID-19 outbreak (SA.58125).

\textsuperscript{67} Commission Decision of 6 July 2020 in COVID-19—aid to Austrian Airlines (SA.57539).
Aegean Airlines\(^{68}\) by Greece with €120 million. All the above-mentioned decisions were assessed under Article 107(2)(b) TFEU which provides that aid shall be held compatible with the internal market by the Commission if it is given to remedy natural disasters or exceptional occurrences. Given the little margin of discretion left to the Commission under Article 107(2)(b) TFEU, the requirements to be met are particularly strict.\(^{69}\) There must be exceptional occurrences, which may have caused prohibitions and recommendations affecting the beneficiaries. Moreover, the State has to include a detailed and accurate analysis on the type of damages compensated, whether it is a loss of income and/or additional costs related to COVID-19. Third, the Member State is required to provide evidence of the causal link between, on the one hand, the COVID-19 outbreak and the prohibitions affecting the beneficiaries and, on the other hand, between the damage suffered by the company and the compensation. However, even though Member States have to meet such strict requirements imposed by Article 107(2)(b) TFEU, aid might have anyways distorted the internal market. For instance, Alitalia was granted compensation for damage twice in 2020, despite the two ongoing Commission’s investigations on aid granted to the company between 2017 and 2019.\(^{70}\) The last Commission’s investigation had been officially communicated on 28 February 2020, a few days before the establishment of the TF.

In addition to compensations for damage, the aviation sector has registered an increased volume of R&R aid over the last months, especially after the introduction of specific rules on recapitalisations and debt’s restrutures in May 2020.\(^{71}\) One of the most criticised measures concerns the recapitalisation of DLH, the holding company of LH Group which owns several air transport businesses including Lufthansa. The financial operation costed €6 billion by means of equity and hybrid capital instruments.\(^{72}\) Further R&R aid was implemented by Estonia granting €30 million to Nordica,\(^{73}\) Latvia €250 million to AirBaltic,\(^{74}\) Poland €250 million to LOT,\(^{75}\) Portugal €1.2 billion to TAP\(^{76}\) and Belgium with two measures—€25 million to Aviapartner, a handling service provider at Brussels National Airport (Zaventem),\(^{77}\) and €290 million to Brussels Airlines.\(^{78}\) Moreover, Scandinavian Airlines—better known as SAS—was recapitalised by Denmark and Sweden jointly, by granting €583 million and €486 million, respectively and Corsair\(^{80}\) was restructured by France with €106.7 million.

Those recapitalisations are mostly assessed under Article 107(3)(b) TFEU in light of Section 3.11 of the TF. Member States are allowed to give public support in the form of equity and/or hybrid capital instruments to undertakings facing financial difficulties due to the COVID-19 outbreak. However, as recapitalisations are deemed the most distortive measures to the internal market, the TF lays out more specific requirements in comparison with the 2014 R&R Guidelines. For instance, the existing Guidelines provide that aid should be ‘as short as possible’, in order to restore the long-term viability.\(^{81}\) Furthermore, the Commission should take into account ‘possible commitments’ from the Member States and assess restructuring aid by considering measures to limit the distortion of competition, so that ‘possible and positive effects outweigh any adverse ones’.\(^{82}\)

The TF however imposes more specific clauses, as it requires Member States to lay out clear conditions on the State’s entry, remuneration and exit from the equity of the undertakings concerned, governance provisions and appropriate measures to limit distortions of competition.\(^{83}\) A ‘credible and detailed exit strategy’ shall be presented, including a plan on the continuation of the beneficiary’s activity, the use of funds invested by the State and further measures that both the State and the beneficiary will take to abide by the repayment schedule.\(^{84}\)

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\(^{68}\) Commission Decision of 23 December 2020 in Covid-19: Recapitalisation of Air Baltic—Latvia (SA.56943).

