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Preserving Fair Competition in the Internal Market in Times of Crisis – The General Court's Application of the Proportionality Principle in EU State Aid Law During the COVID-19 Pandemic

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List of Abbreviations

Art.	Article
CJEU	Court of Justice of the European Union
ECJ	European Court of Justice
e.g.	*Exempli gratia* (for example)
EU	European Union
GC	General Court
i.e.	*Id est* (that is)
MS	Member States
NGEU	Next Generation EU
PPB	Principal place of business
SA	State aid
TEU	Treaty on European Union
TF	Temporary Framework
TFEU	Treaty on the Functioning of the European

1) Introduction

For more than two years now, the COVID-19 pandemic has tormented the world and already resulted in millions of deaths around the globe. To protect their citizens from the novel disease, many countries have introduced draconian restrictions such as complete border closings and nationwide lockdowns, including the closure of non-essential businesses. Albeit the temporary nature of these restrictions, they have contributed to a massive economic downturn and plunged the global economy into its worst recession since World War II.[1]

The crisis has put additional pressure on European Union (EU) Member States (MS), as their economies are closely intertwined and rely on the free movement of goods, persons, and services within the internal market. The EU has therefore introduced several measures to mitigate the economic impact of the pandemic. The historic €750 billion Next Generation EU (NGEU) recovery package was probably the one attracting most public attention.[2] However, the Commission's Temporary Framework (TF) for State aid (SA) measures[3] adopted in March 2020, facilitated the swift approval of SA measures totaling almost €3 trillion[4] – four times the amount of NGEU.[5] Indeed, the TF – primarily based on Art. 107(3)(b) TFEU[6] – enabled the Commission to approve Covid-related SA within days,[7] thereby allowing MS to quickly support companies affected by the pandemic, which most likely avoided mass bankruptcies.

While the Commission has been widely applauded for its flexibility and pragmatism,[8] the huge amount of subsidies pumped into MS' economies without the usual degree of scrutiny also poses considerable risks to the internal market and could potentially lead to major distortions of competition. It is for this reason that the Irish airline Ryanair challenged before the General Court (GC) several Commission Decisions declaring Covid-related SA in support

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[1] See The World Bank <https://www.worldbank.org/en/news/press-release/2020/06/08/covid-19-to-plunge-global-economy-into-worst-recession-since-world-war-ii> accessed 13 January 2022.

[2] See 'European Council conclusions on the recovery plan and multiannual financial framework for 2021-2027', CO EUR 8, CONCL 4 (17-21 July 2020) 2-7.

[3] The Commission has published an informal consolidated version of the Temporary Framework (as last amended) on 18 November 2021 ('Consolidated Temporary Framework') <https://ec.europa.eu/competition-policy/system/files/2021-11/TF_consolidated_version_amended_18_nov_2021_en_2.pdf> accessed 14 January 2022.

[4] In the period from 19 March to 31 March 2022, Covid-related aid measures approved by the Commission under Art. 107(3)(b) TFEU amounted to €2,686 billion, almost all of them adopted within the framework of the TF. See Phedon Nicolaides and Claire Soupart, 'State aid to combat Covid-19: it supports national economies but what is its impact on the internal market?' (2022) 358.

[5] A list of all Covid-related State aid decisions can be accessed at <https://ec.europa.eu/competition-policy/document/download/fd113a0a-9c99-4405-aa4c-4ed52134f657_en>.

[6] A few research-related aid measures were also approved within the TF on the basis of Art. 107(3)(c) TFEU

[7] See Carole Maczkovics, 'How Flexible Should State Aid Control Be in Times of Crisis?' (2020) 279.

[8] See Council Regulation (EU) 2015/1589, Art. 4(5) and Art. 9(6).

of one of the hardest-hit industries – aviation – compatible with the internal market.[9] It alleged that the respective aid measures, granted by MS such as Sweden and Finland, excessively distorted competition by giving 'their national flag carriers a leg up over more efficient competitors, based purely on nationality'.[10] Moreover, although the GC repeatedly dismissed Ryanair's allegations, the Irish airline did not back down and asked the European Court of Justice (ECJ) to overturn the GC's rulings,[11] warning that '[i]f Europe is to emerge from this crisis with a functioning single market, airlines must be allowed to compete on a level playing field'.[12]

The contested judgements (which are still pending before the ECJ at the time of writing)[13] raise hugely important questions about how discriminatory (i.e. distortive) SA measures may be designed to still be compatible with EU law. Central to this debate is the Court's application of the principle of proportionality, which serves as the main legal tool to balance two legitimate but conflicting interests[14] and is therefore crucial to SA law, where the interest of maintaining fair competition in the internal market regularly collides with the common interest objectives set out in Art. 107(2) and 107(3) TFEU. However, even in light of the issue's topicality, there have been surprisingly few attempts by legal scholars to address the GC's recent approach,[15] which – if upheld by the ECJ – could change the application of EU SA law to the detriment of fair competition. Therefore, this thesis aims to provide a comprehensive analysis of the GC's recent application of the proportionality principle in the area of EU SA law by addressing the following research question: Has the General Court applied the principle of proportionality in the cases filed by Ryanair on Covid-related State aid in the best legally possible way to minimize distortions of competition in the internal market and, if not, how should the ECJ respond?

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[9] For a list of all closed Covid-related State aid cases brought before the General Court as of 16 August 2022, see Curia, 'List of result' <https://bit.ly/3w2ZVBB> accessed 16 August 2022.

[10] The Irish Times, 'Ryanair vows to appeal rulings on state aid to airlines' (2021), available at <https://www.irishtimes.com/business/transport-and-tourism/ryanair-vows-to-appeal-rulings-on-state-aid-to-airlines-1.4537085> accessed at 02 August 2022.

[11] Ryanair appealed seven out of eight dismissed cases. Further details are provided in Section 4.

[12] The Irish Times, 'Ryanair vows to appeal rulings on state aid to airlines' (2021), available at <https://www.irishtimes.com/business/transport-and-tourism/ryanair-vows-to-appeal-rulings-on-state-aid-to-airlines-1.4537085> accessed at 02 August 2022.

[13] For a list of the seven pending appeals, see Curia, 'List of result' <https://bit.ly/3Aps34h> accessed 16 August 2022.

[14] See Vasiliki Kosta, 'The Principle of Proportionality in EU Law: An Interest-based Taxonomy' (2019) 2.

[15] Nicolaides has already discussed some of the Covid-related SA judgements of the GC, focusing on issues such as excessive discrimination, the GC's application of the appropriateness test, as well as its interpretation of Art. 107(3)(b) TFEU (also with regard to the proportionality principle). See: Phedon Nicolaides, 'The Limits of 'Proportionate' Discrimination' (2021); Phedon Nicolaides, 'The Appropriateness of State Aid and the Principle of Non-discrimination' (2021); Phedon Nicolaides, 'The Evolving Interpretation of Article 107(3)(b) TFEU' (2022). The analysis part in Section 4 will consider and build on some of the arguments made in these articles.

The thesis first provides a brief overview of EU SA law and how the established legal framework was complemented in response to the COVID-19 pandemic. Second, it discusses the principle of proportionality, its role in the EU legal order, and how it was be applied by the Court in the area of EU SA law prior to the pandemic. Third, it analyzes how the GC applied the proportionality principle in rejecting Ryanair's allegations, focusing on the two judgments in T-238/20 and T-388/20, concerning an aid scheme and an individual aid measure respectively. Finally, it summarizes the main findings and concludes that the GC has failed to apply the principle of proportionality in the best legally possible way to minimize distortions of competition in the internal market. Furthermore, by alleging excessive distortions of competition caused by the unnecessarily discriminatory exclusion of certain undertakings from the *scope* of SA measures, Ryanair (unintentionally) questioned the *raison d'être* of individual aid in EU SA law in general. Should the ECJ therefore concur with the conclusion reached in this thesis that in order to avoid undue distortions of competition, it must restrict the granting of individual aid to cases in which the pursued objective actually requires it, this would fundamentally change the *status quo* in the application of EU SA law.

As this thesis primarily consists of two case analyses, it follows the traditional doctrinal legal research method. Thus, in addition to analyzing recent case law of the CJEU, it also utilizes relevant Treaty provisions and legal documents, as well as a limited number of relevant academic literature.

2) EU State Aid Law and the COVID-19 Pandemic

This section first briefly examines the rationale and general rules of EU SA law. Second, it explores how these rules have been temporarily complemented to adequately respond to the economic challenges caused by the COVID-19 pandemic, and to what extent MS have made use of these temporary options.

2.1) EU State Aid Law

Since States are naturally reluctant to restrict their own room for maneuver when subsidizing their undertakings, SA control as part of competition law is unique to the EU and cannot be found in a similar form in any other jurisdiction.[16] One of the main reasons for supranational SA control at EU level is protecting the internal market against so-called subsidy races, where MS would channel financial aid to their national champions, triggering retaliatory support

[16] See Kelyn Bacon, 'Part I General Rules, 1 Introduction to State Aid Law and Policy', in European Union Law of State Aid (2nd edn, Oxford Competition Law, 2013) 3.

measures from other MS and resulting in a waste of resources that leaves no one better off.[17] Furthermore, the EU SA control regime reduces distortions of competition and market inefficiencies caused, for instance, by the rescue of large and inefficient undertakings.[18] Hence, EU SA rules are crucial to safeguard the proper functioning of the internal market by ensuring fair competition without arbitrary interference by MS. This is reflected in Art. 107(1) TFEU, which generally prohibits MS from subsidizing undertakings (i.e. providing them with *any* financial advantage[19] they would not have been able to obtain on the capital markets[20]) if doing so 'distorts or threatens to distort competition'.[21] However, EU law does not prevent the granting of SA altogether but allows for several exemptions if certain common interest objectives can justify the resulting distortions of competition.

