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EU State aid law and consumer protection: an unsettled relationship in times of crisis

K.J.Cseres, A. Reyna*

I. INTRODUCTION

As a result of the global lockdown, countries around the globe are now facing multiple crises at the same time: a health crisis, a financial crisis, and a collapse in commodity prices, which all interact in complex ways. As a reaction governments and policymakers are providing unparalleled support to firms, financial markets, and households. The effectiveness of these policies is considered central to project worse consequences. In order to coordinate the economic response of the Member States and to mitigate the negative repercussions on the EU economy, the European Commission has adopted a Temporary Framework, which enables Member States to use the full flexibility foreseen under EU state aid rules to support the economy in the context of the COVID-19 outbreak.

The 2008-2009 financial crisis has already demonstrated that the main principles behind the EU state aid rules can be maintained even throughout a crisis situation. Lessons learnt from the temporary measures taken back in 2008 have placed the EU in a strong position to act quickly and decisively to provide relief to the most affected sectors whilst maintaining the discipline of the EU State aid rules. However, in the current crisis the world economy and national economies are also shuttered in their micro-elements, at the demand side. As a result of the measures taken by governments to contain the virus, consumers have seen retail choices limited with hundreds of thousands of shops being required to close their doors, a situation that has exposed consumers to a floodgate of unfair, misleading or abusive business practices.1 Price

1 Price

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1 For example, the UK consumer organisation Which? reported that essential goods were listed in marketplaces like Amazon and eBay at inflated prices, https://press.which.co.uk/whichpressreleases/price-gougers-selling-covid-19-essentials-for-at-least-double-the-typical-price/
gouging for essential consumer products coupled with unfair commercial practices have amplified forcing governments to take various measures, for example introducing price caps. Nevertheless, besides these unfair practices more indirect forms of consumer harm is taking place as a result of some of the current state aid measures that many policy makers may not have immediately realized and acted upon.

First of all, less and better targeted state aid is in the utmost interest of consumers. Keeping inefficient undertakings in the market is likely to decrease consumer welfare in the long-term. Second, the current flexibility offered in the state aid law Temporary Framework has been used by some governments also to tolerate non-compliance with consumer protection rules by undertakings. Such exceptions in fact lead to double burden for consumers. Once as consumers and purchasers of, for example, travel or transport services and second, as taxpayers financing the state aid. Moreover, this may lead to a violation of EU law that lays down the obligation to take consumer protection requirements “into account in defining and implementing other Union policies and activities” (Article 12 TFEU), a principle also laid down in the EU Charter of Fundamental Rights (Article 38). This normative precedent creates a constitutional basis for considering the requirements of consumer protection in the whole body of EU competition law and policy including the Treaty’s state aid provisions.

Competition law and consumer protection are mutually reinforcing areas of the law in order to maximize consumer welfare and provide consumers with access to a range of competitively priced goods and services in markets free of unfair and deceptive practices. In the European Union state aid rules are core elements of the EU competition law system. Most importantly the goal of EU state aid law is to prevent distortion of competition among undertakings as well as between Member States in the internal market. State aid law delivers long-term benefits for
consumers while its impact occurs at the input stage of the production chain and rather than at the output stage resulting in higher prices.

The main question this article aims to answer is how state aid law and consumer protection rules interact in EU law and what lessons these interactions provide for managing the current economic crisis in a coordinated and balanced way that takes equal account of interests on the supply and demand side. While the interaction between consumer law and competition law has been subject to various legal and economic studies in the past, the relationship between state aid rules and consumer protection has not been studied so far.

This article fills this gap, by making three original contributions. First, the article sets out the EU law framework that structures the analysis of how state aid rules and consumer protection interact. It analyses the goals of these two legal areas and how these goals complement or conflict. Second, by presenting two case studies (air transport and energy) it explains and illustrates the constituents of the interaction between these two legal fields and offers an illustration why these intersections should be analyzed in-depth. Third, the article offers policy recommendations that can be applied not only in the current crisis but also beyond, on the coordination and enforcement of these two policies and legal fields.

II. GOALS OF (EU) COMPETITION LAW AND CONSUMER LAW

Competition and consumer laws and policies have the common goal of safeguarding competitive markets where consumers are protected from unrestrained economic power and

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unfair business practices. Thus, competition law and consumer protection are mutually reinforcing areas of the law in order to maximize consumer welfare and provide consumers with access to a range of competitively priced goods and services in markets free of unfair and deceptive practices.

From its inception, consumer protection in the EU has been a complementary policy to competition law. Probe of that is that the first consumer policy unit in the European Commission was formed in 1968 within the Directorate General for Competition. It was, however, the First Community program for consumer protection and information policy of 1975 that recognized the need to develop a European approach to consumer protection.3

The objective of both competition law and consumer protection law is to correct market failures, but their perspectives differ, they approach market imperfections from different angles and apply different instruments. Competition law concentrates on the supply side of markets and on the process of competition amongst undertakings in order to ensure that consumers have a wide range of choice of quality goods and services at the lowest possible prices. Competition law focusses on those types of conduct that interfere with the process of competition, notably restrictive agreements, harmful conduct by a monopolist or dominant firm and anticompetitive mergers. By prohibiting anti-competitive behaviours competition law maintains the availability of consumer choice on the market by lowering prices and widening the range of products and services for consumers.

By contrast, consumer law takes a demand-side perspective of markets and focuses on improving market conditions for the effective exercise of consumer choice. It is primarily concerned with consumer decision-making through regulating the relationship between consumers and business. It targets information asymmetries between sellers and consumers,

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3 Preliminary programme of the European Economic Community for a consumer protection and information policy OJ C 92, 25.4.1975, p. 2–16.
false and misleading advertising and contract terms that are not transparent or inherently unfair. Its objective is to provide a minimum set of information to enable consumers to make informed decisions free of commercial manipulation. Beyond information inefficiencies consumer law also deals with consumers’ behavioral limitations exposing consumers to unfair commercial practices, guarantee rights as well as health and safety aspects of market transactions.

