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Article

EU State Aid Law and Consumer Protection: An Unsettled Relationship in Times of Crisis

Katalin J. Cseres* and Agustin Reyna**

I. Introduction

As a result of the global lockdown, countries around the world 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. 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 measures governments have taken to contain the virus have been first and foremost focused on remedying the supply side of their economies and help undertakings overcome the repercussion of the crisis. At the same time, on the demand side, consumers have seen retail choices limited with hundreds of thousands of shops being required to close their doors and the increased dependency from online commerce to access essential goods, a situation that has exposed consumers to a flood-gate of unfair, misleading, or abusive business practices.

However, besides these practices more indirect forms of consumer harm is taking place as a result of some of the State aid measures that the EU Member States' governments have implemented in support of their national economies. For example, in the context of air transportation, airlines have received substantial support in the form of State aid while national governments also tolerated the breach of the EU passengers' rights legislation. This

Key Points

- The current flexibility offered in the State Aid law Temporary Framework has been used by some Member States' governments to support undertakings, while, at the same time, governments have also tolerated breaches of consumer protection rules, as it was the case of airlines.
- Such practices harm consumers and lead to double burden for consumers: once as purchasers of services and second, as taxpayers financing the state aid measures.
- The article assesses how state aid law and consumer protection rules interact in EU law and what lessons these interactions can provide for managing the current economic crisis in a way that takes equal account of consumer interests as required by the horizontal consumer protection clauses of the TFEU.
- By conducting two case studies (air transport and energy), the article offers an explanation how the coordination and enforcement of these two policies and legal fields can be managed in the current crisis but also beyond.

situation leads to double burden for consumers: once as consumers and purchasers of travel or transport services and second, as taxpayers financing the state aid measures.

Such practices are at odds with EU law. First, they contradict the EU's obligation under its cross-sectional clause (Article 12 together with Article 169 TFEU and Article 38 of the EU Charter of Fundamental Rights) to implement consumer protection across and in other EU policies. This normative precedent requires some form of integration of consumer protection in the whole body of EU law and policy including the Treaty's state aid provisions.

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Second, EU State aid law and EU consumer law are both deeply embedded in the internal market rules. The well-functioning and strengthening of the internal market is the common goal of both EU state aid law (i.e., preventing distortion of competition resulting from subsidies) and of EU consumer law (i.e., reducing barriers to intra-EU trade stemming from different levels of consumer protection). In particular, with regard to the provision of services of general economic interest (SGEI) as a core area of EU internal market law the close, but under-researched connection between state aid law and consumer protection becomes visible as this article will demonstrate. Hence, State aid law does not operate in vacuum, but is interconnected with horizontal EU policies that touch upon a broad variety of goals other than competition in the internal market. Accordingly, the implementation of state aid measures needs to incorporate the balancing of several policy goals such as consumer protection, environmental protection, or regional and sustainable development.

Third, by protecting competition against distortive state aid measures and preventing the misallocation of resources, the enforcement of state aid law not only prevents the support of undertakings who would not be rewarded by the market but also brings long-term and indirect benefits for consumers. However, consumer harm and benefits need to be analysed in EU State aid law through the analytical lens of the consumer-taxpayer welfare standard, that considers consumers also in their capacity as taxpayers and thus as the financing source of state aid.

Against this background, 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. While the interaction between consumer law and competition law has been subject to various legal and economic inquiries in the past,¹ 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 analysing the goals of these two legal areas. Second, by presenting two case studies (energy and air transport) it explains the constituents of the interaction between these two legal fields and offers an illustration why these intersections should be analysed 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 state aid law and consumer law

EU State aid law forms part of the EU's competition law system as well as of the EU's economic constitution, a concept anchored in the EU's foundational Treaties. EU state aid law shares the constitutional value of competition and free trade that have been the cornerstones of the European integration project: the EU's 'microeconomic constitution.'² The link between state aid rules and competition rules has been confirmed by the EU Courts stating that State aid law provisions and competition rules of the Treaty pursue the same objective: undistorted competition in the internal market.³ State aid law is mainly concerned with preventing negative market outcomes that are the result of state subsidies, which reduce economic welfare by weakening the incentives for firms to improve their efficiency and by enabling the less efficient to survive or even expand at the expense of more efficient undertakings. EU state aid law has the aim to prevent the resulting distortions of trade and also bar other sources of inefficiency such as costly subsidy races.

However, there are significant conceptual differences between the way the EU state aid rules safeguard the competitive process and Articles 101–106 TFEU, which focus on maintaining rivalry among undertakings. Articles 101–106 and merger control relate to the behaviour of undertakings, while EU State aid law regulates competition among Member States. EU State aid provisions

1 KJ Cseres, *Consumer Protection and Competition Law*, (Kluwer International 2005) Oles Andriychuk, 'Can We Protect Competition Without Protecting Consumers?' (2010) *Competition Law Review* 77–88; Pinar Akman, 'Consumer' versus 'Customer': The Devil in the Detail' (2010) *Journal of Law and Society*, 37: 315–344; Pinar Akman, 'Consumer welfare and Article 82 EC: Practice and rhetoric' (2009) 32 *World Comp.* 71–90. KJ Cseres, 'The Controversies of the Consumer Welfare Standard', (2007) 3 *Competition Law Review* 121–173.; Philip Marsden and Peter Whelan, 'Consumer Detriment and its Application in EC and UK Competition Law' (2006) ECLR 569; Alison Jones and Albertina Albers-Llorens, 'The Images of the 'Consumer' in EU Competition Law', in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Image(s) of the 'Consumer' in EU Law: Legislation, Free Movement and Competition Law*, (Hart Publishing 2016) 43–92; Angus MacCulloch, 'The Consumer and Competition' in Geraint Howells, Ian Ramsay and Thomas Wilhelmsson

(eds), *Handbook of Research on International Consumer Law*. Cheltenham, (Edward Elgar 2010), 77–106.

2 Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014), 231ff; Francesco De Cecco, *State aid and the European Economic Constitution* (Hart Publishing 2012).