Disregarding the special rules applying to undertakings entrusted with the operation of services of general economic interest,[22] three distinct types of exemptions exist: Automatic exemptions pursuant to Art. 107(2) TFEU, facultative exemptions under Art. 107(3) TFEU, and block exemptions primarily based on the current General Block Exemption Regulation (GBER).[23] Any new aid measure proposed by a Member State and based either on an automatic or a facultative exemption must be notified to the Commission in advance,[24] which must then either approve or reject the application within a given time frame.[25] In contrast, the criteria listed in the GBER are designed to ensure that any aid measure fulfilling them can

[17] Ibid. See also Niels J. Philipsen, 'From Market Integration to Fiscal Discipline: Analysing the Goals of EU State Aid Policy from an Economic Perspective' (2017) 5f.
[18] See Niels J. Philipsen, 'From Market Integration to Fiscal Discipline: Analysing the Goals of EU State Aid Policy from an Economic Perspective' (2017) 6f.
[19] See Case 30/59, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*, 19.
[20] See Case C-142/87, *Kingdom of Belgium v Commission of the European Communities*, para. 26 and 29.
[21] For aid to be considered distortive, the beneficiaries must merely be found to be in a more advantageous position than before the aid was received (see Case T-14/96, *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities*, para 78.). However, aid not exceeding €200.000 over a period of three fiscal years is generally considered not to be capable of distorting competition (see Art. 3 (1) + (2) of Commission Regulation (EU) No 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid). To meet the definition of Art. 107(1) TFEU, the aid must also affect trade between MS, be selective, and be granted through State resources (for the latter, see Joined Cases C-72/91 and C-73/91 *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG*, para. 19.).
[22] See Art. 106(2) TFEU.
[23] See Commission Regulation (EU) No 651/2014.
[24] According to the procedure set out in Art. 108(3) TFEU.
[25] The Commission has two months for a preliminary examination (see Art. 4(5) of Council Regulation (EU) 2015/1589.) and up to 18 months if it finds it necessary to carry out a more detailed assessment (see Art. 9(6) of Council Regulation (EU) 2015/1589.).

automatically be considered compatible with the internal market,[26] allowing the Commission to focus on the more controversial/significant cases.[27]

The main difference between automatic and facultative exemptions concerns the discretion of the Commission to approve/reject the proposed aid measure, which is reflected in the wording of Art. 107(2) and 107(3) TFEU respectively. While the former exemptions 'shall' be compatible with the internal market,[28] the latter 'may be considered to be' compatible with the internal market.[29] However, for aid measures based on Art. 107(2) TFEU, the Commission still examines whether the conditions of the chosen exemption are actually fulfilled[30] and whether the aid intensity/amount is proportionate to its pursued objective to avoid unjustified overcompensation.[31] Let us take the example of Art. 107(2)(b) TFEU, which was used alongside Art. 107(3)(b) TFEU to exempt Covid-related SA, albeit to a much lesser extent.[32] It permits the granting of SA, *inter alia*, 'to make good the damage caused by … exceptional occurrences'. For the Commission to classify COVID-19 as an exceptional occurrence, it had to check whether it (i) was 'unforeseeable or difficult to foresee', (ii) had 'a significant scale/economic impact', and (iii) was 'extraordinary'.[33] Moreover, for Covid-related aid to be eligible under this provision, there must have been a direct causal link between the pandemic and the damage caused,[34] and the aid granted must have been limited to repairing that damage.[35] However, once these objective conditions were met, the Commission was obliged to declare the aid measure compatible with the internal market and had no discretion to decide otherwise.[36]

While the Commission has considerably more leeway when assessing the compatibility of aid measures under Art. 107(3) TFEU,[37] its discretion is not unlimited either. In fact, according to settled case law, it cannot declare an aid measure compatible with the internal market if it

[26] And are, thus, exempted from the notification procedure under Art. 108(3) TFEU.
[27] See Kelyn Bacon, 'Part I General Rules, 3 Compatibility of Aid – General Principles', in European Union Law of State Aid (2nd edn, Oxford Competition Law, 2013) 10.
[28] See Art. 107(2) TFEU.
[29] See Art. 107(3) TFEU.
[30] See Kelyn Bacon, 'Part I General Rules, 3 Compatibility of Aid – General Principles', in European Union Law of State Aid (2nd edn, Oxford Competition Law, 2013) 6.
[31] See Phedon Nicolaides, 'Application of Article 107(2)(b) TFEU to Covid-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence' (2020) 239.
[32] As will be shown in the next subsection.
[33] Carole Maczkovics, 'How Flexible Should State Aid Control Be in Times of Crisis?' (2020) 273.
[34] See Case C-278/00 *Hellenic Republic v Commission of the European Communities*, para. 82.
[35] See Kelyn Bacon, 'Part II Specific Types of Aid, 11 Disaster Aid', in European Union Law of State Aid (2nd edn, Oxford Competition Law, 2013) 5. Also see Phedon Nicolaides, 'Application of Article 107(2)(b) TFEU to Covid-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence' (2020) 239.
[36] See Case T-268/06, *Olympiaki Aeroporia Ypiresies v Commission*, para. 51.
[37] See Case C-667/13, *BPP*, para. 67.

violates provisions or general principles of EU law,[38] which is important to keep in mind when discussing the role of the proportionality principle. By far the most important facultative exemption during the COVID-19 pandemic was Art. 107(3)(b) TFEU, allowing the Commission to declare SA aiming, *inter alia*, 'to remedy a serious disturbance in the economy of a Member State' compatible with the internal market. For an event to constitute a serious disturbance, it must affect the *entire* economy of a MS.[39] However, as will be discussed in Section 4, the GC recently ruled in *Ryanair v Commission* that SA under Art. 107(3)(b) TFEU must not, *in itself*, be capable of remedying the serious disturbance at hand.[40]

Given that it is usually much more difficult for the Commission to reject SA measures under Art. 107(2) TFEU than under Art. 107(3) TFEU, and that COVID-19 was classified as both a serious disturbance *and* an exceptional occurrence,[41] one might wonder why MS did not base their Covid-related aid measures primarily on Art. 107(2)(b) TFEU. The answer to this question lies largely in the Commission's adoption of the TF, as discussed in the next subsection.

2.2) The Commission's Response to the COVID-19 Pandemic

The TF was adopted by the Commission in March 2020.[42] It aimed to enable MS to adequately respond to the immediate economic pressures caused – directly and indirectly – by the pandemic, establishing temporary conditions under which Covid-related SA measures could be swiftly approved by the Commission upon notification by MS.[43] The TF was based primarily on Art. 107(3)(b) TFEU, as the Commission explained in para. 18:

> 'Considering that the COVID-19 outbreak affects all Member States and that the containment measures taken by Member States impact undertakings, the Commission considers that State aid is justified and can be declared compatible with the internal market on the basis of Article 107(3)(b) TFEU, 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'.[44]

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[38] See Case C-594/18 P, *Austria v Commission*, para 44.
[39] See Joined Cases T-132/96 and T-143/96, *Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH v Commission*, para. 167.
[40] See Case T-388/20, *Ryanair v Commission*, para. 41.
[41] See Communication from the Commission, 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' (2020/C 91 I/01), para. 8 and 18.
[42] See Communication from the Commission, 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' (2020/C 91 I/01).
[43] Ibid., para. 16.
[44] Ibid., para. 18.

To this end, the TF listed several[45] types of aid measures that the Commission would consider compatible with the internal market under Art. 107(3)(b) TFEU.[46] The three most commonly used aid types[47] were limited amounts of aid (i.e. direct grants, repayable advances, or tax advantages of up to €2.3 million per undertaking), loan guarantees, and interest subsidies.[48] Most crucially, the TF did *not* oblige MS to strictly link the amount of aid granted to a beneficiary to its actual needs resulting from the impact of COVID-19, but merely defined certain absolute limits such as maximum aid amounts to be granted per undertaking or minimum interest rates/guarantee premiums.[49] Thus, the TF made Art. 107(3)(b) TFEU appear much more attractive to MS than Art. 107(2)(b) TFEU, as the latter required any aid to be limited to recovering the damages caused by the pandemic, presupposing a complex quantification of any such damages. Consequently, Art. 107(2)(b) TFEU only permitted compensation for damages that had already occurred, whereas aid granted under Art. 107(3)(b) TFEU (as interpreted by the TF) also enabled companies to take preventive measures to avoid getting into financial difficulties in the first place.[50]

After several extensions, the TF officially expired on 01 July 2022.[51] To illustrate how extensively it was used by MS, it is helpful to compare both the number and amount of SA measures approved under Art. 107(3)(b) and 107(2)(b) TFEU respectively. According to the data collected by Nicolaides and Soupart in the period from 19 March 2020 to 31 March 2022, MS adopted 623 primary aid measures[52] under Art. 107(3)(b) TFEU (almost entirely within the framework of the TF), compared to merely 98 based on Art. 107(2)(b) TFEU (i.e. outside the TF).[53] The difference in the total amount of aid approved by the Commission in the same period is even more pronounced. As Figure 1 illustrates, the Commission approved[54]

[45] After six consecutive amendments, the TF eventually listed 13 different types of aid measures.
[46] Investment aid for the production of COVID-19 relevant products (i.e. protective equipment, vaccines, etc.) under Section 3.8 of the TF and based on Art. 107(3)(c) TFEU is ignored for the purposes of this paper.
[47] Up until 31 March 2022 and according to the data collected by Nicolaides and Soupart, see Phedon Nicolaides and Claire Soupart, 'State aid to combat Covid-19: it supports national economies but what is its impact on the internal market?' (2022) 357f.
[48] See Phedon Nicolaides and Claire Soupart, 'State aid to combat Covid-19: it supports national economies but what is its impact on the internal market?' (2022) 357f.
[49] See Phedon Nicolaides (2020), 'Application of Article 107(2)(b) TFEU to Covid-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence' (2020) 239.
[50] Ibid.
[51] See the sixth (and final) amendment to the TF, i.e. Commission Communication (2021/C 473/01), para. 3.
[52] Excluding amendments of previously approved measures.
[53] See Phedon Nicolaides and Claire Soupart, 'State aid to combat Covid-19: it supports national economies but what is its impact on the internal market?' (2022) 357.
[54] Note that it is not necessarily the case that the entire amount of *approved* SA is eventually *granted*.

