

European State Aid Rules in Times of Pandemic

Distorting Competition Between European Airlines?*

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Abstract

The outbreak of the COVID-19 pandemic had an immediate and profound impact on mobility and, more specifically, on air passenger transport: airlines were quickly stranded, and the Member States granted aid to air carriers subject to specific eligibility criteria. The Commission reacted swiftly to challenges posed by the COVID-19 pandemic and adopted its Temporary Framework under which vast amounts could be disbursed to market operators. The most controversial eligibility condition set by the Member States is the holding of a national license. This article's research questions are, first, to explore the conditions under which Member States can grant large amounts of state aid to airlines, and second, to assess whether the requirement to hold a national license is compatible with EU law. By addressing these issues, this article seeks to improve our understanding of EU law's capacity to tackle distortions of competition.

Keywords: state aid, air transport, airlines, COVID-19 pandemic, Ryanair.

1. Introduction

The economic and social damage caused by the COVID-19 pandemic's is widely recognized to be unprecedented. The containment measures adopted to limit the outbreak's effect on citizens' health have had a destructive impact on the economy.

Before the pandemic, the air transport sector had been competitive in Europe, as liberalization had deeply affected the conditions under which air

* As the pandemic and the economic situation change rapidly, I note that this article has been submitted for review at the end of April 2021. It contains information collected until this cut-off date. I am grateful to Dr Francesco De Cecco and the anonymous peer reviewers for their helpful comments.

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carriers compete.¹ The outbreak of the pandemic had an immediate and profound impact on mobility and air transport because the Member States rapidly introduced containment measures. Moreover, entry into several Member States' national territories was prohibited. Most post-virus projections expect demand for flights to remain depressed below pre-virus levels long after the end of the lockdown. Low-cost carriers, whose business model is based on full capacity onboard, low charges and prices, halted most of their fleet as the safety measures introduced gravely limited their profitability. Global airlines ceased most activities due to the significant drop in travel demand: in March and April 2020, the number of flights operated in the European airspace fell by up to 90%.² The sector, ravaged by the global lockdown, called for help to alleviate the credit crunch it faced. State aid is the right tool to intervene when the economy is in a situation of crisis, as the Member States may provide financial help to companies to return to viability once the economic conditions normalize.

This article aims to give an overview of the application of state aid rules in the area of air transport, a sector hit particularly severely by the COVID-19 pandemic. The following is not an exhaustive discussion of general state aid rules or crisis measures. Given the scope of this article, it has been narrowed down to focus on selected issues raised by state aid granted to airlines. This article's main questions are, first, to explore the conditions under which Member States grant large amounts of state aid to airlines, and second, to assess whether the requirement to hold a national license is compatible with EU law. By addressing these issues, this article seeks to improve our understanding of the capacity of EU law to tackle distortions of competition. The structure of the article is as follows. First, it outlines state aid rules, identifies their objectives and provides an introduction into the special COVID-19 soft law framework (Sections 2-3). Second, it considers an example of national aid measures introduced to mitigate the effects of the pandemic to airlines (Section 4), followed by a discussion of the General Court's recent judgments on the compatibility of relevant Commission decisions with the Treaty (Section 5). Finally, the article closes with some concluding thoughts (Section 6).

- 1 On the deregulation of the industry see the short summary of Francesco Munoz, 'Lifting the Veil: Covid-19 and the Need to Re-Consider Airline Regulation', *European Papers*, Vol. 5, Issue 1, 2020, pp. 548-550. On state aid issues in the sector, see also Filippo Gherisini, 'Overview of State Aid to Particular Sectors: State Aid in the Transport Sector', in Alberto Santa Maria (ed.), *Competition and State Aid. An Analysis of the EU Practice*, Wolters Kluwer, Alphen aan den Rijn, 2015, pp. 325-342; Kelyn Bacon (ed.), *European Union Law of State Aid*, Oxford University Press, Oxford, 2013, pp. 307-344.
- 2 Overview of the state aid rules and public service obligations rules applicable to the air transport sector during the COVID-19 outbreak, at https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html. Globally, passenger demand fell by 94.3% in April 2020 compared with April 2019; IATA, *Air Passenger Market Analysis* (Apr. 2020), at www.iata.org/en/iata-repository/publications/economic-reports/air-passenger-monthly-analysis---apr-20202/. See also Eurocontrol fresh data to compare the current number of flights to the pre-COVID situation, <https://www.eurocontrol.int/Economics/DailyTrafficVariation-States.html?ectl-public>.

2. A Summary of State Aid Rules

2.1. *The Rationale of State Aid Rules in the Treaty*

Since state aid is a relatively lesser-known part of EU competition rules, a brief overview is called for to guide the readers into this specific field. Although state aid rules are part of the TFEU Chapter on competition,³ their aim is not only to prevent distortions of the market, but also to prevent subsidy wars among the Member States.⁴ In this context, the TFEU rules on state aid have a fundamental importance in minimizing distortions of competition and trade flows and in ensuring the free movement of capital in the internal market.⁵

Granting a selective advantage to undertakings takes as many different forms as the State can influence the market's functioning: buying or selling goods and services under more favorable conditions than those available on the market, as well as recapitalization, risk finance measures, funding infrastructure or guarantees provided by the State to undertakings, *etc.*

Under Article 107(1) TFEU,

“Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”

As seen above, the definition of prohibited state aid consists of the following five elements: (i) it is granted by Member State (imputable to the State) and through State resources (State transfers); (ii) it is aid in the meaning that advantage is granted to one or more undertakings; (iii) it is selective as it favors ‘certain undertakings or the production of certain goods’; (iv) it distorts or threatens to distort competition; and (v) it affects trade between the Member States. The non-

- 3 Title VII. (Common rules on competition, taxation and approximation of law) Chapter 1, followed by the tax provisions in Chapter 2.
- 4 State aid rules have a dual function: to prevent competition from being distorted between undertakings and competition to grant aid between Member States. *See* Jose Luis Buendia Sierra, ‘EU State Aid Control: Competition Between Undertakings or Between Member States’, in Luca Rubini & Jennifer Hawkings (eds.), *‘What Shapes the Law? Reflections on the History, Law, Politics and Economics of International and European Subsidy Disciplines’*, European University Institute, Florence, 2016.
- 5 On the goals of EU state aid control and its development *see* Luca Rubini & Jennifer Hawkins (eds.), *‘What Shapes the Law? Reflections on the History, Law, Politics and Economics of International and European Subsidy Disciplines’*, European University Institute, Florence, 2016; Massimo Merola, ‘The Forces Shaping State Aid Control in the EU’, in Rubini & Hawkings (eds.), 2016; Thibaut Kleiner, ‘Modernisation of State Aid Policy’, in Erika Szyszczak (ed.), *‘Research Handbook on European State Aid Law’*, Edward Elgar Publishing, Cheltenham, 2011, pp. 1-27; Eugene Stuart & Iana Roginska-Green, *‘Sixty Years of EU State Aid Law and Policy’*, Wolters Kluwer, Alphen aan den Rijn, 2018; Juan Jorge Piernas López, *‘The Concept of State Aid Under EU Law. From Internal Market to Competition and Beyond’*, Oxford University Press, Oxford, 2016.

binding Commission Notice on the notion of state aid provides a helpful starting point to better understand what is covered by Article 107(1).⁶