3 C-225/91, *Matra v Commission*, EU:C:1993:239, para. 42; Case T-49/93, *Societe Internationale de Diffusion et d'Edition (SIDE) v Commission of the European Communities*, EU:T:1995:166, para. 72; Case T-156/98, *RJB Mining v Commission*, EU:T:2001:29, para. 113.

complement Articles 101–102 TFEU by preventing distortions to the competitive process that are the consequence of public interventions rather than the conduct of private undertakings. EU State aid law is, thus, based on a particular model of competition,⁴ where normative and non-economic aspects such as fairness, equity, and equality are also of key importance. The distribution of living conditions in different regions of a country or in different EU Member States could, for example, be intolerable for normative reasons such as territorial cohesion. Besides efficiency considerations, these normative considerations of distributional justice play essential role in state aid control.⁵

Hence, despite the fact that the State aid rules' aim of preventing the distortion of competition in the internal market corresponds to the aim pursued by Articles 101 and 102 TFEU,⁶ the concept of competition and distortion of the competitive process is a 'more layered' legal construction than in the area of Articles 101 and 102 TFEU.⁷ These layers are well illustrated when two specific concepts in state aid law are analysed: the interpretation of distortion of competition and, second, the role of consumer welfare. We now turn to these two concepts.

A. EU State aid law and distortion of competition in the Internal Market

EU State aid law is closely connected to internal market law by supporting its creation and well-functioning.⁸ Its rational originates from the core principles of the internal market.⁹ Hence, the focus of the State aid rules is to prevent distortion of competition in the internal market as well as to preclude inefficient subsidy races among Member States. State aid control mainly concerns macro-economic competition between Member States¹⁰ even when specific consideration is given to the impact of the

aid on competition between the beneficiary of the aid and its rivals. Its goal is to preclude the misallocation of resources and to preclude public intervention, which does not correspond to the rationality of the 'market-place' and which would not take place under 'normal market conditions'. Under the State aid rules an anti-competitive behaviour 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. Therefore, State intervention should be directed at improving the efficient functioning of markets by correcting such market failures when competition is unlikely to produce efficient outcomes.¹¹ Nevertheless, as explained above, state subsidies can also be justified on the basis of non-efficiency arguments. For example, the second and third paragraphs of Article 107 TFEU include normative reasons to grant aid that are based on values of allocative distribution and contain strong distributive elements.¹² This political objective refers to both the economic situation in different Member States and the differences concerning the standard of living among regions within a single Member State. Consequently, State aid control is aimed at the best allocation of resources within single Member States and, indirectly, to serve the political goal of economic integration and Europe-wide welfare.¹³

Even though the EU's State aid rules do not bar Member States from introducing subsidies or other forms of public assistance to undertakings, its centralised control system does prevent Member States from providing aid unilaterally. As signified by Executive Vice-President Vestager and in a recent Editorial of this journal,¹⁴ it can be problematic when there are significant differences between EU countries regarding the aid provided by Member States to beneficiaries.¹⁵ The close

4 Francesco De Cecco 'Member State Interests in EU State Aid Law and Policy' in Márton Varjú (ed.), *Between Compliance and Particularism Member State Interests and European Union Law* (Springer 2019), p. 131.

5 Justus Haucap and Ulrich Schwalbe 'Economic Principles of State Aid Control' DICE Discussion Paper, April, 2011, p. 14.

6 Former Article 3 (1) g EC Treaty, now Protocol No. 27. Court has confirmed this see: Case C-225/91, *Matra v Commission*, EU:C:1993:239, para. 42; Case T-49/93, *Societe Internationale de Diffusion et d'Edition (SIDE) v Commission of the European Communities*, EU:T:1995:166 para. 72; Case T-156/98, *RJB Mining v Commission*, EU:T:2001:29, para. 113.

7 Case C-234/89, *Delimitis v Henninger Brou*, EU:C:1991:91, Recent application of *Delimitis*: Case T-328/03, *O2 (Germany) GmbH & Co. v Commission*, EU:T:2006:116; Francesco De Cecco, 'Competition in EC State Aid law' (n 6) 121.

8 Francesco De Cecco 'Competition in EC State Aid law' (n 6); Juan Jorge Piernas López, *The Concept of State Aid Under EU Law: From Internal Market to Competition and Beyond* (Oxford University Press 2015).

9 Andrea Biondi, 'Rationale of State Aid Control: A Return to Orthodoxy in *Cambridge Yearbook European Legal Studies*, 12, 35–52.

10 Jose Luis Buendia Sierra and Ben Smulders, 'The Limited Role of the "Refined Economic Approach" in Achieving the Objectives of State Aid

Control: Time for Some Realism' in *EC State Aid Law: Liber Amicorum Francisco Santaolalla* (Kluwer Law International 2008) 18.

11 Hans W. Friederiszick, Lars Hendrik Röller and Vincent Verouden, 'European State Aid Control: An Economic Framework' in Paulo Buccrossi (ed.), *Handbook of Antitrust Economics* (MIT Press 2007), p. 644.

12 Exemptions on the basis of the General Block Exemption Regulation (GBER) or Article 106 (2) TFEU can similarly be based on non-economic interests.

13 Justus Haucap and Ulrich Schwalbe 'Economic Principles of State Aid Control' (2011) DICE Discussion Paper, No. 17, p. 15. Massimo Merola, 'The Forces Shaping State Aid Control in the EU' in Luca Rubini and Jennifer Hawkins (eds.), *What Shapes the Law?: Reflections on the History, Law, Politics and Economics of International and European Subsidy Disciplines* (Cambridge University Press 2016), p. 102.

14 Alfonso Lamadrid de Pablo and Jose Luis Buendia, 'A Moment of Truth for the EU: A Proposal for a State Aid Solidarity Fund', (2020) 11 *Journal of European Competition Law & Practice*, 1–2.

15 In the context of the COVID-19 crisis, this is the case with regard to Germany that alone accounts for half of the approved aid; *Süddeutsche*

connection between EU State aid law and internal market law has especially been manifested in the process of liberalisation and deregulation in sectors like energy or telecommunications. As the internal market legislation removed the possibility of state support by regulatory means, the provision of subsidies became the main tool available to governments. These developments made it clear that the internal market would require the effective control of State aid.¹⁶ At the same time, the protection of users and consumers interest has also emerged in State aid control as it is analysed in the next section.