SA worth €73 billion under Art. 107(2)(b) TFEU, compared with €2,686 billion pursuant to Art. 107(3)(b) TFEU.[55]

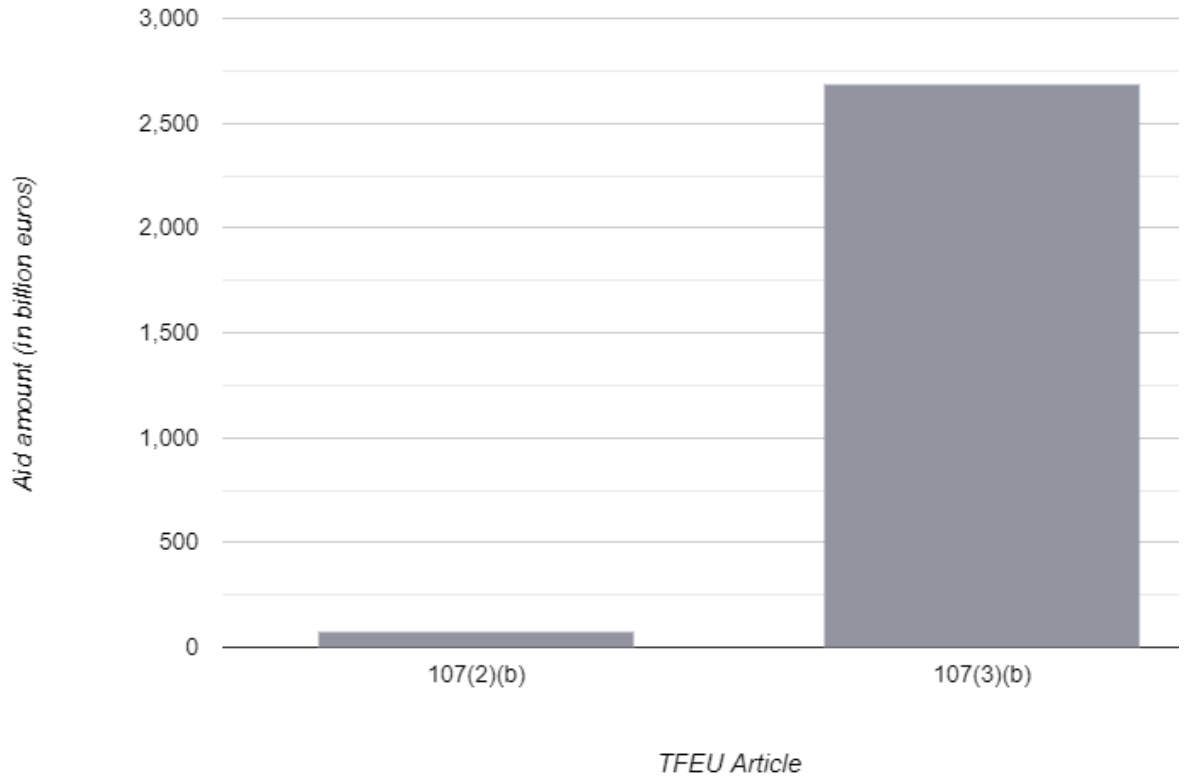

Figure 1: Absolute Amount of Approved State Aid per Treaty Article[56]

Given the huge amount of Covid-related SA approved under Art. 107(3)(b) TFEU and the TF's rather lax rules regarding the extent to which companies may benefit, the question arises as to whether the TF contains any safeguards to limit potential distortions of competition caused by these extraordinary interventions. In this regard, the TF states that any notified aid measure must not only meet the relevant conditions but also be *appropriate*, *necessary*, and *proportionate* to remedy the serious economic disturbance at hand.[57] This reflects the principle of proportionality, which is crucial to prevent SA from excessively distorting competition,[58] and, as a general principle of EU law,[59] must not be violated by *any* aid measure based on Art. 107(3) TFEU. However, in their recent assessment of the economic impact of Covid-related SA on the internal market, Nicolaides and Soupart conclude that

[55] See Phedon Nicolaides and Claire Soupart, 'State aid to combat Covid-19: it supports national economies but what is its impact on the internal market?' (2022) 358.
[56] Ibid.
[57] See Communication from the Commission, 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' (2020/C 91 I/01), para. 18.
[58] As will be shown in the next Section.
[59] See C-456/18, *Hungary v Commission*, para. 41.

> ‘the internal market has been distorted in the sense that state aid has probably affected trade to an extent that has gone beyond returning cross-border trade … to [its] pre-pandemic patterns.’[60]

This finding is broadly in line with Ryanair's statements, emphasizing the importance of examining whether the GC – as the guardian of EU law – applied the proportionality principle in the best legally possible way to minimize distortions of competition when rejecting the airline’s allegations.

2.3) Interim Conclusion

This section briefly summarized the basics of EU SA law to demonstrate its important role in safeguarding fair competition in the internal market. Furthermore, it explained how the TF led MS to base their Covid-related aid measures primarily on Art. 107(3)(b) TFEU, although the Commission actually has much less discretion to reject SA based on Art. 107(2)(b) TFEU. It also emphasized the risk that the huge amounts of Covid-related SA facilitated by the TF extensively distorted competition in the internal market, which warrants a thorough examination of Ryanair’s concrete allegations, the role of the proportionality principle, and its application by the GC.

3) The Principle of Proportionality

The principle of proportionality is not unique to EU law but exists, in slightly varying forms, across legal systems. It may broadly be defined as ‘a tool that assesses the legality of the exercise of power where a legitimate aim is pursued but another interest deserving of legal protection … is damaged.’[61]

Serving as a benchmark for the following analysis, this section first examines the role of the proportionality principle in the EU legal order before focusing more specifically on how it was applied by the CJEU in the area of EU SA law prior to the pandemic.

3.1) Proportionality as a General Principle of EU Law

When it comes to EU law, the principle of proportionality is enshrined in Art. 5(4) TEU, which limits Union action to what is necessary to achieve the objectives of the Treaties. However, proportionality as a general principle of EU law has been defined by the CJEU in much broader terms, holding that

[60] See Phedon Nicolaides and Claire Soupart, ‘State aid to combat Covid-19: it supports national economies but what is its impact on the internal market?’ (2022) 363.
[61] Vasiliki Kosta, ‘The Principle of Proportionality in EU Law: An Interest-based Taxonomy’ (2019) p.2.

> 'the principle of proportionality, which is one of the general principles of EU law, requires that acts adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued'.[62]

Accordingly, a proportionality assessment under EU law generally consists of three main steps:

- **1) Suitability/Appropriateness test**: The act shall be suitable/appropriate for (i.e. capable of) achieving the legitimate aim pursued.
- **2) Necessity test**: The act shall not go beyond what is necessary for achieving the legitimate aim pursued. Thus, where several appropriate/suitable measures are available, the least onerous one shall be chosen.
- **3) Balancing test (proportionality *stricto sensu*):** Overall, the negative effects of the act shall not be manifestly disproportionate to its positive effects.[63]

In practice, however, it is often the case that not all of the three steps are observed. Most crucially, the Court frequently applies the necessity test and the balancing test alternatively rather than complementary, depending on the nature and context of a particular action.[64] Sauter explains that when acts are adopted by EU institutions in areas where they enjoy relatively broad discretion, the CJEU often sticks to the less stringent 'manifestly disproportionate' (i.e. balancing) test.[65] Indeed, in the *Westfälisch-Lippischer Sparkassen- und Giroverband* case, where the plaintiff challenged a Commission Decision declaring German SA compatible with the internal market, the Court noted, with regard to the proportionality principle, that judicial review may be limited, particularly when considering acts of the Commission.[66] Hofmann argues that this self-imposed judicial restraint indicates a strong position of the EU legislator and executive, in line with the principle of separation of powers as defined in Art. 13(2) TEU.[67] Thus, when reviewing Union acts, the Court tends to examine

[62] See Case C-456/18, *Hungary v Commission*, para. 41.
[63] See Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 448.; See also Vasiliki Kosta, 'The Principle of Proportionality in EU Law: An Interest-based Taxonomy' (2019) 2.
[64] See Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 448f.; Also see Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010), 172f.
[65] See Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 448f.
[66] See Case T-457/09, *Westfälisch-Lippischer Sparkassen- und Giroverband v European Commission*, para. 347.
[67] Herwig C.H. Hofmann, 'General Principles of EU law and EU administrative law', in: European Union Law 3rd edn, Oxford University Press (2020) 221f.

whether the EU institutions themselves have taken due account of the proportionality of the measure, rather than replacing their assessment with its own.[68]

It can therefore be concluded that while the principle of proportionality is a key legal principle of EU law applicable to all Union action, its practical application may vary depending on the nature and context of a measure. Thus, the next subsection explains in more detail how the Court applied the principle of proportionality in the area of EU SA law prior to the COVID-19 pandemic. In doing so, it focuses on Art. 107(3) TFEU, since the Commission has no real discretion under Art. 107(2) TFEU anyway, making its application relatively straightforward.