Under Article 108(3), the European Commission shall be informed of any plan to grant or alter aid.⁷ This *ex ante notification obligation enables the Commission to verify whether Article 107(1) conditions are met and whether any Treaty exceptions render the aid compatible with the market*. The Member States shall not put the proposed measure into effect until the Commission's procedure has resulted in a final decision (standstill obligation).⁸

Articles 107(2) and (3) set out exceptions to the prohibition. Article 107(2) exceptions are so-called *ex lege exceptions, where the aid is compatible by law with the Treaty*. Under 107(2)(b), it is compatible with the internal market to grant aid to make good the damage caused by natural disasters or exceptional occurrences. The Commission identified the COVID-19 pandemic as an exceptional occurrence. Under Article 107(2), Member States are under an obligation to notify aid plans to the Commission. The Commission does not have the discretion to authorize the aid. If the aid is granted for the purpose set out in the Treaty (directly linked to it) and is proportionate, it shall be declared compatible with the internal market. 100% of the damage may be rectified, and compensation shall be calculated at the individual company level. Article 107(2) does not require Member States to exclude undertakings in a difficulty from the scope of the aid.⁹

- 6 On the legal nature of soft law, the CJEU states that a notice, which, being an internal measure adopted by the administration, cannot be regarded as a rule of law, nevertheless forms rules of practice from which the administration may not depart in an individual case without giving reasons which are compatible with the principle of equal treatment. *See, with regard to the guidelines on state aid, Judgment of 9 June 2011, Joined Cases C-465/09 P to C-470/09 P Diputación Foral de Vizcaya and others v Commission*, ECLI:EU:C:2011:372, para. 120 (and the case-law cited). On soft law generally see Petra Lea Láncoš, 'A Hard Core Under the Soft Shell: How Binding is Union Soft Law for Member States', *European Public Law*, Vol. 24, Issue 4, 2018, pp. 755-784; Tihamér Tóth *et al.*, 'Effects of European Soft Law at National Administrative Courts', *Loyola University Chicago International Law Review*, Vol. 14, Issue 1, 2016, pp. 101-131; Oana Stefan, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda', *European Papers*, Vol. 5, Issue 1, 2020, pp. 663-670.
- 7 Within the structure of the European Commission DG COMP is responsible for handling state aid cases. *See the website of the Commission at https://ec.europa.eu/competition/state_aid/overview/index_en.html*.
- 8 108(3) TFEU. Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.
- 9 If a measure is authorized under Article 107(2)(b), the principle of 'one time last time' of the Rescue and Restructuring Guidelines does not apply, since the former type of aid is not "rescue aid, restructuring aid or temporary restructuring support" within the meaning of point 71 of the Rescue and Restructuring Guidelines. Therefore, Member States may compensate under Article 107(2)(b) TFEU the damages directly caused by the COVID-19 outbreak to undertakings that have received aid under the Rescue and Restructuring Guidelines. *E.g.* aid to TAP Air Portugal, the major network airline in Portugal was not granted under the Framework because TAP was already in difficulty on 31 December 2019. Instead, the Rescue and Restructuring Guidelines under Article 107(3)(c) provided the legal basis for the authorization of liquidity support in 2020. France also provided rescue and restructuring aid to Corsair. *See* SA.58125.

Nevertheless, if they wish, Member States may exclude such undertakings or a sub-group thereof.¹⁰

Besides *ex lege* exceptions, under Article 107(3), aid may be declared compatible with the internal market by the European Commission. These are the so-called *discretionary exceptions, where the Commission has the power to define the conditions of compatibility*.¹¹ COVID-19 aid fits into two categories of Article 107(3). Under Article 107(3)(b) aid to remedy a serious disturbance in the economy of a Member State; under point (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

For Article 107(3) cases, the Commission has the discretion to declare the aid compatible with the internal market, a discretion which is limited by various secondary acts adopted by the Commission.¹²

Although the Member States used both legal bases to justify their measures, Article 107(3) and the Temporary Framework has also been relied on by the Member States.¹³ According to a well-known State aid expert, Phedon Nicolaides, the reason for this is that this measure

“can be granted both in order to remedy the actual effect of a serious disturbance and to prevent the worsening of the disturbance in the future. In other words, aid can be both ‘retrospective’ and ‘prospective’.”¹⁴

2.2. *Special Rules for the Emergency: The Commission Framework*

Following the outbreak of the COVID-19 pandemic, the Commission promptly responded in a coordinated way to the challenges posed by the health crisis in order to mitigate its socio-economic effects. Similarly to the global financial and economic crisis, it adopted its soft law document, the so-called Temporary Framework, on the exercise of its discretion concerning the authorization of aid

10 Antonios Bouchagiar, ‘State Aid in the Context of the COVID-19 Outbreak, Including the Temporary Framework 2020’, *EUI Working Papers*, RSC 2021/03, Robert Schuman Centre for Advanced Studies Florence School of Regulation, p. 54.

11 The Commission enjoys wide discretion under Article 107(3), the exercise of which involves complex economic and social assessments. See, to that effect, Judgment of 11 September 2008, *Case C-75/05 P and C-80/05 P, Germany and others v Kronofrance*, ECLI:EU:C:2008:482, para. 59; Judgment of 8 March 2016, *Case C-431/14 P, Greece v Commission*, ECLI:EU:C:2016:145, para. 68.

12 The Commission under Council authorization regularly adopts binding acts limiting its own discretion. The Commission can also adopt non-binding, so called soft law measures. The latter come under different headings and are called notices, frameworks, guidances.

13 Maczkovics pointed out that Article 107(2)(b) “constitutes a straitjacket, requires a solidly documented file and a very strict monitoring in order to avoid any overcompensation.” See Carole Maczkovics, ‘How Flexible Should State Aid Control Be in Times of Crisis?’, *European State Aid Law Quarterly*, Vol. 19, Issue 3, 2020, p. 274.

14 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’, *Journal of European Competition Law & Practice*, Vol. 11, Issue 5-6, 2020, pp. 238-243. “This implies that the exception in Article 107(2)(b) to the prohibition of state aid in Article 107(1) is not useful when the intention of the government is to offer to undertakings enough resources to enable them to implement preventive measures to avoid a further deterioration in their financial situation.” See p. 239.

measures adopted by the Member States.¹⁵ On 20 March 2020, the Commission published its Temporary Framework under Article 107(3)(b).¹⁶ Since then, the Framework has been modified five times.¹⁷

Considering that the COVID-19 outbreak affects all Member States and that the containment measures taken by Member States impact undertakings, the Commission found that state aid is justified and can be declared compatible with the internal market based on Article 107(3)(b) TFEU, *for a limited period, to remedy the liquidity shortage faced by undertakings* and to ensure that the disruptions caused by the COVID-19 outbreak do not undermine their viability, especially of SMEs.¹⁸ From the beginning, the Commission has foreseen that the overall aid may not exceed EUR 800,000 per undertaking.¹⁹ The aid may be granted in the form of direct grants, tax and payment advantages, or other forms such as repayable advances, guarantees, loans, and equity, provided that the total nominal value of such measures remains below the overall cap per undertaking.²⁰ A very important condition has been included, under which the aid can be granted only to undertakings not in difficulty on 31 December 2019. This requirement ensures that only viable undertakings receive aid under the Framework. In the first amendment, to preserve employment, the Commission acknowledged that Member States may grant aid in the form of wage subsidies and tax deferrals up to the maximum ceiling. It is permissible for wage subsidies or tax deferrals to be restricted to certain sectors, regions or types of undertakings. In that case, they shall be considered as selective advantages, but the Commission may authorize these under Article 107(3)(b).²¹ Furthermore, zero-interest loans and guarantees on loans covering 100% of the risk were introduced into the Framework as compatible with the internal market on the condition of the Commission's approval.