A. Consumer welfare and the goals of EU competition law

Competition laws are set and enforced in order to maintain and protect the competitive process and to provide society with high quality goods and services at low prices. The ultimate public interest underlying competition law enforcement is the protection of the competitive process. Competition is a process of rivalry between undertakings selling goods or services of the same kind at the same time to a certain group of consumers. The competitive process leads to consumer welfare through allocating resources in a way which is preferred by consumers and it leads to economic growth through innovation and through adjustment to technological changes. Thus, competition laws are set in order to safeguard the process of competition from unrestrained market power. The exact public interests that guide the enforcement of competition law is subject to debate.

In EU law, the European Court of Justice of the European Union (CJEU) has stated that this public interest is “competition as such”, stressing that EU competition rules aim to protect “not only [emphasis added] the interests of competitors or of consumers, but also the structure of the market” (T-Mobile). This contradicts an earlier judgment of the General Court, where the latter, stressing the relevance of consumer welfare as part of the objectives of competition law, considered the well-being of consumers as the “ultimate purpose” of competition law. The positions of the Courts indicate a different way of interpreting how the overall material welfare

of society, which competition law generally aims to increase by maintaining rivalry among firms, relates to the protection of consumer interests. In general, the final objective of competition policies can either be considered to be the protection of the competitive process as such, to which the interests of consumers are subordinated or the immediate and short-term interests of consumers as the primary aim.\(^6\)

Nevertheless, even if one endorses the former position the economic interests of consumers remain a key part of the equation when assessing possible competition law infringements. It is generally acknowledged that increased prices, reduced output and decreased quality are the prime *indicia* of negative effects on competition. Importantly, these indicators are also the hallmarks of consumer harm, which is generally regarded as the inherent part of adverse effects on competition. This means that protecting the process of competition essentially includes safeguarding consumers’ economic interests.\(^7\)

Likewise, since the 1990s the European Commission has reframed its approach on what it regarded as the primary aim of EU competition law and it has implemented this consumer welfare approach to interpret the EU competition rules in its 2004 Modernization Package.\(^8\) Accordingly, the Commission stated that the aim of the EU competition rules was to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.\(^9\)

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\(^7\) A business conduct which makes consumers worse off in terms of price, output and quality makes the competitive process worse off. The CJEU in *Post Danmark* confirmed that the central parameters of competition are price, quality, choice and innovation. If these central parameters are restricted then the process of competition is harmed and the practice at stake is anti-competitive. Case C-209/10 Post Danmark I, EU:C:2012:172, para 22: In *Cartes Bancaires*, the CJEU stated that an anti-competitive behaviour “leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers”. Case C-67/13 P Groupeement des Cartes Bancaires v Commission, EU:C:2014, 2204, para 51.

Accordingly, consumer harm is defined as adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.\(^{10}\)

### III. THE GOAL OF EU STATE AID LAW: A “LAYERED” CONCEPT OF COMPETITION

The nature and goal of state aid rules has also been subject to an extensive debate often emphasizing the “layered judicial construction” of EU state aid law,\(^{11}\) where clarity and consistency has not always been solid.

One part of this debate focused on the question whether state aid rules share a conceptual common ground with free movement rules or the EU Treaty’s competition provisions laid down in Articles 101 and 102 TFEU. The close link between state aid law and free movement rules is based on the balancing exercise inherent in state aid law provisions, most notably in Article 107 TFEU, where a balancing between the beneficial effect of aid and the maintenance of fair trading conditions and undistorted competition is assessed. This assessment closely resembles the proportionality test developed in internal market case law. For example, balancing the negative effects on free movement with positive effects for the protection of European consumers. This qualitative test involves the EU values of free intra-Union trade that is balanced and can be compensated by the positive effects of other EU policies.\(^{12}\)

This debate also relates to the question whether EU state aid law and EU competition law share the same goals. From our perspective, the answer is yes.

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\(^{10}\) Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, O.J. 2009, C 45/7. The EU Commission has stated that identification of likely consumer harm can rely on qualitative and, where possible and appropriate, on quantitative evidence.


First, both state aid law and competition law form part of the EU’s economic constitution, a concept that has long been anchored in its foundational Treaties. The constitutional value of competition and free trade have always been the cornerstones of the European integration project: the EU’s “microeconomic constitution”.13

Both the competition and state aid rules form distinct areas of EU law with unique set of rules, principles and concepts but conceptually they are closely linked and share the same objective.14

In order to explain their conceptual links and shared objectives, we will analyze two specific concepts: First, the interpretation of distortion of competition in the two areas and, second, the role the consumer welfare standard plays in each area.

A. Distortion of competition in the Internal Market

State aid rules aim at preventing distortion of competition in the internal market as well as preventing inefficient subsidy races among Member States. The purpose of the state aid rules is to preclude public intervention which does not correspond to the rationality of the “marketplace” and which would not take place under “normal market conditions”.15 Even though this aim to prevent the distortion of competition in the internal market, corresponds to the aim pursued by Articles 101 and 102 TFEU, 16 the concept of competition and distortion

15 De Cecco ‘Competition in EC State Aid law’ (n11) 113.

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of the competitive process is a “more layered” construction in state aid law than in the area of Articles 101 and 102 TFEU.17

Under the state aid rules an anticompetitive behavior means some form of public intervention that increases the economic strength of the recipient of state aid. Accordingly, distortion of competition is closely linked to the concept of “level playing field” i.e. that all market actors compete on equal terms. In this sense, the state aid rules should prevent inefficient undertakings from surviving on the market or increasing their market power because of the financial aid or fiscal benefits provided by Member States. From this perspective, the process of competition is not altered in favour of inefficient undertakings and it ensures equality among competitors in relation to regulation.18