B. Promoting consumers' wellbeing through the consumer-taxpayer standard in state aid law

A crucial difference to other areas of competition policy is that in State aid law total welfare does not only include the sum of producer and consumer surplus but also the costs of state measures to taxpayers.¹⁷ While the goal of EU State aid rules is not directly linked to consumer welfare like other parts of competition law, it nevertheless impacts consumers as both takers of goods and services and as tax-payers. This indirect impact on consumer welfare can be illustrated by the way state measures might lead to productive inefficiency in the sense that goods and services are no longer produced at the lowest cost possible. This is something that can occur at the input stage of the production chain rather than at the output stage resulting in higher prices.¹⁸ State aid may thus have a negative impact on the incentives to compete and invest, for example, in decarbonising the energy system and thereby contributing to EU's Green Deal objectives. Change in dynamic incentives resulting from State aid to inefficient firms could simultaneously lead to less consumer choice, and potentially to lower quality or higher prices for consumers. This is particularly relevant considering firms' incentives to invest in clean, sustainable energy sources which will have a vast impact in the long term on the environment, consumers' health, and general wellbeing.¹⁹

Zeitung, 'Vestager sieht Bevorzugung Deutschlands bei Staatshilfen', available at <https://www.sueddeutsche.de/wirtschaft/eu-corona-staatshilfe-n-margrethe-vestager-1.4911083>.

16 Hussein Kassim and Bruce Lyons, 'The New Political Economy of EU State Aid Policy' (2013) *Journal of Industry, Competition and Trade* 13, 1–21.

17 Hans W. Friederiszick, Lars Hendrik Röller and Vincent Verouden, 'European State Aid Control: An Economic Framework' in Paulo Buccrossi (ed.), *Handbook of Antitrust Economics* (MIT Press 2007), p. 644.

18 Berg Ahlborn, 'Can State Aid Control Learn from Antitrust? The Need for a Greater Role for Competition Analysis under the State Aid Rules' (n 15) 48.

19 The relevance of other (social) EU policies has considerably increased with the modernisation of EU State aid law, that took place in 2005 (SAAP) and in 2012 (SAM) These modernisation programmes were,

It has been argued that State aids should be judged against a welfare standard, which not only measures the effect on rivals but also incorporates effects on domestic and foreign consumers and non-market effects (externalities), as well as taking account of the marginal cost of public funds.²⁰ Even though consumers can benefit from extended output and lower prices as a result of state subsidies, there are also the undesirable side effects of state measures that could ultimately harm consumers. State aid measures have to be financed by public funding. When consumers are also considered in their capacity as taxpayers and thus the financing source of state aid then the ultimate effect on consumers may be negative.

Accordingly, as suggested by Friederiszick, Röller, and Verouden, the consumer–taxpayer welfare standard should be a crucial analytical lens to scrutinise State aid and in order to establish whether state aid benefit consumers when they are also considered in their capacity as taxpayers.²¹ Therefore, adopting the broader consumer–taxpayer welfare test for EU State aid control is more appropriate than applying the consumer welfare standard conceived in other areas of competition law such as Articles 101 and 102 TFEU. This approach is justified by the fact that of State aid serves to optimise production and stimulate innovation rather than subsidise inefficient beneficiaries, it is likely that consumers will enjoy more sustainable benefits in the long-run. Thus, in this situation the lens of the consumer/taxpayer standard helps to ensure exactly that, on one hand, consumers benefit from product optimisation in terms of innovative products and choice and, on the other hand, that taxpayers' resources are well allocated as it helps to support efficient beneficiaries. State aid can be used to support beneficiaries who are willing to invest in steering their different production stages towards being more sustainable and efficient. In this way, they can contribute

mostly aimed to make State aid rules and enforcement more economics and effects based, more targeted and to 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. European Commission, 'State aid action plan—Less and better targeted state aid: a roadmap for state aid reform 2005–2009', COM(2005) 107 final; European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU—State Aid Modernisation (SAM)', COM(2012) 209 final. The new state aid policy approach also originated from the fact that the economic and global crisis has increased the demand for a greater role of the State to protect the most vulnerable and promote economic recovery. Thus, scarce resources had to be spent more efficiently and effectively. M Papp 'State Aid Modernisation: An Opportunity or a Straitjacket?' First draft prepared for the ECPR Conference in Trento, 2016.

20 H- W. Friederiszick, L-H Röller, V Verouden, European State Aid Control: An Economic Framework in P. Buccrossi (ed.), *Handbook of Antitrust Economics* (2007 MIT Press), p. 644.

21 Ibidem.

to more sustainable consumption patterns and provide consumers with better—more sustainable—products and services.

C. The goals of EU consumer law

The internal market lies, likewise, at the heart of EU consumer law. While consumer law in general is seen as a type of 'social' law, its central premise is the protection of the 'weaker party' by regulating the relationship between consumers and traders with the goal of promoting fair and efficient markets for the benefit of consumers. Consumer protection has generally been understood as a wide range of different regulatory tools ranging from information disclosure and transparency requirements to legislation to protect consumers against unfair contract terms and commercial practices. The foundation of consumer law is based on the idea of the consumer lacks bargaining power vis-à-vis traders and can be subject to exploitation and market abuses.²² In particular, EU consumer law and policy have been shaped by the rationale of reducing barriers to intra-EU trade and the completion of the Single Market. Consequently, EU consumer law did not develop as an autonomous area of EU law but on the basis of the internal market (Article 114 TFEU).²³

Accordingly, the role of the consumer goes beyond her individual transactions and is sub-ordered to the public law objectives of market integration.²⁴ In a similar vein, the normative concept of the consumer (well-informed, reasonable, and circumspect market actor)²⁵ that emerged in the CJEU's jurisprudence, is also aligned with the aim to complete the internal market and to facilitate the functioning of free movement and competition rules. Likewise, the instrumentalist link between the consumer and the internal market has been particularly

strong in the body of EU law that emerged in the regulation of public services such as energy, telecommunications or postal services.²⁶ As public utilities became subject to market liberalisation from the end of the 1990s, the EU adopted a market-oriented approach to deliver public goods and services.²⁷ Its strong focus on competition and market access explain the fact that sector specific consumer protection rules developed as a secondary product of the liberalisation process and has only gradually gained more significance.²⁸

Both EU state aid law and consumer law share the common to support the functioning of the internal market. Departing from this concluding remark, the next section will explain how consumer interests are taken into account in the application of State aid rules.