A couple of months later, in May 2020, the Framework was amended for the second time to *include different types of aid, such as recapitalization and subordinated debt*. In the initial text and during the first amendment, the objective had been to reduce the liquidity constraints on undertakings. The prolonged crisis forced the Commission to face companies' insolvency and to authorize aid not only to finance the liquidity shortage, but also the *recapitalization of companies*. Recapitalization may have a significant distortive impact on the market. Therefore, this type of aid was made subject to straightforward entry, exit and remuneration rules, plus compensating measures to prevent market distortions. When

15 Before the Temporary Framework was adopted, only limited aid could be granted to airlines. On this issue *see* European Commission, Guidelines on State Aid to Airports and Airlines (2014).

16 Communication from the Commission Temporary Framework for state aid measures to support the economy in the current COVID-19 outbreak.

17 Until 31 May 2021. The informal consolidated version of the Framework can be found at https://ec.europa.eu/competition/state_aid/what_is_new/TF_informal_consolidated_version_as_amended_28_january_2021_en.pdf.

18 Id. para. 18.

19 The Framework was published in the OJ on 20 March 2020. During the global financial and economic crisis, the Commission set the state aid ceiling in the real economy at 500,000 EUR.

20 Special provisions apply to public guarantee on loans, subsidized interest rates for loans.

21 Framework, para. 42.

approving a scheme, the Commission requests the separate notification of individual aid above the threshold of EUR 250 million. In relation to such notifications, the Commission will assess whether existing financing in the market or horizontal measures to cover liquidity needs are insufficient to ensure the viability of the beneficiary; that the selected recapitalization instruments and the conditions attached to them are appropriate to address the beneficiary's serious difficulties; that the aid is proportionate; and that other conditions of the Framework are complied with.²²

The rules governing recapitalization measures are strict. In order to prevent undue distortions of competition, beneficiaries must not engage in aggressive commercial expansion financed through state aid or must not take excessive risks. If the beneficiary of recapitalization above EUR 250 million is an undertaking with significant market power in at least one of the relevant markets in which it operates, Member States must propose additional measures to preserve effective competition in those markets. In proposing such measures, Member States may in particular offer structural or behavioral commitments foreseen under the EU merger regulation.²³ Beneficiaries receiving a COVID-19 recapitalization measure are prohibited from advertising it for commercial purposes. As long as at least 75% of the COVID-19 recapitalization measures have not been redeemed, beneficiaries other than SMEs shall be prevented from acquiring a more than 10% stake in competitors or other operators in the same line of business, including upstream and downstream operations. State aid shall not be used to cross-subsidize economic activities of integrated undertakings that were in economic difficulties already on 31 December 2019. As long as the COVID-19 recapitalization measures have not been fully redeemed, beneficiaries cannot make dividend payments, nor non-mandatory coupon payments, nor can they buy back shares, other than in relation to the State. Until at least 75% of the COVID-19 recapitalization measures have been redeemed, the remuneration of each member of the beneficiaries' management must not go beyond the fixed part of his/her remuneration effective on 31 December 2019. For persons becoming members of the management on or after the recapitalization, the applicable limit is the fixed remuneration of the members of the management with the same level of responsibility on 31 December 2019. Under no circumstances shall bonuses or other variable or comparable remuneration elements be paid. Andrea Biondi has highlighted how

“the cumulative effect of all these conditions is particularly burdensome to the point of possibly having a discouraging effect, as companies may prefer to rely on other types of support aid because having the state as a shareholder may make life more difficult.”²⁴

22 Id. para. 51.

23 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

24 Andrea Biondi, 'Governing the Interregnum: State Aid Rules and the COVID-19 Crisis', *King's College London Dickson Poon School of Law Legal Studies Research Paper Series*, Paper No. 2020-48, p. 13.

The third amendment, in July 2020, *introduced rules to alleviate the burden of SMEs and modifications to recapitalization conditions*. Under the third modification, aid granted on the basis of Article 107(3)(b) or (c) shall not be conditioned on the relocation of a production activity or of another activity of the beneficiary from another country within the EEA to the territory of the Member State granting the aid. Such a condition would be harmful to the internal market, irrespective of the number of job losses that actually occurred in the initial establishment of the beneficiary in the EEA.²⁵

In the fourth amendment, in autumn of 2020, the Commission acknowledged *the need to finance fixed costs not covered by revenues*, up to a maximum of 3 million per undertaking. On 1 February 2021, the fifth amendment took account of the continued economic uncertainty and the fact that government measures restricting economic and social life had been prolonged. One of the most significant modification was the *increase of aid ceilings* from the previous 800,000 EUR per undertaking to 1.8 million EUR. The previous maximum of 3 million EUR was raised to 10 million per undertaking in respect of the fixed cost subsidy. Another major relaxation was the introduction of the conversion of repayable instruments into direct grants. This meant that, for example, *loans previously authorized by the Commission could be transformed into non-repayable direct grants*.²⁶

The Commission hesitated to include public policy goals into its Framework, for instance by conditioning its authorization to fulfil higher environmental criteria or to support digitalization. The European Parliament's report admitted that

“the current state aid principles and practices are mainly defensive in nature, *i.e.* they are designed to avoid competition distortions and do not aim at achieving or facilitating other policy objectives. Though they fulfil the prerequisites for maintaining a level playing field in the European economy, they fail to elevate EU State aid policy beyond its defensive goals.”²⁷

Before the adoption of the Framework, several stakeholders urged the Commission not to waste the crisis and to adopt green, digital transformation or social conditions for approving state aid.²⁸ At the end, the Commission did not follow this route in the original text of the Framework and let the Member States freely design their national interventions. The Commission only noted that this possibility is open to Member States, but did not make it a precondition of approval:

25 In effect from 29 June 2020.

26 For a detailed explanation of the crisis rules see Bouchagiar 2021.

27 Study Requested by the ECON committee. Jan Van Hove, ‘Impact of State Aid on Competition and Competitiveness During the Covid-19 Pandemic: An Early Assessment’, European Union, 2020 (Parliament report) p. 18.

28 Some urged the Member States to condition their aid on environmental and societal goals. See Julia Anderson *et al.*, ‘A Framework for a European Economic Recovery After Covid-19’, *Intereconomics*, Vol. 55, Issue 4, 2020, pp. 209-215.