The EU’s state aid rules do not preclude Member States from introducing subsidies or other forms of public assistance to undertakings. However, the EU’s centralized system of state aid law control does prevent Member States from providing state aid unilaterally. The choice for a centralized system of state aid control originates from the assumption that unilateral action by Member States is potentially harmful, as it may produce negative side-effects on other Member States and due to the fact that it leads to a subsidy race among resulting in market inefficiencies in the internal market. As indicated by Executive Vice-President Vestager and in a recent Editorial,19 it can be problematic when there are significant differences between EU countries regarding the aid provided by Member States to beneficiaries. This the case when, for example, Germany alone accounts for half of the approved aid in the context of the COVID19 crisis.20

17 Case C-234/89, Delimitis v Henninger Briu, ECLI:EU:C:1991:91, Recent application of Delimitis: Case T-328/03, 02 (Germany) GmbH & Co. v Commission ECLI:EU:T:2006:116
De Cecco, ‘Competition in EC State Aid law’ (n 11) 121.
18 De Cecco, ‘Competition in EC State Aid law’ (n 11) 121-122.
20 https://www.sueddeutsche.de/wirtschaft/eu-corona-staatshilfen-margrethe-vestager-1.4911083
In this sense, state aid does not only effect competing undertakings and competition within the EU but also Member States through preventing distortion of jurisdictional competition and regulatory competition.21

B. Promotion of consumer welfare

Second, state aid law and competition law both endorse the consumer welfare standard but they do so through different means and to a different extent.22 State aid law is concerned with negative market outcomes, however, it is not market power, but the distributive effects of state aid (economic advantage criterion under Article 107 (1) TFEU) which is its main concern. Nevertheless, state aid for efficient undertakings can benefit consumers, while state aid to inefficient market players is likely to reduce consumer welfare in the long-term.23 Nonetheless, targeted temporary state aid to inefficient undertakings may also entail benefits for consumers in short-term by keeping prices low. State measures can keep consumer prices artificially low, at least in the short term. Therefore, it is the consequence of state intervention namely advantaging certain undertakings which is considered as harmful.24 Taking the nature and goal of state aid law as a starting point, the next section will explain how consumer interests are taken into account in the application of state aid rules.

IV. CONSUMER INTERESTS IN STATE AID LAW: INDIRECT CONSUMER WELFARE STANDARD

21 De Cecco, ‘Competition in EC State Aid law’ (n11) 126.
23 De Cecco, ‘Competition in EC State Aid law’ (n11) 125.
24 Ahlborn, Berg, ‘Can State Aid Control Learn from Antitrust? The Need for a Greater Role for Competition Analysis under the State Aid Rules.’ (n 22) 48.
Article 107 (2) a, contains a direct reference to consumers, but no other reference is made in Articles 107 and 108 to consumer interests. Likewise, the goal of EU state aid rules is not directly linked to consumer welfare. The goal of EU state aid control is to prevent negative impact on the competitors of the beneficiary of state aid and to protect the competitive process. In other words, a state aid raises competition concerns when it enables an inefficient firm to survive artificially in a competitive market to the detriment of more efficient firms. It leads to productive inefficiency, goods and services are no longer produced at the lowest cost possible. In this sense, it has a more indirect impact on consumer welfare and most notably its impact occurs at the input stage of the production chain and rather than at the output stage resulting in higher prices. Firms anticipating that profits will be affected by state aid in addition to their own efforts may find it more beneficial to reduce their own efforts. State aid may thus have a negative impact on the incentives to invest for example, in decarbonizing the energy system and thereby contributing to EU’s climate objectives and innovate for both the beneficiary and competitors. In the longer run, such a change in dynamic incentives leads to less consumer choice, and potentially to lower quality or higher prices for consumers. What is more, the lack of incentives to invest in clean, sustainable sources will have a huge impact in the long term – on the environment, consumers’ health, wellbeing.

Despite these indirect effects, it has been argued that the so-called total or social welfare standard should serve as a benchmark for the analysis of the effects of state measures.

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25 Article 107 (2): The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
26 Ahlborn, Berg, ‘Can State Aid Control Learn from Antitrust? The Need for a Greater Role for Competition Analysis under the State Aid Rules.’ (n 22) 48-50.
27 Ahlborn, Berg, ‘Can State Aid Control Learn from Antitrust? The Need for a Greater Role for Competition Analysis under the State Aid Rules.’ (n 22) 48.

Social welfare takes account of not only the sum of consumers' and producers' surpluses, but also how welfare is distributed across countries and citizens. Social welfare integrates efficiency elements (how much wealth is created by affecting consumers' and/or producers' surpluses) as well as equity elements (how this wealth is divided between Member States and citizens). A social welfare standard considers all the effects that may be generated by the aid.\(^{29}\)

From an economic perspective, the anticompetitive effects of aid generally not only affect the competitors of the beneficiary of aid but especially consumers. Even though it could be argued that a long-term analysis shows that the negative effect of aid on the competitors of the beneficiary also negatively affects the consumers, from an economic perspective, direct focus on the effect of aid on consumers is preferable.\(^{30}\)

However, if only the effect of aid on the consumers in the respective product markets is considered and thus the consumer welfare standard alone is applied, then the effects on companies--both the beneficiaries of aid as well as their competitors--are not considered. Aid could cut the company's marginal costs and lead to lower prices in the short term and thus to higher consumer welfare but state support can also lead to restrictions of competition in the medium- or long-term, in the form of higher barriers to entry therefore reducing consumer choice and incentives to innovate in the long-run. Beneficiaries could increase their market share at the expense of their competitors, even if they are more efficient. These negative effects can also be identified if the change in the producer surplus were to be taken into account.\(^{31}\)

One important element to bear in mind relates to the short and long-term effects on consumers and the assessment of any eventual conflict between the two welfare standards. Even if the aid does not lead to an immediate price fall, one also needs to consider the effect of the aid in the competitive process in the long-term. If state aid serves to optimize production and stimulate


\(^{30}\) Haucap, Schwalbe *Economic principles of state aid control* (n 28) 19-21.