3.2 The Court's pre-Covid Application of the Principle of Proportionality in EU State Aid Law

The Court has developed certain rules and requirements to be respected when applying the principle of proportionality as part of the compatibility assessment of SA measures based on Art. 107(3) TFEU.

In *Hinkley Point C*, Austria challenged the Commission's approval of UK SA measures for the construction of a new nuclear power plant. Regarding the first step of the proportionality test, Austria argued that the authorized aid measures were neither appropriate for improving the UK's energy security,[69] nor for achieving the goal of decarbonization.[70] However, the Court made clear that when assessing the appropriateness/suitability of aid measures, the assessment must always be made in relation to the concrete common interest objective pursued.[71] Thus, sine the UK merely pursued the narrow objective of creating new nuclear energy generating capacity, the Court did not consider Austria's arguments at this stage.[72]

Regarding the necessity test, the Court clarified in *HH Ferries* that whenever SA is considered to be the least onerous measure, its *amount* must still be limited to the necessary minimum.[73] This is because any aid exceeding the amount required to achieve its objective leads to unnecessary distortions of competition.[74] However, it cannot be deduced from the case law that the Commission is always obliged to consider every conceivable alternative that may be equally appropriate and less onerous than the granting of SA. For instance, if a

[68] Ibid.
[69] See Case T-356/15, *Hinkley Point C*, para. 376.
[70] Ibid., para. 378.
[71] Ibid., para. 381.
[72] Ibid.
[73] See Case T-68/15, *HH Ferries v European Commission*, para. 188 and 190.
[74] See Victor Ahlqvist et al., 'How to Estimate the COVID-19 Damages?' (2020) 151.

Member State commits itself to a restructuring plan, ensuring that the measures contained therein do not excessively distort competition, it suffices to determine that that Member State has not previously committed itself to a restructuring plan capable of achieving the same objectives in a less onerous manner.[75]

As regards proportionality *stricto sensu*, the Court held in *Hinkley Point C* that for SA to be compatible under Art. 107(3)(c) TFEU, its negative effects on trade and competition must not be disproportionate to its positive effects.[76] Hence, it essentially obliged the Commission to carry out a balancing test as an ultimate insurance against disproportionate distortions of competition. However, the Court did not require an actual quantification of the effects and accepted the Commission's approach of merely establishing that the *potential* negative effects were small enough not to outweigh its *potential* positive effects.[77] Yet, despite the CJEU's cautious application of the balancing test, the Commission was reluctant to accept it as a mandatory element of *any* compatibility assessment under Art. 107(3) TFEU, as became apparent in *HH Ferries*: The Commission asserted that the Court's finding that aid measures approved under Art. 107(3)(c) TFEU required it to carry out a balancing test was solely based on the specific wording of that Article, which expressly states that the aid measure must 'not adversely affect trading conditions to an extent contrary to the common interest'. Thus, it tried to argue that such a weighing exercise would not be obligatory when assessing the compatibility of an aid measure based on Art. 107(3)(b) TFEU.[78] However, the Court rejected this argumentation, maintaining that

> 'if it were to be accepted … that such a weighing should [only] take place with respect to some of the exemptions laid down in Article 107(3) TFEU … that would be equivalent to recognising that, with respect to some of the objectives referred to in Article 107(3) TFEU, aid could be declared to be compatible even if its positive effects … were inferior to its negative effects in terms of distortion of competition ... [which] would … undermine the effectiveness of the State aid rules.'[79]

In summary, it becomes apparent that in the area of EU SA law, the appropriateness test ensures that the specific common interest objective pursued is actually achieved by the aid measure, whereas the main purpose of both the necessity test and the balancing test is to limit

[75] See Case T-457/09 *Westfälisch-Lippischer Sparkassen- und Giroverband v European Commission*, para. 296f.
[76] See Case T-356/15, *Hinkley Point C*, para. 370.
[77] See Phedon Nicolaides, 'The Compatibility of State Aid with the Internal Market: Lessons from "Hinkley Point C" – Part II' (2018).
[78] See Case T-68/15, *HH Ferries v European Commission*, para. 202.
[79] See Case T-68/15, *HH Ferries v European Commission*, para. 212.

potential distortions of competition that accompany the granting of SA. Therefore, it can be concluded that prior to the pandemic, the CJEU – by requiring the Commission to carry out both a necessity test *and* a balancing test – applied the principle of proportionality in a way that offers a fairly high level of protection for free and undistorted competition in the internal market. However, it did so in a way that does not place an unreasonable burden of proof on the Commission when assessing the compatibility of SA measures based on Art. 107(3) TFEU. The Court's main findings for each of the three steps are summarized in Table 1 below.

Steps in the Proportionality Assessment	**Main Findings of the Court**
Suitability/Appropriateness	Assessment must always be carried out in relation to the specific common interest objective pursued
Necessity	Includes an assessment of whether the aid amount is limited to the necessary minimum. However, not always necessary to consider *every* conceivable alternative that *may* be less onerous than the SA measure
Proportionality *stricto sensu* (balancing test)	Mandatory part of any proportionality assessment under Art. 107(3) TFEU. However, no quantification of the actual positive and negative effects required – A mere balancing of *potential* effects suffices

Table 1: The Court's Pre-Covid Application of the Proportionality Principle in EU SA Law

4) The General Court's Application of the Principle of Proportionality in EU State Aid Law During the COVID-19 Pandemic

All eleven judgements on Covid-related SA delivered by the GC so far[80] have been initiated by Ryanair.[81] Moreover, all but one of the contested Commission Decisions were based either on Art. 107(3)(b) or 107(2)(b) TFEU, as shown in Table 2 below. What all eleven complaints had in common was that the Irish airline felt unlawfully discriminated against, either because it did not meet the eligibility criteria of an aid scheme – which it claimed to be intentionally designed to exclude foreign companies[82] – or because a Member State chose to grant individual aid to one of its direct competitors instead of allocating SA to all affected airlines based on objective criteria such as market share.[83]

[80] See Curia, 'List of result' <https://bit.ly/3w2ZVBB> accessed 16 August 2022.
[81] Or, in one case (i.e. Case T-677/20), by Ryanair together with its subsidiary Laudamotion.
[82] See, e.g., Case T-238/20, *Ryanair v Commission*, para. 23f.
[83] See, e.g., Case T-388/20, *Ryanair v Commission*, para. 89.

Eight of Ryanair's complaints were dismissed by the Court, while three resulted in suspended annulments. However, in the three non-rejected cases, the GC merely held that the Commission had not sufficiently justified its decision to declare the respective aid measure compatible with the internal market. Hence, due to 'overriding considerations of legal certainty', the GC only temporarily annulled the three Commission Decisions, allowing the Commission to re-adopt them once sufficient justifications had been provided.[84] Thus, Ryanair's substantive claims were all either rejected or not considered by the Court as it merely focused on the Commission's failure to state reasons. However, Ryanair has appealed seven of the eight dismissed cases, all of which are still currently pending before the ECJ.[85]

Table 2 provides an overview of all eleven judgements delivered by the GC so far.

Date of Delivery	Case No.	Commission Decision [MS]	TFEU Article	Type of Aid	Outcome
17/02/2021	T-238/20	SA.56812 [SE]	107(3)(b)	Scheme	Rejected (Pending Appeal)
17/02/2021	T-259/20	SA.56765 [FR]	107(2)(b)	Scheme	Rejected (Pending Appeal)
14/04/2021	T-378/20	SA.56795 [DK]	107(2)(b)	Individual	Rejected (Pending Appeal)
14/04/2021	T-379/20	SA.57061 [SE]	107(2)(b)	Individual	Rejected (Pending Appeal)
14/04/2021	T-388/20	SA.56809 [FI]	107(3)(b)	Individual	Rejected (Pending Appeal)
19/05/2021	T-465/20	SA.57369 [PT]	107(3)(c)	Individual	Suspended Annulment
19/05/2021	T-628/20	SA.57659 [ES]	107(3)(b)	Scheme	Rejected (Pending Appeal)
19/05/2021	T-643/20	SA.57116 [NL]	107(3)(b)	Individual	Suspended Annulment
09/06/2021	T-665/20	SA.56867 [DE]	107(2)(b)	Individual	Suspended Annulment
14/07/2021	T-677/20	SA.57539 [AT]	107(2)(b)	Individual	Rejected (Pending Appeal)
22/06/2022	T-657/20	SA.57410 [FI]	107(3)(b)	Individual	Rejected

[84] See Case T-465/20, *Ryanair v Commission*, para. 59., Case T-643/20, *Ryanair v Commission*, para. 82., and Case T-665/20, *Ryanair v Commission*, para. 71.

[85] See Curia, 'List of result' <https://bit.ly/3Aps34h> accessed 16 August 2022.

Table 2: Closed Covid-related State aid Cases Brought Before the GC as of 16/08/2022 [86]

The forthcoming analysis focuses on the two cases T-238/20, concerning a Swedish loan guarantee scheme for certain airlines, and T-388/20, regarding an individual loan guarantee provided by Finland to its largest airline, Finnair. Both cases (highlighted in dark gray in Table 2) are currently pending appeal before the ECJ. The selection was made for the following reasons: First, the analysis aims to focus on Art. 107(3)(b) TFEU, both because the vast majority of aid was granted under this provision and because the Commission has no discretion to declare aid under Art. 107(2)(b) TFEU incompatible with the internal market once certain objective conditions are fulfilled. Second, while Case T-238/20 was the first case to deal with a Covid-related aid *scheme* under Art 107(3)(b) TFEU, Case T-388/20 for the first time dealt with a Covid-related *individual* aid measure under this provision, so it might be interesting to see to what extent the two cases differ. Third, due to the repetitive nature of Ryanair's allegations, examining further judgements would not have provided much additional insight, especially in relation to the fact that this paper is of limited scope and may not cover every single aspect that might merit consideration.