“Against this background, the Commission notes that designing national support measures in a way that meets the EU’s policy objectives related to green and digital transformation of their economies will allow for a more sustainable long-term growth and promote the transformation to the agreed EU objective of climate neutrality by 2050.”²⁹

Later on, the amendments sought to strengthen the link between the aid and other EU policies by introducing a condition applicable only to large undertakings to report on how the recapitalization aid received supports their activities in line with EU objectives and national obligations linked to the green and digital transformation, including the EU objective of climate neutrality by 2050.³⁰

As long as the COVID-19 recapitalization measures have not been fully redeemed, the beneficiaries, other than SMEs, shall publish information on the use of aid. In particular, this should include information on how their use of the aid received supports their activities in line with EU objectives and national obligations linked to green and digital transformation, including the EU objective of climate neutrality by 2050.³¹

France, for example, conditioned liquidity aid granted to Air France on the fulfilment of national green policy choices.³² The firm has to curb its emissions and shut down certain domestic routes, thereby redirecting demand towards rail transport.³³

In the following chapter, the focus will be on *aid granted to airlines*.³⁴

3. State Aid Granted to Airlines

Under the given circumstances, most Member States granted state aid to air carriers operating in their territory. A minority of Member States made the aid eligible under uniform criteria. The eligibility criterion determined by a Member State is uniform if it applies without distinction to all affected airlines, for instance by looking at the number of passengers transported in the past, their individual market shares, or the company’s contribution to connectivity. The aid in these cases can be implemented in several ways: suspension or deferral of airport taxes, air traffic control charges,³⁵ government taxes on air travel, or

29 Framework, para. 45 (consolidated text).

30 Id. para. 44.

31 Id. para. 83.

32 See SA.57082. The Commission has authorized a guarantee on loans and a shareholder loan of 7 billion EUR to Air France. On the environmental concerns see Munoz 2020, pp. 541-548.

33 See at www.bfmtv.com/economie/entreprises/air-france-somme-de-ne-plus-vendre-de-billets-entre-paris-et-une-ville-francaise-situee-a-moins-de-2h30-en-tgv_AN-202004290216.html and www.frontier-economics.com/uk/en/news-and-articles/articles/article-i7377-the-devils-in-the-detail/#.

34 Aid to airports is not discussed in this article.

35 Air Traffic Control (ATC) Charges are levied on aircraft in order to cover the air navigation services provided by the Air Navigation Service Providers over a portion of airspace, generally coincident with national boundaries.

through subsidizing public service obligations,³⁶ or generally subsidizing employment. Up to April 2021, more than 32 measures were taken to support airlines.³⁷

3.1. Aid Under Article 107(2)(b) to Make Good Damages Caused by the Pandemic

Several Member States have availed themselves of this opportunity, usually in the form of aid schemes. Italy granted aid to Alitalia, Romania to Blue Air, Greece to Aegean Airlines, Austria to Austrian Airlines, Finland to Finnair in the form of state loan guarantees and hybrid loans, the Netherlands to KLM in the form of guarantees and a subordinated state loan.³⁸ Alongside the individual aid granted to specific companies, some Member States have also designed schemes to support without distinction airlines operating on their territory. For example, under the Cypriot scheme benefiting 60 airlines, the remuneration level depended on the aircraft's load factor.³⁹

3.2. Article 107(3)(b) Measures to Remedy a Serious Disturbance to the Economy

Denmark designed a scheme benefiting all airline servicing scheduled passenger flights in its territory. It was estimated that around 150 airlines are eligible under the Danish scheme.⁴⁰ By contrast, France opted for an individual aid measure of 7 billion EUR to support the liquidity shortage of Air France by providing a guarantee on loans and providing a shareholder loan. France conditioned the aid on the fulfilment of national green policies.⁴¹

Denmark and Sweden provided 1 billion EUR recapitalization aid to SAS.⁴² Given the large scale of the aid and SAS's market position, the Commission's approval was granted on several conditions under the Temporary Framework. Bonus payments will be subject to strict limitations, and there is a ban on dividends and share buybacks. Furthermore, a ban on acquisitions and cross-subsidization was applied by the Commission. Likewise, Latvia financed the

36 Public service obligations are imposed on a company by the Member State to provide the services under certain conditions. Usually it serves to connect islands or remote places on the national territory. See Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community. Under Article 16, a Member State may impose a public service obligation in respect of scheduled air services between an airport in the Community and an airport serving a peripheral or development region in its territory or on a thin route to any airport on its territory any such route being considered vital for the economic and social development of the region which the airport serves. That obligation shall be imposed only to the extent necessary to ensure on that route the minimum provision of scheduled air services satisfying fixed standards of continuity, regularity, pricing or minimum capacity, which air carriers would not assume if they were solely considering their commercial interest.

37 See at https://ec.europa.eu/competition/state_aid/what_is_new/State_aid_decisions_TF_and_107_2b_107_3b_107_3c.pdf.

38 SA.57116.

39 SA.57691.

40 SA.58157.

41 SA.57082.

42 SA.57543 and SA.58342.

recapitalization of Air Baltic, a state-owned enterprise,⁴³ and the Commission had to ensure that the state receive an appropriate remuneration for the investment. The state-owned Finnair's recapitalization was not made conditional on the above strict conditions because Finnair had no significant market power on the relevant markets; therefore, no additional measure to preserve effective competition was needed.⁴⁴ By contrast, the Commission imposed strict requirements to the 1 billion EUR recapitalization of Air France by France.⁴⁵ As the company had a significant market position at the airport of Paris-Orly, 18 slots per day were made available to competitors to get the Commission's approval. This condition enables lasting entry and expansion of competing airlines operating at that airport. Besides the above, the usual recapitalization conditions also applied with bans on dividends, share buybacks, limits on the remuneration of management, appropriate remuneration of the State, ban on acquisitions. A special provision was inserted to ensure that the aid does not support the Air France-KLM holding's KLM side. A trustee is appointed to monitor the implementation of the conditions. The Dutch Government subsidized KLM itself with 3.4 billion EUR in loans to reduce night flights at Amsterdam Schiphol by 20% and cut the CEO's bonus payments.⁴⁶

An eye-catching sum of 9 billion EUR was granted to the Lufthansa Group by Germany, which has a significant market position at the Frankfurt and Munich airports. The subsidiary airlines of the Lufthansa Group [Deutsche Lufthansa (Lufthansa), Austrian Airlines, Brussels Airlines and Swiss International Air Lines (Swiss)] are owned by the group's private shareholders. The rescue package of the German Government included EUR 6 billion in recapitalization and a EUR 3 billion loan, in exchange for a 20% government stake in the airline which can be increased to 25% plus one share, in addition to two seats nominated by the Government on the supervisory board. The German Government's approach has been one of safeguarding, notably from hostile takeover attempts, and no conditions on carbon emission targets were attached.⁴⁷ The green light given by the Commission was conditional on selling 24 slots per day in the Munich and Frankfurt airports.⁴⁸ Recapitalization under the Framework is possible only if the notification contains a credible exit strategy. Should the state's exit be in doubt six years after receiving the recapitalization aid, Germany is also required to re-notify a restructuring plan for Lufthansa, rendering standard state aid terms applicable again. Furthermore, Austria also provided aid to Lufthansa's subsidiary, Austrian Airlines, to keep the company independent within the group, avoid layoffs, and achieve certain climate targets.⁴⁹

43 SA.56943.

44 SA.57410.

45 SA.59913.

46 Steven Truxal, 'State Aid and Air Transport in the Shadow of COVID-19', *Air & Space Law*, Vol. 45, Special Issue, 2020, pp. 72-73.

47 Id. p. 70.

48 SA.57153.

49 Truxal 2020, p. 71.

To give a couple of examples for non-discriminatory aid schemes, Hungary granted a wage subsidy under Article 107(3)(b) to employers active in the aviation industry.⁵⁰ Denmark⁵¹ and Slovenia⁵² granted under a scheme aid to airports and airlines that land in and depart from the Member State territory.