\(^{31}\) Haucap, Schwalbe *Economic principles of state aid control* (n 28) 19-21.
innovation, it is likely that consumer benefits would be more sustainable in the long-run. In sum, the effects of aid on consumers is a crucial part of the assessment of state aid measures and a long-term consumer welfare standard is justified. The next section will map and analyse the broader constitutional framework of the relationship between state aid law and consumer protection.

V. PROTECTION OF CONSUMER INTERESTS IN STATE AID LAW THROUGH HORIZONTAL CLAUSES AND POLICY DEVELOPMENTS

According to the so-called horizontal (cross-sectional) clauses set out in the Treaty on the Functioning of the European Union, the EU ‘shall take into account’ the requirements of cross-cutting policies in its other EU policies. According to Article 12 TFEU “consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities”. This is thus a legal argument that supports the view that not only Articles 101 and 102, but the whole body of EU competition law and policy including Articles 101-108 TFEU has to take account of the requirements of consumer protection. This argument has been confirmed by the General Court in Test-Achats, where the GC stressed that consumer protection is an interest that, by force of the Treaty, necessarily ought to be taken into account in the implementation of any EU policy and activity, including, therefore competition law. Hence, Article 12 TFEU – as Article 153(2) EC before it – forms a constitutional basis to weigh the interests of consumers in the assessment of possible infringements to competition law, even if the protection of consumers’ economic interests is not taken as the public interest that competition law ought to serve. It follows that consumers’ economic well-being is one of the core public interests being pursued in the enforcement of

32 S Kingston, Greening EU Competition law and policy (CUP 2011) 118.
33 See also Article 38 of the Charter of Fundamental Rights of the European Union, which determines that EU policies ought to ensure a high level of consumer protection, equally invoked by the Court.
35 Association belge des consommateurs test-achats ASBL v. Commission, (n 34) para. 43.
competition law including state aid rules, irrespective of whether competition is considered as a means to achieve an end or as an end in itself. Further to this, when interpreting provisions of Union law, the European Commission, national agencies and national courts are legally required to take into account the principle of consumer protection embedded in the Treaty and in Article 38 of the EU Charter in conformity with Article 52(5) of the Charter regarding the judicial recognition of the principle of consumer protection in the interpretation of EU law.  

Moreover, the relevance of other (social) EU policies has increased with the two rounds of modernization in EU state aid law. The modernization programs in 2005 SAAP and in 2012 SAM have in the first place aimed to make state aid rules and enforcement more economic effects based, more targeted and reduce the amount of state aid. At the same time, both programmes have linked the state aid rules to wider political priorities such as environmental protection, social and territorial cohesion.

The 2012 SAM, on the basis of which the Commission launched a wider review of the State aid rules and which resulted in numerous changes in both substantive and procedural rules, was considered as an integration into the broader goal of a ‘sustainable, smart, and inclusive growth’ under the Europe 2020 Strategy, a follow-up to the Lisbon Strategy. The new state aid policy approach also originated from the fact that the economic and global crisis has

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36 See in this regard the opinion of Ag Wahl in *Pohotovost* when considering the role of Article 38 of the ECFR in the interpretation of the Unfair Contract Terms Directive: “With regard, first, to Article 38 of the Charter, which provides that ‘Union policies shall ensure a high level of consumer protection’, although it is not among the examples mentioned in the Explanations relating to the Charter, it seems that this article, which has nothing to say about a directly defined individual legal position, establishes a principle and not a right and is therefore judicially cognisable, under Article 52(5) of the Charter, only in the interpretation of Union acts and in the ruling on their legality, in this instance Directive 93/13.” Opinion of Advocate General Wahl of 12 December 2013, C-470/12, *Pohotovost* s. r. o. v Miroslav Vašuta, EU:C:2013:844, para 66.


38 The Europe 2020 communication noted that State aid policy can ‘actively and positively contribute […] by prompting and supporting initiatives for more innovative, efficient and greener technologies, while facilitating access to public support for investment, risk capital and funding for research and development’, see Communication from the Commission, Europe 2020: A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, 19.

increased the demand for a greater role of the State to protect the most vulnerable and promote economic recovery. Thus, scare resources had to be spent more efficiently and effectively.\textsuperscript{40}

The 2014 General Block Exemption Regulation (GBER) that was also adopted within the framework of the SAM package allowed the Commission to declare additional categories of aid compatible with the internal market and therefore exempted from \textit{ex ante} notification. These additional categories embodied specific European social objectives to be pursued by Member States, such as social aid for transport for residents of remote regions, which was a novel category that has been introduced by the revised GBER.\textsuperscript{41}

State aid in the energy sector is also underpinned by an explicit social dimension. For example, in relation to environmental aid, the GBER refers explicitly to the Europe 2020 strategy. Also concerning aid to support energy infrastructures, the GBER highlights how infrastructure construction and upgrade in assisted regions can contribute to the economic, social and territorial cohesion of Member States and the Union as a whole by supporting investment and job creation and the functioning of energy markets in the most disadvantaged areas.\textsuperscript{42}

This brief overview of the current primary and secondary law of EU state aid law shows that throughout the past decade consumer interests and non-economic policies in general received greater recognition in state aid law and, sometimes, even to a larger extent compared to Articles 101 and 102 where enhancing consumer welfare is better acknowledged.\textsuperscript{43} Accordingly, the legal basis for a closer interaction and recognition of consumer interests in state aid law is well established.

\textsuperscript{40} M Papp ‘State Aid Modernisation: An Opportunity or a Straitjacket?’ First draft prepared for the ECPR Conference in Trento, 2016
\textsuperscript{41} In this respect, the GBER echoes the wording of Article 3(3) TEU. DFERRI JJ PIERNAS LÓPEZ, The Social Dimension of EU State Aid Law and Policy, 21 Cambridge Yearbook of European Legal Studies 75–100 (2019). A98.
\textsuperscript{42} Preamble Recital 67.
\textsuperscript{43} See Gerbrandy (n 14).
The following sections will introduce two case studies that well illustrate how direct consumer interests have been taken into account in the enforcement of EU state aid law and explain why, in the current crisis, the interaction and mutual recognition of interests in both policies are crucial for a balanced and integrated EU approach.