D. Consumer interests in state aid law

EU State aid law forms part of the EU's competition regime and as such shares with EU consumer law the common goal of safeguarding competitive markets, strengthen the internal market and to provide consumers with access to a range of competitively priced goods and services in markets free of unfair and deceptive practices. Article 107 (2) (a), contains a direct reference to consumers,²⁹ but no other reference is made in Articles 107 and 108 to consumer interests.³⁰ The common link

22 The various aims of consumer protection law include the following: to ensure consumers are provided with accurate information about the goods and services they choose to purchase, to mandate minimum standards of quality applying to the supply of goods and services, to preclude unfair/misleading market practices, and to prevent the exploitation of vulnerable members of the community. The fundamental goals of consumer law are often organised around five principles: (i) the right to information, (ii) the right to choose, (iii) the right to protection of health and safety, (iv) the right to good bargains, (v) the right to count on business liability, and (vi) the right to be heard (consumer participation).

23 Most of the consumer law directives were based on Article 114 TFEU and thus their stated rationale was to combat market fragmentation. See: Stephen Weatherill, 'After KECK: Some Thoughts on How to Clarify the Clarification', (1996) 33 Common Market Law Review 5, pp. 887–908. This situation changed after the Maastricht Treaty as a result of the incorporation of consumer protection as a new legal basis for EU policy making.

24 Marija Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political', (2015) 21 European Law Journal, 572–598.

25 C-238/89, *Pall Corp*, C-315/92, *Clinique*, C-470/93, *Mars* and C-373/90, *Procureur de la République v. X*.18.

26 As public utilities became integral part of the internal market. The (de)regulation mostly focused on supply side market failures and on creating a competitive market structure by introducing specific regulatory frameworks that complemented existing competition rules and institutions. KJ Cseres, 'The Active Energy Consumer in EU Law' (2018), *European Journal of Risk Regulation*, 9(2), 227–244; KJ Cseres, 'Postal Consumers in the EU and in Local Markets: From Users of Universal Services to Users of All (Digital) Postal Services How Does EU and National Law Facilitate Consumers in the Digital Postal Market?' (2019) Amsterdam Law School Research Paper No. 2019-39, Amsterdam Centre for European Law and Governance Research Paper No. 2019-02.

27 The purpose of liberalising the EU's electricity and gas sector was to ensure that EU consumers receive the full benefits of market opening in terms of lower domestic bills for electricity and gas through the introduction of competition and the freeing of all electricity and gas consumers to choose their supplier. KJ Cseres, 'What Has Competition Done for Consumers in Liberalised Markets?' (2008), *Competition Law Review*, Vol. 4, No. 2, pp. 77–121.

28 The creation of a single European market for public services has been pursued progressively by opening up national markets first to competition and the liberalisation process focused first and foremost on guaranteeing market access and other policy objectives such as consumer/user protection, innovation, sustainability and climate change were implemented only at a later stage. KJ Cseres, 'Universal Service and Consumer Protection: a paradigm shift in EU law' (2017) *European Competition and Regulatory Law Review*, 4, 1–18.

29 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.

30 Further 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.

of State aid and consumer protection with the internal market is specified by the fact that consumers should benefit from a competitive and well-functioning internal market by being able to access goods and services across Member States.

In this section, first we analyse the constitutional basis of implementing consumer interests in State aid law and policy making, followed by the application of this theoretical framework in services of general interest.

E. Protection of consumer interests through horizontal clauses

According to the so-called horizontal (cross-sectional) clauses set out in the Treaty on the Functioning of the European Union (TFEU), the EU 'shall take into account' the requirements of cross-cutting policies in its other EU policies.³¹ According to Article 12 TFEU 'consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities'³². This is coupled with Article 169 TFEU establishing that the EU 'shall contribute to protecting the health, safety and economic interests of consumers' through measures adopted pursuant Article 114 TFEU and 'measures which support, supplement and monitor the policy pursued by the Member States'. Consequently, in the whole body of EU competition law and policy including Articles 101–108 TFEU the requirements of consumer protection have to be taken into account alongside with other objectives of the EU. This obligation has been confirmed by the General Court in *Test-Achats*, underlining 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.³³ 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,³⁴ as well as in decisions whether state aid is compatible with the internal market. It follows that consumers' economic well-being is one of the core public interests being pursued in the enforcement of competition law including State aid rules. Further to this, when interpreting provisions of Union law, the European Commission, national authorities and national

courts are legally required to take account 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.³⁵

Following Nowag's theoretical framework,³⁶ the next section will scrutinise how consumer protection can be integrated in State aid law at the stages of defining the scope of the prohibition or at the justification stage.

F. Justification of state aid measures on the basis of consumer interests: the case of public services and Articles 107(2)(b) and 107(3)(b)

Public services or what is called SGEI in EU law is a key area where state measures find their justification in the safeguarding of consumer interests. Concerning the scope of the prohibition laid down in Article 107 (1) consumer interests play an important role when the compatibility of compensating SGEI is assessed under the State aid law provisions. As shown above, the common ground of State aid law and consumer law has been distinct in the process of liberalisation. State aid policy expanded from the mid-1980s as national markets were opened to competition and the privatisation and regulation of public services started. As the EU established a marketised regime for public services, greater control of State aid became a necessary concomitant of further liberalisation and the internal market.³⁷ Consequently, the Commission took a more systematic approach to the regulation of State aid. In this process, the private provision of public services under competitive conditions was considered more efficient and more beneficial for consumers than their public provision. Liberalisation, therefore, has exposed the crucial role of states in ensuring accessibility to public services whilst maintaining high quality and affordable prices that satisfy consumer needs.