On the other hand, several Member States restricted their aid to airlines holding a national license (flag carriers). The Commission has approved these measures. The approval was either based on Article 107(2)(b) in the French case or on Article 107(3)(b) in the Swedish case.

Ireland did not grant any aid to airline service operators, including Ryanair.

4. Challenges of the Current State Aid Law Framework

4.1. Uneven Distribution of State Aid

Many commentators claimed that although it is open to all the Member States to support their economy *via* State aid, the actual amounts granted were very uneven.⁵³ Member States with deep pockets naturally have a significant financial capacity to fund their companies. By contrast, severe fiscal constraints in many

50 SA.57767. Cf. https://ec.europa.eu/commission/presscorner/detail/en/mex_20_1299. Public support takes the form of exemptions (amounting to up to 23% of the monthly gross salary paid to the employees) from the employers' obligation to pay social security, vocational training and rehabilitation contributions. The scheme is open to employers that are active in the manufacturing of air and spacecraft machinery, repair and maintenance of aircraft and spacecraft, and air passenger transport, provided they have experienced a significant reduction in their business activities due to the coronavirus outbreak in the period of April and May 2020. The scheme aims at alleviating employers' costs and avoiding lay-offs and helping to ensure that employees remain in continuous employment during the period for which the aid is granted. The Commission found that the Hungarian scheme is in line with the conditions set out in the Temporary Framework.

51 SA.59370. Cf. https://ec.europa.eu/commission/presscorner/detail/en/mex_20_2252. The scheme is open to all airlines holding a Danish air operator certificate. The support will take the form of direct grants to cover the beneficiaries' wage costs for the staff responsible for certain specific safety-critical functions. The measure is expected to benefit 26 airlines. The aim of the scheme is to support passenger air traffic in Denmark in order to restore the air connectivity within Denmark and to/from Denmark after the coronavirus outbreak. The Commission found that the scheme is in line with the conditions set out in the Temporary Framework.

52 SA.59124. Cf. https://ec.europa.eu/commission/presscorner/detail/en/mex_20_2141. The support takes the form of direct grants and will be accessible to all airlines operating routes to/from Slovenia. The level of support per beneficiary depends on the number of passengers carried by the airline and the number of flights. The measure is expected to benefit approximately 20 airlines. The objective of the measure is to re-establish air connectivity to and from Slovenia, with a view to support the recovery of tourism and more broadly the economy of Slovenia which have been negatively affected by the coronavirus outbreak. The Commission found that the Slovenian scheme is in line with the conditions set out in the Temporary Framework.

53 See at www.euractiv.com/section/competition/news/germany-gains-most-from-relaxed-eu-state-aid-rules/; Munoz2020, p. 538; Thomas Wilson *et al.*, 'The EC's Third Amendment to the State Aid Temporary Framework', *Kluwer Competition Law Blog*, 7 July 2020, at <http://competitionlawblog.kluwercompetitionlaw.com/2020/07/07/the-ecs-third-amendment-to-the-state-aid-temporary-framework/>.

countries, restrict Member States' choice. Which undertakings should then be rescued?⁵⁴

This is why the *geographical distribution of aid* is so important. The report prepared for the European Parliament on COVID-19 state aid underlined that

“The airlines and aviation sector stands out as the largest single beneficiary of state aid during the COVID-19 crisis. Almost all these cases provide support to specific companies, and hence, state aid is not provided under a sectoral regime. [...] The high amounts of financial support provided to airlines raise the question of whether the level playing field has been respected. State aid is clearly channeled to national airlines.”⁵⁵

On the other hand, *the Commission has weak tools to combat the unequal use of aid by the Member States* and there is a widespread consensus among Member States and around the world that countercyclical massive fiscal support may boost the economy, reverse the crisis and mitigate its effects on the economy and society.⁵⁶

Furthermore, *there is no maximum ceiling beyond which the Member States are prohibited from funding eligible projects under state aid law*. Each intervention should be designed to ensure proportionality of the aid compared to its eligible costs. Like Germany and France, larger Member States grant significant volumes of aid to support companies hit by the pandemic. Meanwhile, countries like Greece or Italy, that is, indebted States have less fiscal space to disburse large sums to their ailing industries. Even if particular state aid cases fulfil all criteria and conditions, the unequal geographical distribution of state aid may be a major cause for market distortion.⁵⁷

As there is no available figure on state aid (authorized and spent) to airlines, I use the general overall COVID-19 state aid spending to show the differences.

The European Parliament's report on state aid stated that

“State aid is the right policy reaction. State aid measures adopted by the Member States are increasing at a fast pace, both in number and in estimated budgets. Approval by the Commission is based on enhanced principles, in particular the Temporary Framework developed as an answer to deal with the extraordinary circumstances.”⁵⁸

On the other hand,

54 See Massimo Motta & Martin Peitz, 'State Aid Policies in Response to the Covid-19 Shock: Observations and Guiding Principles', *Intereconomics*, Vol. 55, Issue 4, 2020, pp. 219-222.

55 Parliament report pp. 30-31.

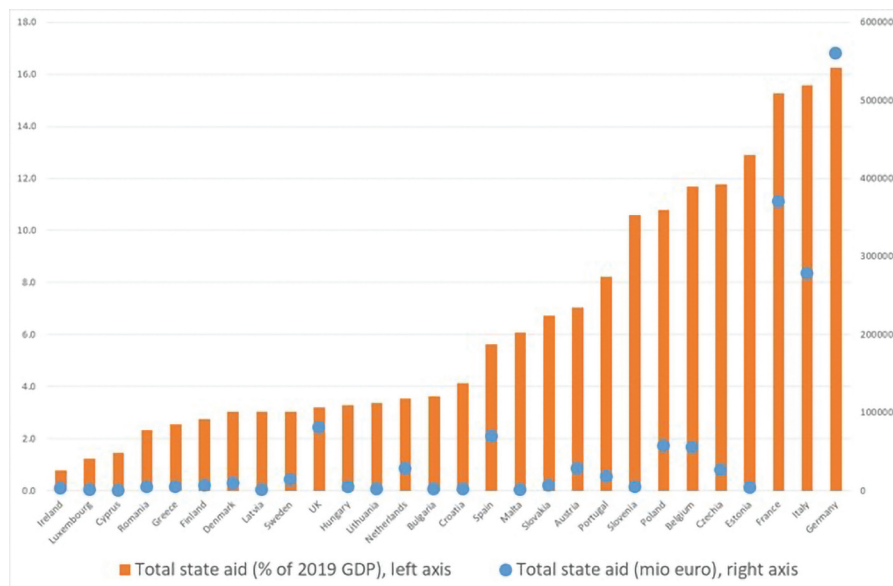
56 See at https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/jobs-and-economy-during-coronavirus-pandemic_en and www.oecd.org/coronavirus/policy-responses/the-territorial-impact-of-covid-19-managing-the-crisis-across-levels-of-government-d3e314e1/.

57 Parliament report, p. 21.

58 Id. p. 6.

Mónika Papp

Figure 1 *Total COVID-19-related state aid provided by the EU Member States, as % of GDP and in absolute terms (million EUR)*



* Id. p. 26. All COVID-19 aid is included in this graph, not only aid given to airlines.