\(^{69}\) Commission Decision of 23 April 2018 to open an investigation in Complaints against alleged State aid to Alitalia (SA.48171) and of 28 February 2020 in New loan to Alitalia (SA.53676).

\(^{70}\) Commission Decision of 5 November 2020 in COVID-19—Recapitalisation of Nordica (SA.57586).

\(^{71}\) Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty [2014] OJ C249, para 47.

\(^{72}\) Ibid., paras 86, 76.

\(^{73}\) Temporary Framework for State aid (n 3) para 45.

\(^{74}\) Ibid., at Section 3.11.7, paras 79–80.
Moreover, if—after 6 years from the recapitalisation—the State’s intervention has not been reduced below 15 per cent of beneficiary’s equity, a restructuring plan in accordance with the R&R Guidelines must be notified to the Commission for approval.  

In general, measures must not exceed the minimum needed to ensure the viability of the beneficiary, and should not go beyond restoring the capital structure of the beneficiary to the one predating the COVID-19 outbreak, i.e., the situation on 31 December 2019. 

In addition, whilst the existing Guidelines impose obligations on Member States not to acquire shares in any company during the restructuring period and from engaging in commercial behaviours aimed at its rapid expansion in the market, the TF includes specific behavioural and structural commitments that the Commission looks at when clearing measures above €250 million. Such additional provisions directly draw on merger control tools. Indeed, the TF more specifically prevents beneficiaries from acquiring a more than 10 per cent stake in competitors or other operators in the same line of business and imposes a limit on management remuneration which shall not go beyond the fixed part of his/her remuneration on 31 December 2019, as long as at least 75 per cent of the COVID-19 recapitalisation measures have not been redeemed. Moreover, the undertakings which receive restructuring aid cannot make dividend payments, nor non-mandatory coupon payments, nor buy back shares, other than in relation to the State, as long as the COVID-19 recapitalisation measures have not been fully redeemed. 

For instance, the Commission—after assessing all eligibility criteria, entry conditions, types of recapitalisation measures, relevant amounts, and remuneration mechanisms—concludes that aid to Lufthansa constitutes State aid compatible with the internal market pursuant to Article 107(3)b TFEU. The Commission takes into account Germany’s commitments to limit the distortion of competition. For instance, the beneficiary will allow one air carrier to establish a base at the Munich Airport and one at the Frankfurt airport, by divesting a number of slots. Moreover, to facilitate new entrants, Lufthansa will grant access to the investors at said airport infrastructures and allow overnight parking stands for the aircraft to be based at the airports. 

V. A preliminary assessment

The analysis has highlighted some pressing issues regarding the future of EU State aid control as the core mechanism to ensure the functioning of the internal market and the maintenance of the level playing field. The analysis carried out on Commission decisions shows a disproportionate distribution of aid, as Germany and France represent 66 per cent of total aid, thus outreaching all other Member States plus the UK by far. It appears that the increasing disparities are linked to States’ GDPs and their fiscal capacities which thus produce unfair advantages for some companies vis-à-vis the competitors. Although the Commission may argue that possible negative effects on the internal market have already been taken into account by the TF itself, EU State aid rules must always ensure the full respect of the principle of non-discrimination as contained in Article 18 TFEU.

The second main finding concerns policy objectives. The largest amount of aid has been granted to undertakings in financial hardship, whereas the most common policy objectives for State aid in previous years, such as environmental policies including energy savings, RDI and regional aid, have been set aside. As Member States have been at the liberty of deciding how much aid to apply, which companies to help, what sectors to support, a prolonged TF would produce long-term repercussions in the European and national economies. Therefore, some conclusive suggestions for the future of State aid control will be proposed.