31 Suzanne Kingston, *Greening EU Competition law and policy* (Cambridge University Press 2011), 118.

32 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.

33 Case T224/10, *Association belge des consommateurs test-achats ASBL v. Commission*, EU:T:2011:588, para. 43.

34 *Ibidem*.

35 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 AG Wahl of 12 December 2013, C-470/12, *Pohotovost' s. r. o. v Miroslav Vašuta*, EU:C:2013:844, para. 66.

36 Julian Nowag, *Environmental Integration in Competition and Free-Movement Law*, (Oxford University Press 2016) p. 5.

37 The sixteenth report on competition policy: "A competition policy which is responsive to the needs of European industry", available at <https://ec.europa.eu/commission/presscorner/detail/en/P>.

As liberalisation unfolded, services of SGEI began to play a fundamental role both in internal market law and State aid law, but also, with some delay, in the EU law governing the protection of consumers.³⁸ Although SGEI is enshrined in Article 14 TFEU and Protocol No 26 of the Treaty, the EU legislator has not defined what SGEIs are. It has merely defined certain common elements of SGEIs that include among others, the protection of users and consumers.³⁹ Accordingly, the notion and concept of SGEI connects, on the one hand, the concept of competition, market-making and integration by establishing an open economy with free competition on EU level, and on the other hand the concept of market correction, social welfare and redistribution in the interest of all EU citizens.⁴⁰ If we consider the CJEU's judgment in *Altmark*,⁴¹ which confirmed that financial compensation for the provision of SGEI can take place without risking the violation of State aid rules if state funding for SGEI is provided in the most efficient way (i.e., the conditions formulated in *Altmark* are fulfilled),⁴² then we also have to conclude that with *Altmark* EU law has also confirmed an efficiency test for the uninterrupted supply of SGEI to consumers. Accordingly, the so-called *Altmark* test is a fundamental guarantee for the optimal allocation of consumers' as taxpayers' money through introducing the efficiency test, which at the same time includes the efficient provision of public services for consumers.⁴³

Besides the scope of Article 107 TFEU, SGEI also play a role at the justification stage of otherwise incompatible state aid measures. Article 106 (2) lays down an exception

for undertakings that are entrusted with the provision of SGEI. This exception means that proportional restrictions that are necessary in relation to a legitimate public interest objective such as consumer protection as one element of SGEI can be justified. In *Federutility*, the CJEU has confirmed that Member States are allowed, in the general economic interest, to impose on undertakings operating in the gas sector public service obligations in order to ensure, in particular, that the price of the supply of natural gas to final consumers is maintained at a reasonable level. In doing so, Member States must reconcile the objective of liberalisation and that of the necessary protection of final consumers pursued in the natural gas sector.⁴⁴ Accordingly, measures that are taken in order to protect consumers could justify the otherwise distortive effect of these measures on the competitive process.

Moreover, Article 107(2)(b) allows aid to make good the damage due to exceptional occurrences and 107(3)(b) when aid remedies a serious disturbance of the economy of a Member State. Under Article 107(2)(b) the Commission applies a narrow and restrictive approach in assessing the state measure and requires a causal link between the exceptional circumstance and the compensatory measure and that the measure is proportionate, i.e., it does not allow for overcompensation. Article 107(2)(b) was applied in the Commission's very first decision in March 2020 concluding that the pandemic was an exceptional occurrence,⁴⁵ but its application remained limited.⁴⁶ These exceptions will be discussed in more details below in Section V.

This brief overview of the current primary and secondary law of EU State aid law shows that consumer interests and policies are receiving greater recognition in State aid law and consumer interests can be more easily integrated in the framework of state aid law than under Articles 101 and 102 TFEU.⁴⁷ This is illustrated by the common goal of State aid law and the horizontal principle of consumer protection to strengthen the internal market and the way consumer interests gained more recognition as part of the concept of SGEI and a core element of the

38 K J Cseres, 'Universal Service and Consumer Protection: a paradigm shift in EU law' (n 29).

39 Other elements are universal service, affordability and quality of services. European Commission, 'Green paper on services of general interest' (2003) COM(2003) 270 final, 16–19, 30. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'White paper on services of general interest' (2004) COM(2004) 374 final, 4.

40 Thomas Müller, 'Efficiency Control in State aid and the Power of Member States to define SGEIs', (2009) *European State Aid Law Quarterly*, Vol. 8, No. 1, pp. 39–46.

41 Case C-280/00, *Altmark*, EU:C:2003:415.

42 In its 2003, *Altmark* the European Court of Justice held that public service compensation does not constitute State aid when four cumulative conditions are met: the recipient undertaking must have public service obligations and the obligations must be clearly defined; the parameters for calculating the compensation must be objective, transparent, and established in advance; the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit; Where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical well-run company.

43 We refer to the third and fourth criterion of the test. Case C-280/00, *Altmark*, EU:C:2003:415, para. 93.

44 C-265/08 *Federutility and Others*, EU:C:2010:205, para. 32.

45 Commission Decision of 12 March 2020 on the aid measure—Denmark—State aid notification on compensation scheme cancellation of events related to COVID-19 (Case COMP/SA.56685) 8 [24].

46 The measures adopted on the basis of Article 107 (2) (b) affected less than 10 per cent of the cases. Denmark relied most on that provision. A fifth of the cases were ad hoc cases, mostly in the aviation sector, in France, Germany, Austria, Sweden and Denmark. Carole Maczkovics, 'How Flexible Should State Aid Control Be in Times of Crisis?', (2020) *European State Aid Law Quarterly*, Vol 19, Issue 3, p. 2.

47 Anna Gerbrandy, 'Rethinking Competition Law within the European Economic Constitution', (2019) *Journal of Common Market Studies*, 57: 127–142.

legal and policy framework that addresses the funding of such services. Accordingly, the legal basis for a closer interaction and recognition of consumer interests in state aid law is well-established.

The following sections will introduce two case studies that 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.