“total state aid budgets differ substantially across the EU Member States. Moreover, there is no convincing evidence that total state aid is proportional to the economic damage suffered during the first wave of the COVID-19 pandemic. Hence, this raises the question of whether the level playing field is maintained. There is a serious risk that excessive state aid support by some Member States will jeopardize free and fair competition in the EU single market. The only possible compensation would be substantial positive cross-border spill-overs. In other words, state aid provided by one EU Member State could be beneficial to the other EU Member States. Whether this is the case remains to be seen in the future when state aid has actually been provided.”⁵⁹

The preliminary figures indicate that *the actual gaps between aid spent by the larger Member States may not be as significant as what they had initially announced*. The Commission has tried to put the differences of nominal amounts in context, partly acknowledging the problem. The Commissioner for Competition conceded that

59 Id.

“not all Member States have the room in their national budgets to provide companies with support. Indeed, the differences in the size of European economies and budgets risk to fragment further the single market.”⁶⁰

On the other hand, according to the data of the Commission services, the aid approved does not correspond to the aid paid out. More substantive national schemes have been approved to provide financial leeway to Member States and reduce the administrative burden of notification. On the other hand, these schemes have not been completely exploited by the Member States. According to the end of July 2020 data, the Commission has authorized 2.3 trillion EUR in crisis aid, but the Member States used up much less: only 346 million EUR has actually been spent. Until 30 October, 3 trillion EUR has been approved, more than half is German aid, Italian and French aid account for another 15% each of the total amount, but Spain, for example, only for 5%.⁶¹

Moreover, it is important to note that under schemes based on non-discriminatory criteria, companies established outside the Member State may also receive aid, such as tax deferrals.⁶² Advantages granted to national companies may also have a spill-over effect when the positive economic effects are enjoyed by the entire value chain.

While it is widely acknowledged that the uneven Member State support granted during the crisis may jeopardize the unity of the internal market, state aid law is not the right instrument to tackle this serious problem because it lacks tools to address the roots of the problem.⁶³ The Commission keeps an eye on the overall state aid spending authorized and notes the difference between the amounts authorized and those actually spent on the economy.

To overcome discrepancies in state aid spending, the Commission made a proposal for the *Solvency Support Instrument*, which would allow equity support to businesses all over Europe, focusing on businesses that are most in need of support as a result of the pandemic. The Instrument would focus on Member States and sectors hardest hit and on those Member States which are least able to offer equity support to businesses. The guarantee provided by the European Investment Bank would help crowd in significant private investment in the equity of companies. The investment supported by these instruments must deliver on the objectives set by the Green Deal and the Digital Agenda.

60 Statement by Executive Vice-President Margrethe Vestager at the press conference on Solvency Support Instrument, 29 May 2020, at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_973.

61 Speech of Vice-President Margrethe Vestager on State aid at the event organized by the Berliner Gesprächskreis zum Europäischen Beihilfenrecht, 30 October 2020.

62 E.g. SA.57691. Cyprus implemented a scheme under which the aid amount depended on the load of the aircraft. See also SA.58157. The Danish scheme is open to all airlines servicing scheduled passenger flights in Denmark.

63 According to Maczkovics, “the Commission’s approach may thus be seen as too flexible to genuinely preserve the integrity of the internal market and to ensure a level playing field among all economic operators.” See Maczkovics 2020, p. 279.

At the European Council meeting in July 2020, however, EU Heads of State or Government *did not approve the draft EU level instruments, like the solvency support instrument and the strategic investment facility*. Instead, they voted for the Recovery and Resilience Facility designed by the Member States themselves to channel resources to the economy.

The uneven spending rates of different Member States may be corrected in the future by EU instruments such as the Next Generation EU Recovery Instrument, the Recovery and Resilience Facility or the Sure Programme.⁶⁴

4.2. *Monitoring Exercise and Transparency*

The impact assessment report prepared for the European Parliament highlights some of the changes necessary to ensure a level playing field.

“The number of cases targeted at individual companies is very limited, with the airline and aviation sector as a notable exception. A limited number of cases are targeted at firms with a specific size.”⁶⁵

The report recommended that the Commission enhance the transparency of the case evaluation process and highlighted the need for evaluating the different aid measures in their interconnectedness. “It is recommended that cases be evaluated while taking into account previous cases submitted by the same Member State as well as similar case submitted by other Member States.”⁶⁶ Furthermore, the report recommended the monitoring of the use of authorized aid. “It is recommended that cases be evaluated while taking into account previous cases submitted by the same Member State as well as similar case submitted by other Member States.”⁶⁷

Given the vast number of approvals and the large amounts granted under them, it will be a challenge for the Commission to monitor the implementation of aid schemes and the individual aid measures.⁶⁸ As shown above, positive decisions come in the most critical cases with strings, so-called conditions attached to the approval. In some decisions, as indicated above, a trustee has been appointed. Still, in most cases, it is the task of the Member State and the Commission to monitor implementation. *The effectiveness of the Commission's ex post monitoring has been the subject of long-standing criticism by the European Court*

64 See the brief overview by Jonatan Echebarria Fernández, ‘A Critical Analysis on the European Union's Measures to Overcome the Economic Impact of the COVID-19 Pandemic’, *European Papers*, Vol. 5, Issue 3, 2020, pp. 1399-1423.

65 Parliament Report, p. 7.

66 Id.

67 Id. p. 8.

68 See in a similar vein: Francisco Costa-Cabral *et al.*, ‘EU Competition Law and COVID-19’, *TILEC Discussion Paper*, 22 March 2020, available at SSRN, p. 3.

of Auditors. Even before the crisis, the European Court of Auditors raised the issue of the lack of robust *ex post* monitoring of state aid cases.⁶⁹

4.3. The External Factor

The European aviation industry is part of the global market, where very different national rules apply.⁷⁰ European state aid rules are considered to be very strict compared to other jurisdictions' laws.

One can argue that the relaxation of strict European subsidy rules and the provision of vast amounts of subsidies is not the right approach because *air carriers will not be supported based on their efficiency, but governments will pick winners and losers*. While this argument might hold water, governments, on the other hand, face a real threat of takeovers by private and public undertakings controlled by third states. In the absence of state aid, this threat will materialize because other large economies have provided even more subsidies to companies to bounce back from the crisis. In this regard, the Commission issued an early warning that Member States should tackle this issue.⁷¹

In 2004, Regulation (EC) No. 868/2004 was adopted. The objective was to protect EU airlines against the subsidization of third-country airlines and unfair pricing practices adopted by the latter when operating on routes to and from the EU. In 2019, the Regulation was repealed, and a new one was adopted. Regulation (EU) No. 2019/712 has a broader scope since it prohibits practices distorting competition, discrimination and subsidies.⁷² Besides the air transport sector, the Member States and the Commission tend to react more assertively to distortions created by the global regulatory field. The Commission published its White Paper on levelling the playing field as regards foreign subsidies in July 2020.⁷³

69 *Do the Commission's Procedures Ensure Effective Management of State Aid Control?*, European Court of Auditors, Special Report No. 15, 2011; *More Efforts Needed to Raise Awareness of and Enforce Compliance with State Aid Rules in Cohesion Policy*, European Court of Auditors, Special Report No 24, 2016.