4.1) Case T-238/20 – Swedish Aid Scheme

In April 2020, the Commission approved a Swedish loan guarantee scheme for certain airlines, enabling banking institutions to provide loans for a period of up to six years without having to take excessive risks, thus aiming to ensure connectivity in Sweden and maintaining the continuity of economic activity both during and after the pandemic.[87] The aid measure was granted under Section 3.2 of the TF and considered by the Commission to be compatible with the internal market on the basis of Art. 107(3)(b) TFEU.[88] The main eligibility criterion was that each beneficiary must be in possession of a Swedish license pursuant to Regulation 1008/2008, requiring Swedish license holders to have their 'principal place of business' (PPB) in Sweden.[89] The Commission considered this to be a relevant requirement to ensure that the beneficiaries have a link to Sweden and contribute to securing its connectivity in line with the measure's objective.[90]

[86] See Curia, 'List of result' <https://bit.ly/3w2ZVBB> accessed 16 August 2022., Moreover, for a list of the seven pending appeals, see Curia, 'List of result' <https://bit.ly/3Aps34h> accessed 16 August 2022.
[87] See Decision C(2020) 2366 final on State Aid SA.56812 (2020/N) – Sweden – COVID-19: Loan guarantee scheme to airlines.
[88] Ibid., Section 4.
[89] Regulation (EC) No 1008/2008, Art. 4(a).
[90] See Decision C(2020) 2366 final on State Aid SA.56812 (2020/N) – Sweden – COVID-19: Loan guarantee scheme to airlines, Point 43.

Ryanair, which has its headquarters (i.e. its PPB) in Ireland but also operates in Sweden, did not benefit from the aid scheme as it did not satisfy the key eligibility criterion. Thus, it challenged the Commission Decision, most notably alleging (i) an infringement of the principle of non-discrimination on grounds on nationality as set out in Art. 18 TFEU and (ii) a breach of the Commission's obligation to weigh the aid's positive effects against its negative effects on trade and competition.[91]

4.1.1) Infringement of the Principle of Non-discrimination

Regarding the first allegation, the Court begins by acknowledging that the eligibility criterion of holding a Swedish license

> 'results in a difference in treatment for airlines whose principal place of business is in Sweden … and for those [such as Ryanair] whose principal place of business is in another Member State and which operate in Sweden, to Sweden and from Sweden'.[92]

However, it subsequently points out that while Art. 18 TFEU prohibits 'any discrimination on grounds of nationality', this prohibition explicitly applies only '[w]ithin the scope of application of the Treaties, and without prejudice to any special provision contained therein'.[93] Thus, the GC goes on to argue that even if the eligibility criterion of holding a Swedish license amounted to discrimination, it may nevertheless be permissible under EU law if it can be established that Art. 107(3)(b) TFEU allows for such a difference in treatment.[94] To this end, the Court considers it necessary to examine not only whether the aid measure's objective satisfies the requirements of the chosen exemption (which was rather uncontroversial), but also whether 'the conditions for granting the aid do not go beyond what is necessary to achieve that objective.'[95] This directly relates to Ryanair's main argument that the Commission has failed to demonstrate the necessity to allocate the aid on the basis of possessing a Swedish license and that other, more objective eligibility criteria such as market share would have been equally appropriate but less discriminatory/distortive.[96]

It must therefore be noted that Ryanair and the GC seem to agree that the main issue revolves around the necessity of the aid scheme's eligibility criteria and, thus, its *scope*. This

[91] See Case T-238/20, *Ryanair v Commission*, para. 23. The additional pleas in law put forward by Ryanair – i.e. infringement of the free provision of services, infringement of the procedural rights under Art. 108(2) TFEU, and infringement of the duty to state reasons – can be ignored for the purposes of this analysis.
[92] See Case T-238/20, *Ryanair v Commission*, para. 30.
[93] Art. 18 TFEU. See also Case T-238/20, *Ryanair v Commission*, para. 31.
[94] See Case T-238/20, *Ryanair v Commission*, para. 31.
[95] Ibid.
[96] See Case T-238/20, *Ryanair v Commission*, para. 38 and 52.

essentially expands the necessity test under Art. 107(3) TFEU to include another element in addition to the special obligation to limit the aid *amount* to the necessary minimum. However, in its proportionality assessment, the GC appears to confine itself to a lengthy discussion on the aid's appropriateness rather than focusing on the decisive issue of necessity, as will be demonstrated in the following two subsections.

4.1.1.1) The Court's Application of the Appropriateness Test

To confirm the scheme's appropriateness, the GC puts forward three main arguments, all based on the beneficiary's obligation – arising from the possession of a Swedish license – to have its PPB in Sweden. First, it argues that such an obligation guarantees that the recipients have a stable presence in Sweden and do not cease their service provisions on Swedish territory at short notice.[97] Second, the Court claims that it is indispensable for Swedish authorities to be able to control the manner in which the aid is used and monitor the beneficiaries' financial situation.[98] Third, it asserts that the various tasks and obligations to be performed from an airline's PPB under Regulation No 1008/2008 create a stable link between the Swedish authorities and the airlines holding a Swedish license.[99] Hence, the Court concludes that all these factors render the aid scheme appropriate for securing Swedish connectivity.[100]

However, Nicolaides questions the logic behind the Court's reasoning, particularly in relation to its first and second arguments. Concerning the first one, he suggests that Sweden could have simply obliged all beneficiaries to demonstrate that the loans are used exclusively to support services related to the Swedish economy and to maintain their Swedish operations throughout the pandemic.[101] Regarding the second argument, he points out that an aid grantor such as Sweden can easily monitor the recipients' financial situation, e.g. 'through regularly submitted certified accounts', without the need for the beneficiaries to have their PPB in Sweden.[102]

While these counterarguments show that the criterion of holding a Swedish license would probably not have been required to ensure the beneficiaries' link to the local economy, they do not *per se* render the aid scheme inappropriate. In fact, as long as the aid measure as a whole is capable of achieving its intended objective (i.e. securing Swedish connectivity), it may be

[97] Ibid., para. 40.
[98] Ibid., para. 41.
[99] Ibid., para. 42.
[100] Ibid., para. 44.
[101] See Phedon Nicolaides, 'The Limits of 'Proportionate' Discrimination' (2021) 12.
[102] Ibid.

considered appropriate within the meaning of the first step of the proportionality test. Moreover, due to the fact that those airlines possessing a Swedish license were responsible for the vast majority of both Sweden's domestic freight transport and passenger traffic in 2019 (as the Court later indicates),[103] the aid measure was probably capable of securing Swedish connectivity. Therefore, despite the GC's relatively poor reasoning, it can still be concluded that the aid scheme was *appropriate* in light of its objective.[104]

4.1.1.2) The Court's (Non-)Application of the Necessity Test

Having concluded that the aid scheme is appropriate, the Court does not proceed with a proper examination of its necessity but instead examines its 'proportionate nature'.[105] In this regard, it argues that possession of a Swedish license is the 'most appropriate' criterion for ensuring an airline's permanent presence on Swedish territory.[106] In fact, the GC asserts that the beneficiaries' obligation to have their PPB in Sweden induces them to stay in that country and additionally ensures that their financial and administrative decisions are taken there, which the Court considers particularly important to safeguard Swedish connectivity.[107] Yet, while it is true that Art. 2(26) of Regulation 1008/2008 clarifies that the PPB shall be where an airline's 'principal financial functions and operational control' are exercised, this is not necessarily related to safeguarding connectivity in Sweden, as an airline can exercise operational control from its headquarters in a Member State where it conducts only a tiny fraction of its operations. In fact, Ryanair itself conducts the vast majority of its business activities outside of Ireland (where its PPB is located).[108]

The Court further uses the fact that the eligible airlines were collectively responsible for 84% of Sweden's domestic freight transport and 98% of its domestic passenger traffic in 2019 as a justification for its assertion that the criterion of holding a Swedish license is the 'most appropriate' one.[109] Yet, if these numbers are, as the Court puts it, 'a key piece of information bearing in mind [Sweden's] size and geography',[110] is this not an indication that less discriminatory and equally appropriate eligibility criteria are, in fact, available? Just consider the following: If the aid scheme benefited all airlines whose company name begins with the letters 'A-Y' and excluded only those beginning with a 'Z', the recipients would likely be

[103] See Case T-238/20, *Ryanair v Commission*, para. 46.
[104] Ibid., para. 44.
[105] Ibid., para. 45.
[106] Ibid., para. 45.
[107] Ibid.
[108] See Phedon Nicolaides, 'The Limits of 'Proportionate' Discrimination' (2021) 13.
[109] See Case T-238/20, *Ryanair v Commission*, para. 45f.
[110] Ibid., para. 46.

responsible for the vast majority of domestic freight transport and passenger traffic as well. However, there would not be any objective justification for excluding the remaining undertakings and it could very well be that the fictitious company Z-Airlines contributes most to securing Swedish connectivity while still falling outside the scope of the aid scheme. This is what Nicolaides describes as 'unnecessary [or disproportionate] discrimination'.[111]

Ryanair itself also proposes several alternative eligibility criteria such as market share or number of passengers carried,[112] which are all rejected by the GC, arguing that the Commission is not obliged to examine every conceivable measure that could hypothetically be equally appropriate and less onerous than the aid measure in question.[113] However, contrary to what the Court seems to suggest, the question is not whether there are less onerous options than granting SA. Instead, it is about ensuring that the chosen option (i.e. SA) is designed in a way that does not excessively/unnecessarily distort competition. Moreover, it is not at all hypothetical to come up with objective and non-discriminatory eligibility criteria that allow the aid's actual objective of ensuring connectivity in Sweden to be achieved most efficiently.