III. Direct consumer interest in state aid law: energy and transport

A. Energy

Energy is one area where state aid law is directly relevant for consumers and where the pandemic has also raised crucial questions in the context of the green recovery since its generation and use have great implications for the planet. EU State aid rules have a direct and tangible impact on the structure of the energy market. In order to promote EU energy market objectives, including market integration and sustainability, Member States give aid to certain projects. The EU Treaty rules as well as Commission guidance allow State aid for renewable energy, for capacity mechanisms, for energy efficiency, and for cross-border infrastructure. The 2014 Energy and Environmental Aid Guidelines (EEAG) are significantly wider in their scope than the previous guidelines, covering operating aid for renewables, investment aid for energy infrastructures as well as investment and operating aid for generation adequacy measures.

Due to the special characteristics of energy markets and the energy sector more generally, state and markets live in close interaction.⁴⁸ The availability of electricity and the security of supply have characteristics of a public good. Moreover, energy prices may not be sufficiently high to reflect the value of additional capacity at times of scarcity, or regulators may impose ceilings on prices. Secondly, there may also be insufficient incentives to achieve the learning benefits or invest in the research and development associated with deploying new and immature technologies as a result of knowledge spillovers.⁴⁹ These capital market failures can restrict the funds available to energy infrastructure projects.⁵⁰ For all these reasons, the

energy sector is characterised by high level of government involvement. According the Commission's European State Aid scoreboard in 2019⁵¹ more than half of approved state decisions the energy sector was the most subsidised.

Moreover, the EU's new approach to its industrial policy has explicitly stated that in order 'become more competitive as it becomes greener and more circular, industry will need a secure supply of clean and affordable energy and raw materials'.⁵² Energy is also at the centre of the European Green Deal that acknowledged that State aid rules shall be made fit for supporting Europe's decarbonisation since they are one of the instruments to channel finance to Europe's green transition.⁵³ In order for the EU to become climate neutral by 2050, which is at the heart of the European Green Deal, it is important to have various EU policies play a role. The 'Clean Energy for All Europeans' package, the recent *overhaul* of the EU's energy policy framework adopted in 2019⁵⁴ aims to redesign electricity markets and to set rules for a 'consumer centred clean energy transition'.⁵⁵

This implies a shift from the incumbent hierarchical model of a top-down oriented energy supply towards a decentralised system with more bottom-up energy supply by consumers, producing their own energy. Consumer participation is seen therefore as an absolute prerequisite for managing the energy transition successfully.⁵⁶ In order to engage consumers more in the energy transition,

48 Kim Talus, *Introduction to EU Energy Law*, (Oxford University Press 2016), p. 117.

49 Nicole Robins and Tridevi Chakma, 'State Aid in Energy under the Spotlight', (2016) *European State Aid Law Quarterly*, Vol. 15, No. 2, p. 251–252.

50 *Ibidem*.

51 About 55 per cent of total spending (66.5 billion EUR), excluding aid to agriculture, fisheries and railways, was attributed to State aid to environmental and energy savings. European Commission, 'State aid Scoreboard 2019', available at https://ec.europa.eu/competition/state_aid/scoreboard/state_aid_scoreboard_2019.pdf.

52 Energy-intensive industries are indispensable to Europe's economy and are relied on by other sectors. Modernising and decarbonising energy-intensive industries must therefore be a top priority. Commission, A New Industrial Strategy for Europe, COM(2020) 102 final. Brussels, 10.03.2020, p. 7.

53 ClientEarth, 'A State Aid Framework for a Green Recovery. Mainstreaming climate protection in EU State aid law' (2020), available at <https://www.documents.clientearth.org/wp-content/uploads/library/2020-09-30-a-state-aid-framework-for-a-green-recovery-coll-en.pdf>.

54 Commission, 'Clean energy for all Europeans package completed: good for consumers, good for growth and jobs, and good for the planet' (Brussels, 22 May 2019), available at https://ec.europa.eu/info/news/clean-energy-all-europeans-package-completed-good-consumers-good-growth-and-jobs-and-good-planet-2019-may-22_en.

55 *Ibidem*.

56 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, 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 realise 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 allow trading renewable energy sources across borders".

Directive 2019/944⁵⁷ enables consumers to participate in demand response programmes⁵⁸ by adjusting their consumption according to price signals that reflect the value and cost of electricity or transportation in different time periods.⁵⁹

The role of consumers as contributors to a cost-effective energy transition is also reflected in the revised Renewable Directive (Directive 2018/2001). 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. This is the first EU legislation facilitating the involvement of household consumers in the deployment of renewable energy through self-generation of renewables and their joint collectives.⁶⁰

However, active consumer engagement remains limited due to the lack of clear information, lack of adequate financial incentives (e.g., when switching the supplier) or adequate financial compensation for consumers' flexibility services.⁶¹ Moreover, some consumers are getting disconnected from the energy markets due to personal, financial, or behavioural circumstances as well as the lack of digital skills.⁶² This disengagement is coupled with

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.⁶³

Parallel to the legislative and policy efforts to put the consumer into 'the driving seat' of the energy transition, Member States have given massive reductions of energy prices to a large number of industries that ultimately lead to increased costs for energy consumers. In Germany, for example, the financial relief granted to companies through industrial renewable electricity surcharge exemptions amount to more than 4 billion EUR per year. In 2016 alone, German energy intensive industries received around 6.5 billion EUR in subsidies.⁶⁴ In this way, citizens and not companies pay the bill for climate change and decarbonisation.⁶⁵

With lower energy prices, industries' incentives to implement energy efficiency measures decrease. This can frustrate the implementation of energy efficiency measures, jeopardise the EU's Green Deal objectives. Therefore, attaching conditionalities to the provision of state aid is the most justifiable way to increase competitiveness in the EU and achieve its climate goals.⁶⁶ Danish industries can serve as an example, which only receive reductions in the renewable surcharges if they commit and stick to energy efficiency improvements.⁶⁷

Hence, the European Commission should assess a request from a Member State to grant aid to energy beneficiaries by also considering the measure's short and long-term impact on consumers.

B. Transport

Transport is another core area of State aid law where consumer interests are directly at stake.