70 On the global context see Costa-Cabral *et al.* 2020, p. 5. On the global aviation market, its history and regulation see Antogoni Lykotrafiti, 'What Does Europe Do About Fair Competition in International Air Transport? A Critique of Recent Actions', *Common Market Law Review*, Vol. 57, Issue 3, 2020, pp. 831-860.

71 Communication from the Commission. Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) Brussels, 25 March 2020 C(2020) 1981 final. The Parliament report also pointed out that "a more assertive use of State aid policies would align EU state aid policies to the ones implemented by other major economies (e.g. US and Japan)." Parliament report, p. 35.

72 Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport and repealing Regulation (EC) No 868/2004.

73 COM(2020) 253 final, 17 June 2020. On 5 May 2021 the Commission adopted its proposal based on the White Paper. Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market. Brussels, 5 May 2021, COM(2021) 223 final.

5. The Ryanair Cases and the Issue of Discrimination

Ryanair, the only private company having a substantial share of the European low-cost aviation market, *challenged all Commission decisions authorizing allegedly discriminatory aid measures before the General Court*. Its legal argument is based on several claims: (i) first, the violation of the nationality-based discrimination prohibition under Article 18 TFEU and the free provision of services. (ii) Second, the violation by the Commission of its obligation to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition (the so-called balancing test) or, in case of the French scheme, a manifest error of assessment in the review of the proportionality of the aid. (iii) Third, the failure to open a formal investigation procedure despite the fact that the Commission has encountered serious difficulties, and (iv) fourth, the failure to state reasons.⁷⁴

Altogether, *Ryanair challenged eleven Commission decisions*, and until now, the General Court has adopted rulings in expedited procedure in nine cases.⁷⁵ In the first wave, two Commission decisions, one on the Swedish aid scheme and one on the French aid scheme, were decided by the General Court. Bouchagiar revealed that

“prior to the COVID-19 outbreak, the Commission seems to have required that aid be non-discriminatory in certain cases. For example, in its communication on aid to the transport sector under Article 107(2)(b) TFEU following the terrorist attacks of 11 September 2001 in the United States, the Commission requested that compensation be paid in a non-discriminatory manner to all airlines in a given Member State. The Commission approved such aid schemes in France and Germany to cover operating losses incurred by airlines, linked to the closure of airspace as a result of the terrorist attacks. Moreover, in the context of the Icelandic volcanic eruption and dust cloud in April 2010, which led to the closure of most of European airspace, the Commission approved an aid scheme in Slovenia covering part of the economic losses of airlines and airports. The Commission noted that the aid was non-discriminatory since it was granted to all air carriers with a valid

⁷⁴ This article does not deal with the procedural law aspects of the judgments.

⁷⁵ Until 20 April 2021. Judgment of 17 February 2021, *Case T-238/20, Ryanair v Commission (Sweden)* ECLI:EU:T:2021:91, on appeal under C-209/21 P; Judgment of 17 February 2021, *Case T-259/20, Ryanair v Commission (France)*, ECLI:EU:T:2021:92, on appeal under C-210/21 P; Judgment of 14 April 2021, *Case T-388/20, Ryanair v Commission (Finnair I, COVID-19)*, ECLI:EU:T:2021:196, on appeal under C-353/21 P; Judgment of 14 April 2021, *Case T-378/20, Ryanair v Commission (SAS, Denmark, COVID-19)*, ECLI:EU:T:2021:194, on appeal under C-321/21 P; Judgment of 14 April 2021, *Case T-379/20, Ryanair v Commission (SAS Suède, COVID-19)*, ECLI:EU:T:2021:195, on appeal under C-320/21 P; Judgment of 19 May 2021, *Case T-643/20, Ryanair v Commission (KLM; COVID-19)*, ECLI:EU:T:2021:286; Judgment of 19 May 2021, *Case T-628/20, Ryanair v Commission (Espagne; COVID-19)*, ECLI:EU:T:2021:285; Judgment of 19 May 2021, *Case T-465/20, Ryanair v Commission (TAP; COVID-19)*, ECLI:EU:T:284; Judgment of 9 June 2021, *Case T-665/20, Ryanair v Commission (Condor; COVID-19)*, ECLI:EU:T:344.

Slovenian operating license, which were the only companies directly damaged due to the closure of the Slovenian airspace.”⁷⁶

Indeed, the CJEU is not bound by the Commission’s earlier practice. Hence, *the crucial legal issue is whether a requirement of non-discrimination (based on nationality) can be derived from primary law*. Linked to this, in my opinion, is the role and the freedom of Member States to support their economy. The context in which state aid has to be understood is that state intervention in markets and industrial policy generally is a Member State competence, while transport is a shared competence.⁷⁷ Accordingly, it is up to the Member States to design aid measures and set their objectives. At any rate, Member States have limited fiscal capacity to support an entire industry or the entire national economy. Suppose the Member States are bound by the Treaty to provide aid to each air carrier operating on their territory. In that case, they may not have sufficient fiscal capacity to disburse enough support to save each operator. Against this backdrop, the CJEU jurisprudence recognized a long time ago that *there is no entitlement to state aid; companies do not have a right to claim aid from the Member States*.⁷⁸

The General Court directly tackled this argument in the *Danish case* and held that it does not follow from either Article 108(3) or Article 107(2)(b) that Member States are obliged to make good the entire damage, likewise, they cannot be required to grant aid to all of the victims of that damage.⁷⁹ In another case, the General Court had to rule on the legality of a loan guarantee granted by Finland to the majority state-owned undertaking, *Finnair*.⁸⁰ The aid was approved by the Commission under Article 107(3)(b) to remedy a serious disturbance in the economy. After failing to obtain a loan in the credit market, Finland granted a guarantee to Finnair on a private loan. The Commission approved the aid as justified by mitigating the risk of the company’s insolvency due to the sudden erosion of its business, to endure supply chain security and generally due to Finnair’s importance for the Finnish economy. Indeed, Finnair is a major air freight and passenger operator in Finland. The General Court held that the guarantee was appropriate to remedy a serious disturbance in the Finnish economy. Ryanair claimed that the Commission failed to balance the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition. After relying on the textual interpretation of Article 107(3)(b), the General Court rejected this argument. Contrary to Ryanair’s claim and the text of 107(3)(c), *the wording of 107(3)(b) does not require the Commission to weigh the positive and negative effects of the aid*

76 Bouchagiar 2021, p. 55.

77 See Article 4 TFEU on shared competences and Article 6 on supporting, coordinating and supplementing EU competences.

78 In Judgment of 23 November 2015, *Case T-670/14, Milchindustrie-Verband eV*, ECLI:EU:C:2015:906. The General Court ruled in its order, that it is a matter falling within the sovereignty of the Member State. See also Order of 30 May 2018, *Case C-481/17, Yanchev*, ECLI:EU:C:2018:352, para. 22.

79 Judgment of 14 April 2021, *Case T-378/20, Ryanair v Commission*, para. 24.

80 Judgment of 14 April 2021, *Case T-388/20, Ryanair v Commission (Finnair I, COVID-19)*.

measure. For decisions adopted under Article 107(3)(b), the sole condition to be proved by the Commission is the appropriate, necessary and proportionate nature of the aid to remedy the serious disturbance of the economy.