Finally, while the Court rightly points out that MS' resources are limited, which may require them to set certain priorities,[114] this does not absolve them of their responsibility to allocate the available means in a way that is only as discriminatory/distortive as necessary in light of the pursued objective. Therefore, the Court's subsequent conclusion that 'the aid scheme at issue did not go beyond what was necessary to achieve the stated objective' does not logically follow from its reasoning.[115]

As becomes apparent from the above analysis, the main reason for the GC's poor reasoning seems to lie in its flawed application of the proportionality principle. While it aims (or rather pretends) to apply both an appropriateness *and* a necessity test, all its main arguments are employed, *de facto*, to establish the aid's appropriateness. Indeed, the Court's argument that the eligible airlines are collectively responsible for the vast majority of Sweden's domestic freight transport and passenger traffic is perhaps the most convincing one with regard to the measure's appropriateness, but was formally used to establish its necessity (i.e. its 'proportionate nature').[116] The GC's argumentation is thus problematic not only because, as

[111] See Phedon Nicolaides, 'The Limits of 'Proportionate' Discrimination' (2021) 2.
[112] See Case T-238/20, *Ryanair v Commission*, para. 52.
[113] Ibid., para. 53.
[114] Ibid., para. 50.
[115] Ibid. para. 46.
[116] The GC appears to use these two terms interchangeably

Harbo puts it, courts should generally 'do what they say they are doing',[117] but also because departing too far from its own interpretation of the proportionality principle, including the established terminology, undermines the legitimacy of its findings.[118]

It must therefore be concluded that while the Court correctly considered that the aid's objective satisfies the conditions of Art. 107(3)(b) TFEU,[119] it failed to convincingly establish that the conditions for granting the aid did not go beyond what was necessary to achieve its intended goal. Hence, considering both the principle of non-discrimination under Art. 18 TFEU and the principle of proportionality as applied in relation to Art. 107(3)(b) TFEU – and contrary to the GC's findings[120] – the Swedish aid scheme, as designed, causes unnecessary discrimination that is contrary to EU law.

4.1.2) Infringement of the Obligation to Conduct a Balancing Test

Regarding Ryanair's claim that the Commission failed to weigh the aid's positive effects against its negative effects on trade and competition, the GC compared the wording of Art. 107(3)(b) TFEU to that of Art. 107(3)(c) TFEU, pointing out that

> 'the latter provision contains a condition relating to proof that there is no effect on trading conditions to an extent that is contrary to the common interest, which is not found in Article 107(3)(b) TFEU'.[121]

Thus, it went on to reject Ryanair's allegation by concluding that

> 'such a balancing exercise would have no *raison d'être* in the context of Article 107(3)(b) TFEU, as its result is presumed to be positive.'[122]

Thereby, the GC goes directly against its own precedent set up in *HH Ferries*, where it held that applying the balancing test solely in relation to Art. 107(3)(c) TFEU undermines the effectiveness of EU SA rules.[123] Moreover, the Court not only relieves the Commission of the *obligation* to apply a balancing test but rather holds that such a test has no reason to exist in relation to Art. 107(3)(b) TFEU, as the effects of aid measures approved under that exemption are presumed to be positive. This new interpretation of the law inevitably leads to certain spillover effects such as severely limiting the Commission's power to impose additional

[117] See Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 181.
[118] Ibid., 185.
[119] See Case T-238/20, *Ryanair v Commission*, para. 33.
[120] Ibid., para. 56f.
[121] Ibid., para. 67.
[122] Ibid., para. 68.
[123] See Case T-68/15, *HH Ferries v European Commission*, para. 212.

conditions on beneficiaries to minimize potential distortions of competition, as the Court had previously justified this authority by referring to the Commission's obligation to carry out a balancing test.[124] Hence, the GC effectively deprives the Commission of large parts of the discretion it used to enjoy when assessing the compatibility of aid measures with the internal market pursuant to the facultative exemptions listed in Art. 107(3) TFEU.[125]

To justify its departure from previous case law, the Court argues that the *HH Ferries* judgment did not take into account the actual consequences of the different wording of Art. 107(3)(b) TFEU and Art. 107(3)(c) TFEU.[126] In this regard, the GC refers to the ECJ's judgement in *Hinkley Point C*, more specifically para. 20 and 39 thereof.[127] However, as Nicolaides rightly points out, in the paragraphs cited, the Court was dealing with an issue not directly related to the present one,[128] making it difficult to understand this specific reference. Nevertheless, the GC is right to maintain that the judgement in *HH Ferries* did not properly consider the difference in wording between Art. 107(3)(b) and 107(3)(c) TFEU and, thus, left room for diverging interpretations of the law.[129] Yet, although it has a legitimate ground for reconsidering the previous case law on this issue, there are two main problems with the direction the Court now seems to have taken.

First, and more generally, by effectively limiting the Commission's broad discretion to assess the compatibility of SA with the internal market to measures falling under Art. 107(3)(c) TFEU, it ignores the difference in wording between Art. 107(2) and 107(3) TFEU. As explained previously, the former entails automatic exemptions that 'shall be' compatible with the internal market, whereas the latter lists facultative exemptions that 'may be considered to be' compatible with the internal market. It therefore seems illogical that the positive effects of a *potentially* compatible aid measure shall *generally* be presumed not to be disproportionate to its negative effects on competition. Moreover, it is possible to take into account the difference in wording between both Art. 107(2) and 107(3) TFEU *and* between Art. 107(3)(c) and 107(3)(b)[130] TFEU. For instance, the Court could oblige the Commission to carry out a balancing test for aid measures under Art. 107(3)(c) TFEU, while leaving it to the Commission's discretion to do so in relation to aid measures based on the other facultative

[124] See, e.g., Case T-457/09, *Westfälisch-Lippischer Sparkassen- und Giroverband*, para. 199.
[125] Indeed, the GC essentially limits the Commission's wide discretion to Art. 107(3)(c) TFEU, since this is the only provision with explicit wording on the balancing requirement.
[126] See Case T-238/20, *Ryanair v Commission*, para. 69.
[127] See Case C-594/18 P, *Austria v Commission*, para. 20 and 39.
[128] See Phedon Nicolaides, 'The Evolving Interpretation of Article 107(3)(b) TFEU' (2022) 39.
[129] See Case T-68/15 *HH Ferries v European Commission*, para. 210-214.
[130] As well as the remaining facultative exemptions under Art. 107(3) TFEU.

exemptions. Thereby, it would respect the different wording between these Articles, while still allowing the Commission to impose additional conditions on beneficiaries to minimize potential distortions of competition[131] if deemed necessary. Furthermore, the general presumption that an aid measure's positive effects outweigh its negative effects would remain limited to SA granted under Art. 107(2) TFEU.

Second, and especially in light of the specific case at hand, the following needs to be recalled: The principle of proportionality is a key legal principle as it serves, *inter alia*, as a tool for balancing two competing interests, both deserving legal protection. In the case of EU SA law, these interests are, on the one hand, the common interest objective pursued by the respective aid measure and, on the other hand, the preservation of fair competition in the internal market. Within a proportionality assessment, both the necessity test and the balancing test are capable of ensuring that potential distortions of competition through the granting of SA remain limited, thereby protecting both interests at stake. This is why it has not been too problematic that the CJEU often applied these two steps alternatively rather than complementary.[132] However, if neither of these two steps is (correctly) applied, as happened *in casu*, the interest of preserving fair competition remains unprotected. Therefore, if the performance of a balancing test is omitted, ensuring the necessity of an aid measure becomes all the more important, and the potential consequences of not doing so much more serious.

In summary, depriving the Commission of its authority to weigh the aid's positive and negative effects, solely based on the different wording of Art. 107(3)(c) TFEU compared to that of the other facultative exemptions, is problematic insofar as it ignores the difference in wording between Art. 107(2) and 107(3) TFEU. Moreover, the non-application of the balancing test in the present case may lead to excessive distortions of competition because the aid's necessity was not adequately assessed in the first place.

4.1.3) Interim Conclusion

The analysis has shown that the GC's judgement in Case T-238/20 is problematic in two main ways. First, by correctly identifying the key issue of whether the *conditions* for granting the Swedish aid measure go beyond what is necessary to achieve its objective, the Court acknowledged that the necessity test in EU SA law does not merely relate to the amount of an aid measure, but also to its scope. Nevertheless, it subsequently failed to (adequately) assess the necessity of the aid scheme, confusing it with the measure's appropriateness. One might

[131] Arising from aid measures based on Art. 107(3)(a), 107(3)(b), 107(3)(d), and 107(3)(e) TFEU.
[132] See Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 448f.

suspect that this is because, as the analysis suggests, it is difficult to reasonably argue that the Swedish aid scheme, as designed, does not go beyond what is necessary to achieve its objective.

Second, the Court held, contrary to previous case law, that a balancing test has no *raison d'être* in the context of Art. 107(3)(b) TFEU due to the different wording compared to Art. 107(3)(c) TFEU, depriving the Commission of much of the discretion it previously enjoyed and, thus, disregarding the difference in wording between Art. 107(2) and 107(3) TFEU. The ECJ should therefore clarify that while the criteria of Art. 107(3)(b) TFEU may differ from those of Art. 107(3)(c) TFEU (e.g. insofar as the latter *must* incorporate a balancing test, while the former *may* include one), they cannot be identical to those of Art. 107(2) TFEU. Furthermore, the ECJ should insist that if the Commission chooses to omit the balancing test, it must instead carry out a proper necessity test to ensure that the vital interest of maintaining fair competition in the internal market is not left unprotected.