A. Direct consumer interest: State aid in the air transport sector

Transport has been one area of state aid law where consumer interests have been more directly recognized and addressed. References can be found in secondary legislation, such as the 2014 General Block Exemption Regulation, the 2014 Rescue and Restructuring Guidelines and Guidelines on State aid for environmental protection and energy 2014–2020. The transport sector is characterized by a large degree of public investments and the provision of public transport services (in particular for passengers) relies to a large extent on public subsidies. While being heavily dependent on public financing due to amongst others high costs of infrastructure, certain means of transport have a considerable and negative impact on the environment and human well-being. Accordingly, the transport sector, including air transport, is not only driven by purely economic considerations, for example, measured by the economic performance of a given airline, but also issues relevant for regional development, territorial and social cohesion as well as environmental protection. These are increasingly

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44 Article 51: Social aid for transport for residents of remote regions 2. The entire aid shall be for the benefit of final consumers who have their normal residence in remote regions.
45 Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty OJ C 249/1, 31.7.2014. See para 87. Measures limiting distortions of competition should not compromise the prospects of the beneficiary’s return to viability, which might be the case if a measure is very costly to execute or, in exceptional cases duly substantiated by the Member State concerned, would reduce the activity of the beneficiary to such an extent that its return to viability would be compromised, nor should they come at the expense of consumers and competition.
46 Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 20/10, 28.6.2014. See paras 181 and 182 on funding for renewable energy sources. Funding of support to energy from renewable sources through charges does as such not target a negative externality and accordingly has no direct environmental effect. [...] The increase in electricity costs may be explicit through a specific charge which is levied from electricity consumers on top of the electricity price or indirect through additional costs faced by electricity suppliers due to obligations to buy renewable energy which are subsequently passed on to their customers, the electricity consumers.
important aspects of consumer protection, too. Transport and most notably air transport links people and regions and as such play a vital role in the integration and the competitiveness of the EU, as well as its interaction with the world. The relevance of transport infrastructure has been underlined by the Europe 2020 Strategy and identified as part of the EU’s sustainable growth strategy. The ‘Roadmap to a Single Transport Area’ also emphasized the importance of an efficient use of resources. In practice, transport has to use less and cleaner energy, better exploit a modern infrastructure and reduce its negative impact on the climate and the environment and, in particular, on key natural assets like water, land and ecosystems.

These policy developments also have implications for state aid law, which is, as argued above, not isolated from these other European policies. On the contrary, it is inherently interwoven with a set of essentially non-economic principles EU laid down in the abovementioned cross-sectional clauses of the Treaty. Hence, the impact assessment of a rescue/restructuring aid decision and its compensatory component must not be limited to purely economic efficiency-oriented considerations but should require a fundamental value judgment of equally important policy objectives.

Transport has also been a key area of consumer protection. Passenger rights have a prominent place in EU transport law, that has been gradually established as from the late 1980s and developed into EU legislation for the protection of users of transport services. One core legislation of passenger rights is EU Regulation 261/2004 that offers compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of

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49 In particular, the Commission has emphasized in its White Paper ‘Roadmap to a Single Transport Area’ that the internalization of externalities, the elimination of unjustified subsidies and free and undistorted competition are an essential part of the effort to align market choices with sustainability needs. Roadmap to a Single Transport Area – Towards a competitive and resource efficient transport system, COM (2011) 144.
50 J Kociubinski, ‘Fleet Reduction in Rescue and Restructuring Aid to Airlines: A Critical View’ (2014) Eur St Aid LQ 454
flights. Worldwide, EU law is exceptional as a legal area, where consumers enjoy a full set of passenger rights. However, a recent study from January 2020 of the EU Commission found that these rights need to be better known and easier to understand and enforced. As the rules need to provide more legal certainty to passengers and the industry, the Commission proposed to modernize air and rail passenger rights,\textsuperscript{52} but little progress has been made due to the difficulties encouraged in the Council where several Member States attempted to reduce standards of protection.\textsuperscript{53}

\textit{(1) Brief overview of state aid law enforcement in the current crisis}

The current crisis is deeper and applies to a wider range of industries than the financial crisis in 2008.

Still, the role of the EU is crucial to guarantee that state aid law remains effective. Similarly, the EU’s role in the current crisis is also to coordinate a common response to the pandemic. The control on state aid should prevent destructive subsidy races as well as prevent Member States to seize the moment of crisis and support firms that were already non-viable before the crisis such as certain airlines.\textsuperscript{54}

The Temporary Framework adopted by the Commission in the context of the COVID-19 outbreak\textsuperscript{55} indicates that the main legal basis for state measures is Article 107(3)(b) similarly to the Temporary Framework adopted in 2008 in the course of the financial crisis.

Still, Member States can also adopt measures on the basis of Article 107(2)(b) TFEU, when they compensate companies for the damage suffered in exception circumstances e.g.

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compensation of “companies in sectors that have been particularly hard hit (e.g. transport, tourism and hospitality)”. Under this provision the Commission applies a narrow and restrictive approach in assessing the state measure and requires a causal link between the pandemic and the compensatory measure and that the measure is proportionate i.e. it does not allow for overcompensation.

However, it still requires notification to the Commission but the aid would be almost automatically authorised if it falls within the scope of the provision and meets the conditions set out in the Temporary Framework. For example, the Commission has already found that the COVID-19 outbreak qualifies as an exceptional occurrence when it approved the Danish aid scheme to compensate damages caused by cancellations of large public events due to COVID-19 outbreak.\(^5\) At the time of writing, the Commission has already approved over 100 state aid decisions.\(^5\)

This provision is expected to be applied specially for sectors such as aviation and transportation (e.g. cancellation of flights), tourism and hospitality (e.g. closure of hotels, restaurants), entertainment and events (e.g. cancellation of larger events and closures), and retail (e.g. shop closures). Moreover, the principle of “one time, last time” applies for rescue aid received in the last ten years (e.g. by airlines) but does not apply to compensation for COVID-19 caused damage as long as there is causality.