Ryanair's second argument was that the aid is contrary to the general principle of non-discrimination under Article 18 TFEU and to the freedom to provide services. In Ryanair's reasoning, the aid "is a measure of pure economic nationalism."⁸¹ The General Court held that Article 107 is *lex specialis* to Article 18 TFEU because any discrimination on the grounds of nationality within the scope of application of the Treaties is prohibited "without prejudice to any special provisions contained therein."⁸² Therefore, the General Court referred back to its reasoning under Article 107. It first noted that individual aid, by definition, benefits only one undertaking, so discrimination is inherent in the individual character of the aid.⁸³ Under Article 107, the General Court started its reasoning by analyzing the measure's objective and then proceeded to establish whether the two situations are similar in light of the measure's objective. Finland aimed to provide sufficient liquidity to Finnair to maintain its viability and air services. The General Court highlighted that *the main objective was not to preserve Finland's domestic and international air connectivity*. In light of this, the aid provided solely to Finnair was not considered discriminatory. In the General Court's view, the Commission is not obliged to widen the circle of beneficiaries.⁸⁴ As to the proportionality of the measure, Ryanair did not challenge the amount of the aid directly. Instead, it claimed that under non-discriminative conditions, each air operator active in Finland should have received aid. The General Court rejected this by reasoning that that would have affected the sufficiency of the resources available to Finnair.

In the *Danish case*, the aid granted by Denmark to SAS and the Commission's approval was subject to judicial review. Ryanair, among others, claimed that the Commission had not taken account of the competitive advantage resulting from the discriminatory nature of the measure. The General Court did not accept this argument either, because it is settled case-law that the advantage procured by

81 Id. para. 78.

82 Id.

83 As opposed to individual aid, aid schemes are any acts on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be granted to one or several undertakings for an indefinite period of time and/or for an indefinite amount. Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, p. 1. Probably Ryanair's view was that under the proportionality principle, the state should have organized an aid scheme available to any undertaking active in the Finnish air transport sector. Contrary to that argument, under state aid law, there is no obligation on Member States to regulate aid in aid schemes. It is just a choice available to Member States.

84 Id. para. 87. On the other hand, if the measure is declared discriminative, the Member State is under the obligation to widen the circle of beneficiaries or to repeal or modify its conditions.

that aid for the recipient does not include any economic benefit the recipient may have enjoyed as a result of exploiting the advantage.⁸⁵

In its earlier decision, the Commission authorized *state aid granted by Sweden* in the form of a loan guarantee scheme to airlines under the Framework and Article 107(3)(b). The Commission concluded that the guarantee is necessary, appropriate and proportionate to remedy a serious disturbance in the Swedish economy. The scheme aims to ensure that the airline which hold a license issued by Sweden and which is important to secure connectivity in Sweden has sufficient liquidity to ensure that the disruptions do not undermine its viability and to preserve the continuity of economic activity. Under Regulation No 1008/2008, a national license is issued to airlines if their principal place of business is in the Member State (in this case Sweden). The financial situation of airlines holding a Swedish license is regularly monitored under the Regulation by the Swedish licensing authority. Ryanair pleaded before the General Court that the Commission's authorization is contrary to Article 18, the prohibition of discrimination on the grounds of nationality. Under CJEU jurisprudence, the Commission cannot declare an aid plan compatible with Article 107 if certain conditions contravene other provisions (including the general principles) of EU law. The General Court considered that Article 107 is a special provision compared to Article 18. Therefore, it examined the argument only from the perspective of Article 107(3)(b). It held that under the said provision, the aid should be viewed from the standpoint of its objective as set by the Member State. The General Court anchored the national eligibility condition in secondary EU law. According to the General Court, the aid is appropriate because it is

“normal for the Member States concerned to seek to ensure that the airlines eligible for the guarantee have a stable presence, in order for them to be present on Swedish territory to honor the loans granted, so that the State guarantee is used as little as possible.”⁸⁶

As to the proportionality of the aid, the General Court pointed out that

“in order to secure Sweden's connectivity, the double requirement of a Swedish license and air services in Swedish territory through regular flights is the most appropriate for guaranteeing that the presence of an airline on that territory is permanent.”⁸⁷

The General Court also assessed the fact that airlines holding a Swedish license were responsible for 98% of the domestic passenger traffic and 84% of the domestic freight transport. The share of national license holders in international

85 Judgment of 21 December 2016, *Case C-164/15 P and C-165/15 P, Commission v Aer Lingus and Ryanair Designated Activity*, ECLI:EU:C:2016:990, para. 92.

86 Judgment of 17 February 2021, *Case T-238/20, Ryanair DAC v Commission*, ECLI:EU:T:2021:91, para. 40.

87 Id. para. 45.

passenger air traffic within the EU was 49%. Importantly, it is evident from the judgment that *the proportionality test is not a strict one*. The General Court highlighted that *the Commission is not bound to decide on every alternative measure conceivable* since it is not required to prove positively that no other conceivable hypothetical measure could better achieve the intended objective. Ryanair “cannot ask the Court to require the Commission to take the place of national authorities in that task of normative prospecting in order to examine every alternative measure possible”.⁸⁸

In another case, the *aid scheme granted by France* under similar conditions was scrutinized by the General Court. France deferred the payment of civil aviation tax and solidarity tax on condition of holding a national license, and the aid has been held compatible with the internal market under Article 107(2)(b). The General Court held that the national license condition creates an institutional link with the place where the damage suffered arose, and therefore it is appropriate. The General Court linked the requirement of holding the national license to a stable presence on national territory, which the Member States are justified to apply to ensure that the shortfall in tax revenue is as low as possible. For the General Court, the requirement of holding a national license safeguards the administrative and financial stability of beneficiaries in the national territory.

6. Conclusions

This article has explored the ample room available to the Member States to support airlines. The crucial question of how competences are divided between the Member States and the EU helps understand the carefully framed judgments of the General Court. In my view, *the General Court was right to refuse the arguments put forward by Ryanair, but its reasoning is quite timid and hesitant*. A more assertive, strong argumentation would have ensured more clarity in the case-law. Companies under Article 107 do not enjoy entitlement to state aid. The Treaty is based on the following division of competences: Member States may use state aid to intervene in the economy and use this powerful industrial policy tool to further objectives set by themselves. Member States enjoy a margin of discretion to define the conditionality of the aid subject only to binding secondary EU legislation. EU competence is limited to verifying the competition aspects of the intervention, or more precisely, the intervention’s appropriateness, necessity and proportionality to achieve the objectives incorporated in Article 107(2) or (3).

The arguments about the breach of the non-discrimination principle, raised by Ryanair, if successful, would have rendered individual aid measure to airlines incompatible with the internal market. This way, the only method to design the aid measure would be through aid schemes reaching and affecting each market

88 Id. para 53. The General Court similarly rejected the argument that the aid measure is contrary to the free provision of services.

operator equally. By doing so, the Commission would supplement the Member State competence with its own decision.

That said, there is a seeming tension between the legality of the conditions as illustrated by the General Court judgments and economic reality. The vast amount of aid will probably distort competition at the level of the undertakings on those routes where airlines compete with each other.⁸⁹ It is hoped that these distortions will be limited, and the Commission will carefully monitor the fulfilment of the conditions attached to its authorizations in these cases.

89 Generally, academic opinion points into this direction. See e.g. Jose Luis Buendia & Angela Dovalo, 'State Aid versus COVID-19: The Commission Adopts a Temporary Framework', *European State Aid Law Quarterly*, Vol. 19, Issue 1, 2020, p. 7.