In summary, the GC allowed the Commission to declare the Swedish aid scheme compatible with the internal market, despite the fact that neither a proper necessity test, nor a balancing test had been carried out. This sets a dangerous precedent for the future, as it essentially signals to both MS and the Commission that the Court would tolerate any appropriate aid scheme,[133] regardless of its potential negative impact on competition. The ECJ must therefore reject such an approach.

4.2) Case T-388/20 – Individual Aid to Finnair

In May 2020, the Commission approved a Finnish aid measure to provide its flag carrier, Finnair, with a loan guarantee to help the company obtain a €600 million loan to cover its working capital needs.[134] Finnish authorities had argued that Finnair's looming insolvency would have further exacerbated the serious disturbance in the Finnish economy caused by COVID-19 due to Finnair's particular importance to that economy. Thus, by averting the company's potential insolvency, the aid measure aimed to prevent a further disruption of the Finnish economy.[135] Just like the Swedish aid scheme, the individual measure was granted by

[133] Based on any facultative exemption other than Art. 107(3)(c) TFEU.
[134] See C(2020) 3387 final, State Aid SA.56809(2020/N) – Finland, 'COVID-19: State loan guarantee for Finnair', Points 5 and 7.
[135] See Case T-388/20*, Ryanair v Commission*, para. 37f.

the Commission under Section 3.2 of the TF and found to be compatible with the internal market on the basis of Art. 107(3)(b) TFEU.[136]

Ryanair challenged the legality of the Commission Decision approving the Finnish aid measure, alleging, *inter alia*, a violation of Art. 107(3)(b) TFEU and an infringement of the principle of non-discrimination.[137] Regarding the former, the Irish airline argued that the individual measure is not appropriate to remedy the serious disturbance in the Finnish economy and that the Commission had failed to conduct a balancing test.[138] Concerning the latter, it asserted that since the pandemic affects all airlines operating in Finland, there is no need to exclusively support Finnair and that the aid therefore goes beyond what is necessary to achieve its objective.[139]

4.2.1) Violation of Art. 107(3)(b) TFEU – Appropriateness and Balancing Test

Addressing Ryanair's allegation that the aid measure was inappropriate to remedy the serious disturbance in the Finnish economy, the Court began by clarifying that

> 'Article 107(3)(b) TFEU does not require that the aid in question is capable, in itself, of remedying the serious disturbance in the economy of the Member State concerned. Once the Commission has established the reality of a serious disturbance in the economy of a Member State, that State may be authorised … to grant State aid, in the form of aid schemes or individual aid, which help to remedy that serious disturbance. It could therefore involve a number of aid measures, each contributing to that end.'[140]

Although the GC uses the verb 'remedy' and thus sticks to the wording of Art. 107(3)(b) TFEU, it should be noted that – given the specific circumstances of the case and the aid's actual objective of preventing a further disruption of the Finnish economy – the Court appears to imply that SA granted under this provision may also neutralize the *effects* of the serious disturbance rather than merely its *cause*.[141]

Since Ryanair did not dispute the existence of a serious disturbance in the Finnish economy caused by COVID-19,[142] the Court further argues that to determine the appropriateness of the

[136] See C(2020) 3387 final, State Aid SA.56809(2020/N) – Finland, 'COVID-19: State loan guarantee for Finnair', Point 6 and Section 5.
[137] See Case T-388/20, *Ryanair v Commission*, para. 25. The additional pleas in law put forward by Ryanair – i.e. infringements of the free provision of services and freedom of establishment, infringement of Art. 108(2) TFEU, and infringement of the duty to state reasons – can be ignored for the purposes of this analysis.
[138] See Case T-388/20, *Ryanair v Commission*, para. 27-29.
[139] Ibid., para. 78.
[140] Ibid., para. 41.
[141] See Phedon Nicolaides, 'The Evolving Interpretation of Article 107(3)(b) TFEU' (2022) 34.
[142] See Case T-388/20, *Ryanair v Commission*, para. 35.

aid measure, the Commission was merely required to demonstrate the *importance* of the beneficiary to the Finnish economy.[143] Thus, it proceeds to describe how the Commission actually assessed Finnair's importance:[144] It first pointed out that before the pandemic,[145] Finnair was responsible for about two thirds of all passengers transported to, from, and within Finland and carried at least 80% of all passengers on domestic flights.[146] Second, the Commission explained that the airline is not only Finland's most important air freight operator, but also operates regular cargo routes to several Asian countries that are vital to Finland's supply of various pharmaceutical products indispensable to combat the pandemic.[147] Third, it highlighted Finnair's important role as an employer in Finland, employing nearly 7,000 people.[148] Finally, the Commission referred to the airline's significant contribution to Finland's GDP.[149] The GC subsequently concludes that the Commission had sufficiently demonstrated Finnair's importance to the Finnish economy.[150]

Although Ryanair did not dispute the correctness of the facts considered by the Commission, it argued that given the size of Finland's economy and population, some of these figures, such as those relating to employment and GDP contribution, were not large enough to render the individual aid measure compatible with the internal market pursuant to Art. 107(3)(b) TFEU.[151] However, the Court held that even if some of the numbers were relatively small, Finnair's significant contribution to Finland's (regional) connectivity[152] – and the lack of viable alternatives in the short term – would still sufficiently demonstrate its importance and, thus, make the aid appropriate to remedy the serious disturbance in the Finnish economy.[153]

In summary, the GC's judgement provides three main takeaways with regard to the appropriateness of individual aid measures granted under Art. 107(3)(b) TFEU. First, the aid measure must not, in itself, be capable of remedying the serious disturbance at hand, but merely help to prevent that disturbance from deteriorating. Second, whether individual aid is appropriate for achieving that objective depends on the importance of the beneficiary for the economy of the granting Member State. Third, the Commission enjoys wide discretion in

[143] Ibid., para. 42.
[144] Ibid., para. 43-53.
[145] I.e. in 2019.
[146] See Case T-388/20, *Ryanair v Commission*, para. 45.
[147] Ibid., para. 47.
[148] Ibid., para. 48f.
[149] Ibid., para. 53.
[150] Ibid., para. 54.
[151] Ibid.
[152] Which was also among the factors considered by both Finland and the Commission.
[153] See Case T-388/20, *Ryanair v Commission*, para. 57-60.

determining the recipient's importance to the economy of that Member State. While the Court's restraint may be justified in light of the Commission's broad discretion under Art. 107(3)(b) TFEU, the latter should nonetheless develop a common approach in assessing the importance of undertakings to enhance legal certainty.

Finally, with regard to Ryanair's claim that the Commission had failed to carry out a balancing test, the Court essentially repeats its reasoning in Case T-238/20[154] and rejects the plaintiff's allegation by concluding once again that

> 'such a balancing exercise would have no raison d'être in the context of Article 107(3)(b) TFEU, as its result is presumed to be positive.'[155]

4.2.2) Infringement of the Principle of Non-discrimination – Necessity Test

Having rejected the Commission's supposed violation of Art. 107(3)(b) TFEU, the GC subsequently focused on the alleged infringement of the principle of non-discrimination. In this regard, it makes a crucial observation right at the beginning, noting that

> 'individual aid such as the one at issue, by definition, benefits only one undertaking, to the exclusion of all other undertakings, including those in a situation comparable to that of the recipient of that aid. Thus, by its nature, such individual aid introduces a difference in treatment, or even discrimination, which is nevertheless inherent in the individual character of that measure. To maintain, as the applicant does, that the individual aid at issue is contrary to the principle of non-discrimination in essence amounts to calling into question systematically the compatibility with the internal market of any individual aid solely on account of its inherently exclusive and thus discriminatory character, even though EU law allows Member States to grant individual aid provided that all the conditions laid down in Article 107 TFEU are satisfied.'[156]

Yet, while the Court rejects the notion that individual aid inevitably violates the principle of non-discrimination simply because it contains an inherent degree of discrimination, it subsequently sets out clear conditions as to when such discrimination is legally permissible. More specifically, it holds that individual aid measures, such as the one at issue, may discriminate against other undertakings in a comparable situation only if 'it is justified by a legitimate objective and … necessary, appropriate and proportionate in order to attain that

[154] Ibid., para. 65-67.
[155] Ibid., para. 66.
[156] Ibid., para. 81.

objective.'[157] In this regard, the Court later recognizes that proportionality is not actually a distinct criterion but rather means that the aid measure does not go beyond what is appropriate and necessary to achieve its pursued objective, [158] leaving three (rather than four) conditions that must be fulfilled for an individual aid measure to be legally discriminatory.