Since the TF might have already produced distortions of competition and negative effects on trade which will last in the medium and long-term, it is recommended that the TF should stay in place for the time strictly necessary to address the immediate consequences of the pandemic. Yet, the TF has already been extended twice. First, in October 2020 it was prolonged until June 2021 while specific clauses provided that rules on recapitalisations would be applicable until September 2021. Second, on 19 January 2021 the Commission issued consultations to the Member States seeking opinions on the TF’s prolongation until the end of 2021. Ten days later the

85 Ibid., para 85.
86 Ibid., para 54.
87 Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (n 81) paras 83–85.
88 Temporary Framework for State aid (n 3), at Section 3.11.6 para 72, that refers to the Notice on remedies acceptable under Council Regulation 139/2004 and under Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2004] OJ L 133.
89 Ibid., paras 74–78. See also COVID-19—Aid to Lufthansa (n 72), paras 66–68.
90 COVID-19—Aid to Lufthansa (n 72) para 71.
Commission took the final decision\(^{94}\) to extend the TF until the end of 2021. Nevertheless, given that over €1.5 trillion has been spent on aid in less than 1 year, the rules need to move from an emergency regime to a more normalised one. Concerns arise in particular with regard to the specific instrument used by the Commission. Indeed, soft law instruments, such as Commission communications, might fail to ensure the same level of legal guarantees applicable to other areas of EU law. As regards the decision-making process, the TF—while streamlining the procedures and speeding the notification process—might have encroached upon the principles of transparency and democracy. Indeed, only few consultations among the Member States were carried out before adopting the TF's amendments. In addition, the outputs coming from such consultations are still undisclosed.\(^{95}\)

Much can be learnt by the implementation of pandemic aid. On the one side, the distortions provoked by the TF remind us of the *rationale* behind EU State aid control which is to ensure the smooth working of the internal market and maintain competition between the EU undertakings. On the other side, however, the Commission should take stock of the lessons learnt during the pandemic and translate them into a better new State aid regime. For these reasons, the Commission should also take advantage of the fitness check carried out on the 2012 State aid Modernisation Package\(^{96}\) which was launched in January 2019 in line with the Better Regulation Guidelines.\(^{97}\) Since many instruments of State aid control will be revised in the upcoming months, it would be beneficial to acknowledge pandemic aid by addressing its distortive effects. For instance, the new instruments could limit aid or set thresholds and limits for undertakings which have benefitted from aid under the TF once or more than once, where deemed appropriate.

Finally, one can wonder whether EU State aid control is an adequate tool to counteract the crisis and whether the national efforts will be sufficient to respond to it. Despite the initial reluctance, the Commission eventually allocated common funds, through for instance Sure, Next Generation, including the Recovery Fund and the emission of Eurobonds. These might be effective and appropriate instruments to enact an EU industrial strategy and start recovering together. Indeed, it would have been better if the amount granted by the States through public resources had been provided by an EU-wide fund based on the principle of solidarity.\(^{98}\) Notwithstanding the necessity for a Treaty amendment, especially as far as Article 125 TFEU is concerned, many commentators highlight that if the recovery was funded by the UE, there would be less distortions in the internal market and more common goals achieved. In conclusion, Europe will properly tackle the crisis when it eventually finds a common route. Archimedes once said, 'give me a place to stand and with a lever I will move the whole world'. Although still in the search of a working lever, the European Union has been using EU State aid as a substitute tool. Only when it eventually finds the proper lever to lift economic growth, the EU will say: *Eureka*.!

\(^{94}\) Statement by the European Commission available at [https://ec.europa.eu/commission/presscorner/detail/en/ip_21_261](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_261). (accessed on 27 July 2021).

\(^{95}\) For an overview of recent consultations, see [https://ec.europa.eu/competition/consultations/closed.html](https://ec.europa.eu/competition/consultations/closed.html). (accessed on 27 July 2021).

\(^{96}\) EU State Aid Modernisation [2012] COM/2012/0209 final.

\(^{97}\) Available at [https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-better-regulation-commission.pdf](https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-better-regulation-commission.pdf). (accessed on 27 July 2021).

\(^{98}\) Motta, Peitz (n 4); Lamadrid de Pablo, Buendía Sierra (n 4).