Article 107(3) b, can be applied to grant state aid for “for a limited period, to remedy the liquidity shortage faced by undertakings and ensure that the disruptions caused by the COVID-19 outbreak do not undermine their viability, especially of SMEs”.\(^5\)

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\(^5\) EU Commission, Coronavirus Outbreak - List of Member State Measures approved under Article 107(2)b TFEU, Article 107(3)b TFEU and under the Temporary State Aid Framework, 03 June 2020. https://ec.europa.eu/competition/state_aid/what_is_new/State_aid_decisions_TF_and_107_2_b_and_107_3_b.pdf

\(^5\) Point 18 Temporary Framework
demonstrate that State aid is necessary, appropriate and proportionate to remedy the serious disturbance or disruptions.\textsuperscript{59} This proportionality criterion is fundamental to avoid that Member States provide aid to inefficient beneficiaries who were already unviable before the outbreak since the aid could allow them to undercut and push out of business unsupported but viable undertakings.\textsuperscript{60}

With the crisis mounting pressure on the travel sector, the Temporary framework has been by now amended twice and the second amendment\textsuperscript{61} inserted point 9, which reads that \textit{“Member States can decide support to operators in the travel and tourism industry to ensure that reimbursement claims caused by the COVID-19 outbreak are satisfied with a view to ensuring the protection of passenger and consumer rights, and equal treatment of passengers and travellers.”} Thus, state measures supporting airlines can be a crucial mechanism to guarantee reimbursements to consumers and help airlines to comply with their legal obligations under Regulation 261/2004 on passenger rights.

\begin{itemize}
\item \textbf{(2) State aid and consumer protection in the transport sector during crisis}
\item Currently, transport as well as tourism are among the sectors that are the most severely affected by the ensuing economic crisis. Airlines have been increasingly calling on their governments to provide emergency state support to remedy their damage as a result of imposed lockdowns and travel bans that overwhelmed the aviation industry.\textsuperscript{62} At the same time, airlines have also
\end{itemize}

\textsuperscript{59} Point 19 Temporary Framework
\textsuperscript{61} 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 164/03 OJ C 164, 13.5.2020, p. 3.
\textsuperscript{62} End of March the European Commission approved the first State aid measure (French scheme) aiming to mitigate damages caused by the COVID-19 pandemic to the airline sector. French scheme aims at compensating airlines for part of the damage suffered due to the coronavirus outbreak, by temporarily reducing the pressure on their cash flows. https://ec.europa.eu/commission/presscorner/detail/en/IP_20_514
In April, The European Commission approved a Swedish State guarantee of up to approximately €137 million on a revolving credit facility in favour of Scandinavian airline SAS. The measure aims at partly compensating the airline for the damage suffered due to the coronavirus outbreak. https://ec.europa.eu/commission/presscorner/detail/en/IP_20_748
Since then various Member States’ measures including the Netherlands, France, Belgium, Germany has been approved for supporting airlines. For an overview: https://ec.europa.eu/competition/state_aid/what_is_new/State_aid_decisions_TF_and_107_2_b_and_107_3_b.pdf
been calling for an exemption from certain consumer protection rules, most notably, Regulation 261/2004 on passenger rights. Airlines have been denying refunds to passengers whose flights have been cancelled. This takes a double toll on consumers. Consumers pay first as travelers, by being denied refunds for cancelled flights, and second as taxpayers, by funding the state support. It has been argued that Member States, when granting aid to their national airlines, make the support conditional on the airlines respecting their obligations under Regulation 261/2004 to offer reimbursement of flights that have been cancelled, instead of forcing consumers to accept vouchers or other solutions that are not in line with existing EU passenger rights. Similar conditionality should apply to any State support for other operators in the travel and tourism industry.63

After several Member States tried to limit the rights granted under EU law for air travelers by taking national measures,64 the European Commission addressed the situation concerning passenger rights in the context of Interpretative Guidelines on EU passenger rights.65 In these Guidelines the Commission recalled the supremacy of EU law by indicating that passengers have the choice between cash reimbursement and reimbursement in the form of a voucher and by pointing to the fact that national measures imposing vouchers as the sole mechanism to compensate consumers for the canceled travels is against EU law.

As air transport operators and Member States insisted that the Commission adopts alternative solutions to cash reimbursement, the Commission provided recommendations66 containing minimum standards on how to make the option of vouchers offered to passengers and travelers as an alternative to reimbursement for cancelled package travel and transport services more

66 COMMISSION RECOMMENDATION of 13.5.2020 on vouchers offered to passengers and travelers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic COM (2020) 3125 final
attractive to consumers. In this document the Commission indicated that in the context of state aid, Member States have different options to support airlines with their obligations to provide reimbursements to consumers. For example, Member States can adopt “specific schemes to provide support to operators in the transport and travel sectors to ensure that reimbursement claims caused by the COVID-19 pandemic are satisfied.”  

Moreover, the Recommendation encourages Member States, without being required to do so by EU law, to consider setting up guarantee schemes for vouchers to ensure that in the event of insolvency of the issuer of the voucher, passengers or travelers are reimbursed. It is important to note that only those bookings that fall within the scope of the Package Travel Directive are covered against insolvency. Consequently, passengers that have bought tickets directly from an airline or through an intermediary are not protected in the event of bankruptcy and are likely to lose their money in such cases despite having the legal right to a full reimbursement under the Passenger Rights Regulation. This crisis is, therefore, exposing on one side, a long-overdue reform of airlines insolvency protection for consumers and, on the other side, the fact that EU State Aid law provides considerable discretion to Member States not only to provide relief to the affected sectors but also to act as a powerful mechanism to directly support consumers who are suffering the adverse effects of the pandemic on the air transport sector.