Since both the existence of a legitimate objective and the aid's appropriateness have already been confirmed by the Court, [159] it merely has to focus on its necessity. In this regard, it notes that Ryanair

> 'does not call into question the amount of the aid. However, it claims that the fact that Finnair receives 100% of that aid, even though its share in Finland's connectivity is less than 100%, goes beyond what is necessary to attain the objective pursued'.[160]

Thus, as was the case with the Swedish aid scheme, the main issue here revolves around the *scope* of the aid measure. In fact, the plaintiff submits that the aid's goal could have been achieved without discrimination if it had been 'allocated to all the airlines that operate in Finland, based on their market share',[161] essentially alleging that the granting of *individual* aid to Finnair is more distortive than necessary to attain the measure's intended purpose. However, the GC rejects Ryanair's allegation, claiming that 'the grant of the aid at issue only to Finnair did not go beyond what was necessary to attain the objective pursued by that aid'.[162] To support its conclusion, the Court puts forward two main arguments. Firstly, it asserts that due to the fact that Finland's resources are limited, it cannot support all airlines operating within its territory, as this would prevent it from allocating a sufficient amount of aid to Finnair, rendering the measure ineffective (as Finnair would likely go bankrupt anyway).[163] Secondly, it argues that the fact that a Member State has decided to grant individual aid to a specific undertaking (and has duly justified that decision) does not oblige it to also subsidize other undertakings, since no company has a *right* to receive SA.[164]

Let us first turn to the second argument. While the GC previously stated that EU law in principle allows MS to grant individual aid,[165] it also held that such aid must be both

[157] Ibid., para. 82.
[158] Ibid., para. 90.
[159] Ibid., para. 84f.
[160] Ibid., para. 89.
[161] Ibid.
[162] Ibid., para. 92.
[163] Ibid., para. 91.
[164] Ibid., para. 88.
[165] Ibid., para. 81.

appropriate and necessary in light of its objective.[166] Furthermore, with regard to the aid's appropriateness, the Court accepted its narrow goal of preventing a further disruption in the Finnish economy, but also indicated that such an individual measure may be just one part of a series of measures which could then collectively contribute to achieving the larger goal of remedying the serious disturbance at hand. One could thus imagine a scenario in which Finland consecutively grants individual aid to two or three airlines based on their individual importance to the Finnish economy. However, since 'importance' is such a vague criterion, this would enable Finland to actively discriminate against foreign airlines such as Ryanair, as it could simply argue that the fact that it has decided to grant individual aid to some undertakings (each of them important to the Finnish economy) does not give Ryanair the right to also demand SA. However, this may lead to excessive/unnecessary discrimination because an aid scheme based on objective criteria such as market share[167] would be equally appropriate and less discriminatory/distortive, as it would prevent the granting Member State from cherry-picking its beneficiaries.

This brings us back to the Court's first argument that Finland's resources are limited and that granting SA to all airlines under an aid scheme would therefore reduce the aid amount that can be spent in support of Finnair to insufficient levels, rendering the alternative measure inappropriate to achieve its objectives. In principle, this is a strong argument, since aid given to a company that does not prevent its insolvency is not only inefficient but simply a huge waste of resources. However, what the Court failed to consider is that it is not necessarily a question of granting SA to either one airline or to all airlines operating in Finland. In fact, if the granting MS does not have sufficient resources to eliminate all discrimination, it still has an obligation to minimize the level of discrimination. Thus, if Finland's aid budget is insufficient to subsidize all airlines, it may nevertheless allocate the available resources based on a combination of criteria such as economic significance (consisting of, for instance, market share and GDP contribution) and required aid intensity, so that the liquidity problems of the economically most significant airline are first eliminated before the second most important company is supported, and so forth (until the aid budget is exhausted).[168] An aid scheme designed in this way would not only allow the desired objective to be achieved most efficiently, but also ensure that even if Finland's available resources merely allowed it to

[166] Ibid., para. 82 and 90.
[167] As had been proposed by the plaintiff.
[168] See Phedon Nicolaides, 'The Limits of 'Proportionate' Discrimination' (2021) 9.

support one airline (which is rather unlikely given the country's financial situation), that airline would still be selected on the basis of objective criteria.

While such an approach would avoid unnecessary discrimination, it would also drastically limit MS' discretion to award individual aid, since a well-designed aid scheme would be an appropriate and less discriminatory/distortive alternative in most cases. However, neither does the Treaty expressly confer the right to grant individual aid on MS – as the exemptions under Art. 107(2) and 107(3) TFEU only contain the word 'aid' – nor has there been any previous case law on this specific issue.[169] It thus appears that the GC's initial statement that 'EU law allows Member States to grant individual aid'[170] is rather misleading and that the provision of such aid has so far merely been a long-established and unchallenged practice. Furthermore, the proposed approach would not eliminate MS' option to grant individual aid altogether. As Nicolaides explains, it all depends on the pursued objective: If the exclusive aim is to rescue a specific undertaking (e.g. because its bankruptcy would have extremely negative social consequences in a specific region) or to subsidize an important infrastructure project of common European interest, individual aid would still be required.[171] Yet, if the objective is to prevent the worsening of a serious disturbance in the Finnish economy (which inevitably affects multiple companies), individual aid may still be appropriate (e.g. if the chosen recipient is extremely important to the Finnish economy, which is arguably the case with Finnair), but certainly not necessary (i.e. the least distortive means) to attain that objective. Thus, compared to the option of permitting excessively discriminatory aid that unnecessarily distorts competition, it would seem reasonable to limit MS' discretion in granting individual aid to cases where the pursued objective actually demands it.

Based on the above analysis, it must be concluded that the GC was wrong to maintain that the granting of individual aid only to Finnair did not go beyond what was necessary to attain the pursued objective of preventing a further disruption of the Finnish economy.

4.2.3) Interim Conclusion

The real significance of Case T-388/20 became apparent when the GC recognized that Ryanair's allegation (that a well-designed aid scheme would be equally appropriate and less distortive than the individual aid measure) essentially amounts to systematically calling into

[169] In fact, when the GC states that 'EU law allows Member States to grant individual aid' in para. 81 of Case T-388/20 (i.e. the *Finnair* case), it is not able to cite any previous case law.
[170] See Case T-388/20, *Ryanair v Commission*, para. 81.
[171] See Phedon Nicolaides, 'Individual Aid to Counter the Effects of Serious Economic Disturbance is Legally Possible, but Is it Appropriate?' (2022).

question the compatibility of individual aid with the internal market. While the Court rejected the notion that individual aid should be incompatible *per se* simply because of its inherently discriminatory character, it also held that to be compatible, it must be both appropriate and necessary to achieve its objective. Thereby, the GC has put itself in a bind: While it has been able to justify the individual aid's appropriateness by allowing its objective to be defined much more narrowly than would appear intuitive given the wording of Art. 107(3)(b) TFEU, it failed to convincingly explain why a properly designed aid scheme would not constitute an equally appropriate and less discriminatory/distortive alternative. This is because, as the analysis has shown, whenever the aid's objective does not actually require the granting of individual aid, the latter will never pass the necessity test as there will always be an appropriate and less discriminatory/distortive alternative in the form of an aid scheme.

Therefore, given the fact that EU law does not explicitly confer the right to grant individual aid on MS, it must be concluded that the ECJ should overturn the GC's judgement and limit MS' ability to grant individual aid to cases where the pursued objective actually demands it, as this would significantly reduce excessive distortions of competition in the internal market.

5) Conclusion

The purpose of this paper was to examine whether the GC has applied the principle of proportionality in the cases filed by Ryanair on Covid-related State aid in the best legally possible way to minimize distortions of competition in the internal market and, if not, how the ECJ should respond.

Regarding the first part of the research question, this thesis has shown that within a proportionality assessment, both the necessity test and the balancing test are responsible for limiting distortions of competition, and that the Court, prior to the pandemic, required the Commission to carry out both of these tests when dealing with SA based on Art. 107(3) TFEU, thereby ensuring a high level of protection for free and undistorted competition in the internal market.

However, in the first part of the analysis, it has been shown that while the Court rightly confirmed the appropriateness of the contested aid scheme, its application of the necessity and balancing tests was either flawed or, in the case of the former, non-existent. This flawed application of the proportionality test consequently led the GC to permit the authorization of an aid scheme that went beyond what was necessary to achieve its objective, while simultaneously arguing that the Commission was correct in not carrying out a balancing test

as the aid's positive effects could be presumed to outweigh its negative effects on competition. Therefore, the GC not only failed to apply the principle of proportionality in the best legally possible way to minimize distortions of competition, but even allowed the legitimate interest of safeguarding fair and undistorted competition in the internal market to remain entirely unprotected.

In the second part of the analysis concerning the individual aid measure, it could be observed that the GC's approach was similar to the previous one, with the notable difference that this time, it actually tried to justify the Commission's finding that the individual aid measure did not go beyond what was necessary to achieve its objective. Nevertheless, it was demonstrated that the Court's arguments must be rejected and the measure therefore went beyond what was necessary as well. Thus, the negative implications of the GC's judgement for free and undistorted competition were essentially the same.

However, the above findings were somewhat overshadowed by the fact that, by forcing the GC to focus on the *scope* of the authorized aid measures (i.e. on the question of how exclusionary SA can be designed in order not to go beyond what is necessary to achieve its objective), a much more fundamental question about the application of EU SA law was raised. While the analysis has shown that it is relatively easy to argue that an aid *scheme* should only be as exclusionary as necessary (i.e. by using objective eligibility criteria that allow the desired aim to be achieved most efficiently), the situation is less obvious when it comes to *individual* aid measures. This is because the latter is by definition limited to one undertaking, so the assertion that a well-designed aid scheme would be an equally appropriate and less discriminatory/distortive alternative generally calls into question the *raison d'être* of individual aid in EU SA law.

This brings us to the second part of the research question on how the ECJ should respond. In this regard, it was argued that the ECJ should overturn the GC's rulings and ensure the proper application of the proportionality principle to avoid excessive distortions of competition. This is not only to ensure, in the words of Ryanair, that the aviation industry emerges from the pandemic with an intact level playing field, but also to not create a dangerous precedent for the future, in which the application of the principle of proportionality in EU SA law is generally weakened to the detriment of free and undistorted competition in the internal market. However, perhaps even more importantly, the analysis has shown that the proper application of the proportionality principle requires the ECJ to generally limit the granting of individual aid to cases where the pursued objective actually demands it, because whenever

this is not the case, individual aid will not pass the necessity test, as there will always be an appropriate and less discriminatory/distortive alternative in the form of an aid scheme.

It must therefore be concluded that by alleging excessive distortions of competition caused by the unnecessarily discriminatory exclusion of certain companies from the *scope* of SA measures, Ryanair (unintentionally) questioned the *raison d'être* of individual aid in EU State aid law in general. Should the ECJ thus concur with the conclusion reached in this thesis that the granting of individual aid should be limited to cases in which the pursued objective actually requires it, this would fundamentally change the *status quo* in the application of EU SA law in favor of fair and undistorted competition in the internal market.

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