The transport sector is characterised by a large degree of public investments and the provision of public transport services (in particular for passengers) relies to a large

57 Directive 2019/944 of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast).

58 According to the Directive 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).

59 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), available at https://www.cerre.eu/sites/cerre/files/cerre_smart_consumers_internet_of_energy_november2019_0.pdf.

60 Even though self-consumers and prosumers were already recognised in certain national renewable energy policies, they are addressed for the first time in EU law together with 'renewable energy communities'. Final consumers are now explicitly recognised (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.

61 BEUC, 'The future of energy consumers' (2019), available at https://www.beuc.eu/publications/beuc-x-2019-055_the_future_of_energy_consumers.pdf.

62 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; OFGEM, 'Consumer Vulnerability strategy' (2019), available at https://www.ofgem.gov.uk/system/files/docs/2020/01/consumer_vulnerability_strategy_2025.pdf.

63 BEUC, 'The future of energy consumers' (2019), available at https://www.beuc.eu/publications/beuc-x-2019-055_the_future_of_energy_consumers.pdf; BEUC, 'Letter to Director General Johannes Laitenberger: Future State aid decisions related to energy must better protect the interest of consumers', (24 July 2019), available at https://www.beuc.eu/publications/beuc-x-2019-044_letter_to_mr_laitenberger_guidelines_on_state_aid.pdf.

64 Climate Action Network, 'European Fat Cats, EU Energy Intensive Industries: paid to pollute, not to decarbonise' (2019), available at, p. 18.

65 Ibidem, p. 3.

66 Clientearth, 'A State Aid Framework for a Green Recovery. Mainstreaming climate protection in EU State aid law' (n 56) p. 33.

67 See: Commission decision, Denmark Reduced contribution to financing of RES support for energy-intensive users (COMP/SA.42424), available at http://ec.europa.eu/competition/state_aid/case/s/259362/259362_1691772_143_2.pdf.

extent on State subsidies. While being heavily dependent on public financing due to amongst others high costs of infrastructure, certain means of transport have a considerable negative impact on the environment and human well-being.⁶⁸ These are increasingly important aspects for consumers. 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. The relevance of transport infrastructure has been underlined by the Europe 2020 Strategy⁶⁹ and identified as part of the EU's sustainable growth strategy. The 'Roadmap to a Single Transport Area' emphasised the importance of using less and cleaner energy, better exploiting a modern infrastructure and reducing transport's negative impact on the climate and the environment.⁷⁰ In its recent strategy for sustainable and smart mobility, the European Commission highlighted the importance of State aid rules to 'drive the sector's transition to sustainability, giving all modes an increasing opportunity to compete on equal terms for a subsidy'.⁷¹

These policy developments also have implications for State aid law as it is inherently interwoven with a set of essentially non-economic principles EU law laid down in the abovementioned cross-sectional clauses of the Treaty. The impact assessment of a rescue and 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.⁷²

Transport has also been a key area of consumer protection. Passenger rights have a prominent place in EU law that has been gradually established as from the late 1980s and developed into EU legislation for the protection of passengers.⁷³ 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 flights. *However, a recent study* from January 2020 of the EU Commission highlights the lack of awareness and enforcement of *these rights, a situation that has worsened with the pandemic. In the following section, we discuss specifically the implications of State aid in times of crisis, using as a test case the impact of the pandemic in the air transport sector.*

IV. Consumer interests and state aid law enforcement in the current crisis

Lessons learnt from the temporary State aid measures taken back in 2008 have placed the EU in the 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, the current crisis is deeper and has affected a wider range of industries than the financial crisis in 2008. The role of the EU, in the current crisis is crucial not only in order to guarantee that State aid law remains effective but also in order to coordinate a common response to the pandemic that takes into account possible adverse effects of state measures on the demand side, both considering the interests of consumers and taxpayers. Accordingly, the EU control on State aid should prevent destructive subsidy races, prevent Member States to seize the moment of crisis and support firms that were already non-viable before the crisis such as certain airlines⁷⁴ but also do so in a way that does not invalidate the obligations of firms to respect fundamental consumer protection rules.

The Temporary Framework adopted by the Commission in the context of the COVID-19 outbreak⁷⁵ indicates that the main legal basis for state measures is Article 107(3)(b).⁷⁶ As mentioned above, Member States could also adopt measures on the basis of Article 107(2)(b) TFEU, when they compensate companies for the damage suffered in '*exceptional circumstances*', e.g., compensation of '*companies in sectors that have been particularly hard hit (e.g. transport, tourism and hospitality)*'. For example, the Commission found that the COVID-19 outbreak qualifies as an exceptional occurrence when it approved the Danish aid scheme to compensate damages caused

68 Małgorzata Agnieszka Cyndecka, 'The 2019 'Fitness Check' of State Aid Modernisation Reform of 2012—an Opportunity to Redefine and Reintroduce Sustainability into the EU/EEA State Aid Rules? The Example of the Transport Sector', (2019) *Sustainability* 11, 6328.

69 Communication from the Commission—Europe 2020—A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final of 3 March 2010.

70 In particular, the Commission has emphasised in its White Paper 'Roadmap to a Single Transport Area' (*) that the internalisation 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.

71 Communication from the Commission, Sustainable and Smart Mobility Strategy—putting European transport on track for the future, COM(2020) 789, para. 76.

72 Jakub Kociubinski, 'Fleet Reduction in Rescue and Restructuring Aid to Airlines: A Critical View' (2014) *European State Aid Law Quarterly*, 454–462.

73 Jens Karsten, 'Passengers, consumers, and travelers: The rise of passenger rights in EC transport law and its repercussions for Community consumer law and policy' (2007) *Journal of Consumer Policy* 30, 117–136.

74 Francisco Costa-Cabral, Leigh Hancher, Giorgio Monti and Alexandre Ruiz Feases, 'EU Competition Law and COVID-19' (2020), TILEC Discussion Paper No. DP2020–007.

75 Commission Communication on a "Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak", C(2020) 1863 final, 19 March 2020.