**B. Direct consumer interest: energy sector**

Another area where state aid law enforcement is directly relevant for consumers is the energy sector. In order for the EU to become climate neutral by 2050, which is at the heart of the

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European Green Deal, it is important to have competition policy play its role. The “Clean Energy for All Europeans” package, the recent overhaul of the EU’s energy policy framework adopted in 2019\textsuperscript{70} aims to redesign electricity markets and to set rules for a “consumer centred clean energy transition”. The package aims at accelerating the clean energy transition and give all Europeans access to secure, competitive and sustainable energy.\textsuperscript{71}

This legislative package is closing a regulatory disconnection\textsuperscript{72} that was the result of EU energy regulation before 2019 and currently available new technologies, such as smart meters, small scale renewable energy technologies and decentralized energy storage that enable consumers to actively participate in the energy markets. By engaging in more efficient energy use, consumers can become crucial actors to drive the energy transition. In fact, the incumbent hierarchical model of a top-down oriented energy supply with a limited number of dominant suppliers is evolving towards a decentralized system with more bottom-up energy supply by consumers, producing their own energy.\textsuperscript{73} Consumer participation is seen as an absolute prerequisite for managing the energy transition successfully.\textsuperscript{74}

For instance, Directive 2019/944\textsuperscript{75} extends and modernizes consumer rights in electricity markets, enables them consumers to engage and participate for instance in demand response


\textsuperscript{73}Instead of being dependent on a top-down energy model, consumers can now actively manage their own consumption and even (co-)produce their own energy.

\textsuperscript{74}Directive 2019/944, Recital 10: Consumers have an essential role to play in achieving the flexibility necessary to adapt the electricity system to variable and distributed renewable electricity generation. In order to realize the shift to a smart and sustainable energy system, more flexibility is necessary in the distribution grid. The proper integration of renewable energy sources into the market requires short-term electricity markets that allows trading renewable energy sources across borders.

programs\textsuperscript{76} by adjusting their consumption according to price signals, that reflect the value and cost of electricity or transportation in different time periods..\textsuperscript{77}

The fact that active consumers are perceived as crucial actors to realize energy efficiency, sustainability and can contribute to a cost-effective energy transition\textsuperscript{78} is also reflected in the revised Renewable Directive (Directive 2018/2001).\textsuperscript{79} This Directive enables consumers to self-consume renewable electricity without facing undue restrictions, and ensure that they are remunerated for the electricity they feed into the grid. The revised Renewable Directive is the first EU legislation that aims to facilitate the involvement of household consumers in the deployment of renewable energy by facilitating self-generation of renewables and their joint collectives. Even though self-consumers and prosumers were already recognized in certain national renewable energy policies, they are addressed for the first time in EU law together with ‘renewable energy communities’. \textsuperscript{80}

Energy is an essential service for consumers and consumers have an essential role to play in achieving the flexibility necessary to adapt the electricity system to variable and distributed renewable electricity generation. However, active consumer engagement is today still limited due to a number of reasons, such as unclear information, sometimes hardly comparable offers,

\textsuperscript{76} According to Directive 2019/944, demand response means the change of electricity load by final customers from their normal or current consumption patterns in response to market signals (including in response to time-variable electricity prices or incentive payments).

\textsuperscript{77} According to this legislation, consumers should be able to produce electricity, offer flexibilities in their energy consumption and provide balancing services for maintaining system operation which becomes increasingly valuable for integrating variable renewable energy sources. This is especially true for smart consumers who have access to distributed energy resources assets, such as demand response, solar photovoltaics, storage, electric vehicles and heating appliances. With the ‘internet of energy’, interconnected smart consumers can trade on both sides of the market, either directly or through an intermediary such as an energy service provider, an aggregator or an energy community. CERRE, Smart Consumers in the Internet of Energy - Flexibility Markets and Services from Distributed Energy Resources, 2019. https://www.cerre.eu/sites/cerre/files/cerre_smart_consumers_internet_of_energy_november2019_0.pdf

\textsuperscript{78} The new EU rules are claimed to make it easier for individuals to produce, store or sell their own energy, and strengthen consumer rights with more transparency on bills, and greater flexibility.

\textsuperscript{79} In December 2018, the revised renewable energy Directive 2018/2001/EU entered into force, as part of the Clean energy for all Europeans package, aimed at keeping the EU a global leader in renewables and, more broadly, helping the EU to meet its emissions reduction commitments under the Paris Agreement. The recast RED changes perspective and only sets an EU-wide target of 32% without any binding national targets.

\textsuperscript{80} Final consumers are now explicitly recognized (Article 2 and Article 21) to be able to generate, store and consumer renewable energy and excess production and participate in the applicable support scheme, without losing their consumer rights and obligations as end customers connected to the grid and without being faced with discriminatory or disproportionate procedures and charges.
lack of adequate financial incentives (e.g., when switching the supplier) or adequate financial compensation for consumers’ flexibility services. At the same time, some consumers are getting disconnected from the energy markets due to personal, financial or behavioral circumstances as well as the lack of digital skills.

Energy consumers also face increasingly complex tariff schemes, rising energy prices and various forms of misleading and unfair commercial practices that make switching difficult and increase consumers’ confusion over how to lower their energy bills and engage in more efficient energy consumption.

Parallel to these legislative and policy efforts to put the consumer into “the driving seat” of the energy transition, state aid measures in the form of massive reductions of energy prices given to a large number of industries leads to increased costs for energy consumers. For example, in Germany, the financial relief granted to companies by the industrial renewable electricity surcharge exemptions amount to more than 4 billion EUR per year, according to the German Federal Office for Economic Affairs and in 2016 alone, German energy intensive industry received around 6.5 billion EUR in subsidies. For German households, these forms of state support, in fact, have the result that they pay nearly twice as much for their electricity as energy intensive industry sectors. Similarly, in Poland energy intensive users can be exempted from surcharges levied on electricity consumers to finance the Polish capacity mechanism to ensure that electricity supply can match demand in the medium and long term. These state subsidies