76 The Temporary Framework will be in place until the end of June 2021, except for recapitalisation measures for which the Commission has extended this period until the end of September 2021.

by cancellations of large public events due to COVID-19 outbreak.⁷⁷

This provision was 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).⁷⁸

It is important to highlight that 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'*.⁷⁹ Member States have to demonstrate that State aid is necessary, appropriate and proportionate to remedy the serious disturbance or disruptions.⁸⁰ 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.⁸¹ At the time of writing, the Commission has already approved over 328 state aid decisions⁸² and has amended the Temporary Framework four times expanding its scope.

With the crisis mounting pressure on the travel sector, the State aid Temporary framework allows Member States to *'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'*.⁸³ Thus, state measures supporting airlines and travel operators can be a crucial mechanism to guarantee reimbursements to consumers and help airlines and travel operators to comply with their legal obligations under Regulation 261/2004

on passenger rights and under Directive 2015/2302 on package travel, respectively.

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 while, at the same time, they have asked to be exempted from certain consumer protection obligations notably under Regulation 261/2004 on passenger rights. Accordingly, many Member States adopted measures contravening EU law which led to infringement proceedings by the European Commission⁸⁴ as well as complaints by consumer organisations before the Consumer Protection Co-operation Network for the simultaneous violation of consumer law by deceiving consumers into accepting vouchers instead of reimbursements.⁸⁵ The European Commission addressed the situation concerning passenger rights in the context of Interpretative Guidelines on EU passenger rights⁸⁶, which recalled the supremacy of EU law by indicating that passengers have the choice between cash reimbursement and reimbursement in the form of a voucher (i.e., contract performance deferral). The refusal of airlines to refund passengers whose flights have been cancelled takes a double toll on consumers. Consumers pay first as travellers, by being denied refunds for cancelled flights, and second as taxpayers, by funding the state support. This is why 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 261/2004.⁸⁷

As air transport operators and Member States insisted that the Commission adopts alternative solutions to cash reimbursement, the Commission provided recommendations⁸⁸ containing minimum standards on how to make the option of vouchers more 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

77 EU Commission, State aid: Commission approves €12 million Danish scheme to compensate damages caused by cancellations of large public events due to COVID-19 outbreak, Press release, 12 March 2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_454.

78 Moreover, the principle of 'one time, last time' applies for rescue aid received in the last 10 years (e.g., by airlines) but does not apply to compensation for COVID-19 caused damage as long as there is causality.

79 Point 18 Temporary Framework.

80 Point 19 Temporary Framework.

81 BEUC, Letter to Commissioner Vestager, The consumers' perspective on State aid and COVID-19 (8 April 2020), available at https://www.beuc.eu/publications/beuc-x-2020-020_the_consumers_perspective_on_state_aid_and_covid-19.pdf.

82 Commission, 'Coronavirus Outbreak -List of Member State Measures approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework' (1 March 2021), available at https://ec.europa.eu/competition/state_aid/what_is_new/State_aid_decisions_TF_and_107_2b_107_3b_107_3c.pdf.

83 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, 13.5.2020, p. 3.

84 Commission, July infringements package 2020: key decisions, available at https://ec.europa.eu/commission/presscorner/detail/en/INF_20_1212 https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1212.

85 BEUC, Press Release: BEUC reports major airlines for breaching passenger rights and calls for industry investigation, (22 July 2020), available at <https://www.beuc.eu/publications/beuc-reports-major-airline-s-breaching-passenger-rights-and-calls-industry-investigation/html>.

86 Commission Notice Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19, Brussels, 18.3.2020 C(2020) 1830 final.

87 BEUC, Letter to Commissioner Vestager, The consumers' perspective on State aid and COVID-19 (n 84).

88 Commission Recommendation of 13.5.2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic COM (2020) 3125 final.

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’.⁸⁹ Moreover, the Recommendation encourages Member States to consider setting up guarantee schemes for vouchers to ensure that in the event of insolvency of the issuer of the voucher, passengers, or travellers are reimbursed. The German government, for example, did so by providing additional liquidity to reimburse consumers of travel packages benefiting 2300 travel operators established in Germany⁹⁰ and the in December the European Commission approved a €26 million Bulgarian scheme to support tour operators and travel agents with the refund of customers whose travel packages have been cancelled between 1 March and 31 December 2020 due to the coronavirus outbreak.⁹¹ However, only those bookings that fall within the scope of the Package Travel Directive⁹² 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.⁹³ 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.

V. Conclusions

Targeted and proportionate EU State aid guarantees that national support measures are effective in helping sectors of the economy affected by 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 a race to the bottom between Member States. Even though similar messages have already been formulated in the course of the current crisis by policy makers and academic scholars, the main contribution of the current paper is to take a broad market-wide lens by including supply and demand side issues in analysing the current economic crisis. Supporting national sectors and undertakings cannot be proportionate if the demand side, now and in the future, has to bear the costs of such rescue measures. In EU law, it is the constitutional duty of all 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 to ensure that the competitive process leads to the best outcome for consumers in terms of choice, quality, and prices.

Moreover, beyond the goal of competition law to promote consumers’ welfare (a discussion has especially been pronounced with regard to Articles 101 and 102 TFEU), it is the EU’s State aid law framework that has implemented a more prominent role for non-economic interests, such as territorial, social cohesion, or environmental protection and climate change developed over the past 15 years. 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 while ensuring that aid is possible to attain the political goals of the EU.

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 consumers, in terms of its effects on the competitive process, its impact on the environment and 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 forms also a core element in the energy transition and its ensuing legislative and policy framework. Such a test

89 Recommendation COM(2020) 3125 final point 15.

90 Commission decision of 31 July 2020, Germany COVID-19: Aid in the form of guarantees on vouchers issued for package tours (COMP/SA.57741), https://ec.europa.eu/competition/state_aid/cases/1/202032/287255_2178558_45_2.pdf

91 Commission decision of 18 December 2020, Bulgaria COVID-19: State aid scheme for tour operators and travel agents (COMP/SA.59990), https://ec.europa.eu/competition/state_aid/cases/1/20212/290355_2230743_65_2.pdf.

92 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC.

93 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.

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.

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