82 OFGEM’s Consumer Vulnerability Strategy 2025 formulates: Risk factors can stem from individual circumstances or characteristics and the market itself, and how they interact. The range of risk factors means that vulnerability can often be multidimensional. Vulnerability can be transitory as circumstances change or permanent. https://www.ofgem.gov.uk/system/files/docs/2020/01/consumer_vulnerability_strategy_2025.pdf
85 Concerns about a lack of investment in electricity generation capacity to meet peak demand have prompted several EU Member States to introduce rewards for making capacity available, in the form of capacity mechanisms. However, capacity
have a direct impact on energy costs for consumer households, putting consumers at risk of
indebtement or harm to their health due to reduced use of energy. Household energy bills are
packed with tariffs that are inflated due to these state measures exempting industries from
certain financial burden they should otherwise bear. For example, according to the Agency for
Cooperation of Energy Regulators, in 2018, on average, 37% of the final electricity price
consisted of the energy component, while the remaining 63% of the electricity bill consisted of
network costs, taxes, levies and other charges.86 This means that consumers hardly ‘feel’
electricity price signals. Furthermore, “[electricity prices for EU households increased slightly
in 2018, on average by 1.9% to 20.8 euro cents/kWh with respect to the previous year. Over
the same period, electricity prices for industrial consumers decreased for the fifth consecutive
year, by an additional 2.2% to 10.2 euro]”.87

Exempting industries from network costs and levies and providing state subsidies inflating
household bills might fall under the scope of EU State Aid law. The subsidies allowed under
the 2014-2020 Guidelines on State aid for Environmental protection and Energy can thus have
a disturbing impact on consumers. In order to support the renewable generation of energy, the
Guidelines allow Members States to give significant discounts to a large number of industries.
At the same time, these reductions have made consumer households’ electricity bills rise and
put an extra burden especially on those consumers in vulnerable situations.88 Decisions on
what form of aid to provide for ensuring competitiveness of European industries, amongst other
energy related exemptions, have rarely considered the distributional impact of these measures
to final consumers.

86 ACER Market Monitoring Report, 2018, Electricity and Gas Retail Markets Volume, page 16-17
port%202018%20-%20Electricity%20and%20Gas%20Retail%20Markets%20Volume.pdf
89 Ibidem p. 8.
Moreover, the widespread use of national energy subsidies reduces the incentives of undertakings who use significant amounts of energy to reduce their energy consumption. With lower energy prices due to the reductions, industries’ incentives decrease to implement energy efficiency measures. This can frustrate the implementation of energy efficiency measures, jeopardize the EU’s environmental, energy and climate targets and undermine Sustainable Development Goals. Therefore, attaching conditionalities is the most sustainable way to increase competitiveness and achieve Europe’s climate goals. For instance, Danish industries only receive reductions in the renewable surcharges if they commit and stick to energy efficiency improvements. Furthermore, subsidies to intensive industries can lead to a race to the bottom amongst Member States since these industries will seek to establish themselves in those countries offering more favorable conditions. For instance, the Belgian energy regulator compared in 2018 electricity prices with neighbouring countries and it concluded that Belgian energy intensive industry is at a competitive disadvantage with Germany and the Netherlands because of reductions in environmental surcharges. This has an important social dimension when factories must reallocate to benefit from more lenient energy tariffs risking leaving behind thousands of people unemployed.

VI. CONCLUSIONS

Targeted and proportionate EU State aid serves to make sure that national support measures are effective in helping sectors of the economy affected during the COVID-19 outbreak but also that companies are able to bounce back from the current situation, keeping in mind the importance of meeting the green and digital twin transitions in accordance with EU objectives. Likewise, EU State aid control ensures that the EU Internal Market is not fragmented avoiding

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88 See: http://ec.europa.eu/competition/state_aid/cases/259362/259362_1691772_143_2.pdf
89 https://www.creg.be/sites/default/files/assets/Publications/Studies/F20180716EN.pdf
a race to the bottom between Member States. Similar messages have already been formulated in the course of the current crisis by policy makers and academic scholars.

The main contribution the current paper makes is to take a broad market-wide lens including supply and demand side issues in analyzing the current economic crisis. Supporting national sectors and undertakings cannot be proportionate if the demand side has to bear the costs of such rescue measures. In EU law, there is a constitutional duty on the EU institutions, most notably the Commission to consider the protection of consumers when implementing its policies, including state aid law and policy.

A competitive marketplace is a *sine qua non* of consumer choice, low prices and high quality of products. Safeguarding competitive markets is not only the core aim of competition laws but also protects consumers from unrestrained economic power and business practices. In the EU, the competition law system is enriched with state aid rules, that share conceptual links and underlying objectives with the Treaty’s competition rules as laid down in Articles 101 and 102. Besides their different analytical frameworks, they share the ultimate goal to preserve competition in the internal market and ensure that the competitive process leads to the best outcome for consumers in terms of choice, quality, and prices.

Even though the question of how competition law promotes consumers’ welfare has been more pronounced in the discussions related to Articles 101 and 102 TFEU, it has been the development of EU state aid law over the past 15 years that implemented a more prominent role for non-economic interests, such as territorial, social cohesion or environmental protection and climate change.

This might be due to the geo-political nature of EU state aid law, namely that the European Commission must prevent unfair competition through subsidy race between Member States.

Nevertheless, the constitutional foundations of EU law, both in its Treaty and the Charter of Fundamental Rights require the Commission to consider how notified state measures are going
to impact the welfare of consumers, in terms of its effects on the competitive process, and its impact on society as a whole, in terms of ensuring an efficient allocation of taxpayers' money. Such a compound analytical test is now crucial in the crisis management of for example the transport and tourism sector, but has been also a core element in the energy transition and its ensuing legislative and policy framework. Such a test that should be carried out systematically in State aid procedures and in the long run should also inform Member States distributive policies.

State aid law and consumer protection have a symbiotic relationship. Allocative state measures directly or indirectly have an impact on consumers, either as takers of goods and services or as taxpayers. Therefore, there are sufficient reasons to call for a closer integration of both EU policies. And, the current COVID19 crisis, due to its magnitude, can become the ultimate test for this unsettled relationship.