

The EU scheme for the state aid rules in the air transport sector during the Covid-19 crisis

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Abstract

Paper provides for a systematic overview of the EU scheme for the State aid rules applicable to the air transport sector during Covid-19 crisis. The COVID-19 outbreak is having a major impact on European air transport sector. In order to help air transport undertakings in Europe to overcome the financial troubles, to preserve jobs, to secure supply of essential food, medicals or other items, etc., the EU Commission adopted set of legislative measures enabling the EU Commission and Member States to authorise hundreds of State aid measures, not only to air transport sector, but also to other economic sectors, which were mostly affected by the pandemic. Since in normal circumstances member states State aid to national undertakings are subject to extremely stringent EU competition law regime, the intention of this paper is, firstly, to analyse to what extent and under what conditions that has changed during pandemic. Secondly, the intention of the paper is to explore to what extent and for what purposes different Member States granted State aid to their airline industries with special respect to the French, Austrian, Swedish and Croatian State aid policy. Lastly, the authors will raise question whether massive capital injection to air transport companies being made only by certain, wealthier, member states are going, in long term, to cause negative impacts on the competition in the air transport sector in the internal market³.

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1. Introduction

The global economic crisis caused by the coronavirus is a phenomenon whose economic and social impacts are still unpredictable, and which is going to be studied in years to come.⁴ However, although unprecedented in many aspects, the

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⁴ For more on economic impact of the Covid-19 see: Kissler, S., M.; Tedijanto, C.; Lipsitch, M.; Grad, Y.; *Social distancing strategies for curbing the covid-19 epidemic*, MedRxiv, No. 1, 2020, p. 1.

COVID-19 crisis evidently did not affect all countries, economies and economic sectors in the same way.⁵ While it is already evident that some economies and sectors are going to suffer larger damage than the others, there are also some economic sectors that are less affected or there are even some sectors that the COVID-19 crisis did not strike at all (such as the IT sector, pharmaceutical industry, etc.).⁶ Furthermore, economic shocks in some sectors are only of a short-term and temporary nature, while in some business sectors the economic crisis caused by the coronavirus will cause long-term and irreparable damage and will permanently change the business landscape.⁷

One of the sectors that is already suffering irreparable damage is the air transport sector.⁸ The travel restrictions imposed for the mitigation of the spread of the infection and the social distancing measures have not only reduced the passenger's traffic but also the movement of goods, touristic arrangements, etc.⁹ In early 2020, the number of flights fall 90% below the rate in 2019.¹⁰ Although the number of flights increased in 2020 and 2021,¹¹ new waves of the pandemic have only extended the restriction measures, while the detrimental effects of the those new waves of the pandemic will manifest in the years to come.¹² There is no doubt that the sustainability of particularly smaller air transport companies is seriously jeopardized¹³.

Recognizing that saving air transport companies and maintaining vivid competition in air transport sector during COVID-19 and in post COVID-19 times is of vital importance for the consumers and for the functioning of the internal market, the EU has worked on several levels to help air transport sector to meet challenges caused by the corona outbreak. In March 2020 the European Commission set up a temporary State aid rules scheme in document called the *Communication*

⁵ Nicola, M.; Alsafi, Z.; Sohrabi, C.; Kerwan, A; Al-Jabir, A.; Iosifidis, Ch.; Agha, M.; Agha, R.; *The socio-economic implications of the coronavirus pandemic (COVID-19): A review*, International Journal of Surgery, Vol. 78, 2020, p. 185.

⁶ Ayati, N.; Saiyarsarai, P.; Nikfar, S., *Short and long term impacts of COVID-19 on the pharmaceutical sector*, DARU J Pharm Sci, No. 28, 2020, p. 799.

⁷ *Ibid.*

⁸ Iacus, S., M.; Natale, F.; Santamaria, C.; Spyrtos, S.; Vespe, M., *Estimating and projecting air passenger traffic during the COVID-19 coronavirus outbreak and its socio-economic impact*, Safety Science, Vol. 129, 2020, p. 3.

⁹ For more statistic data about the impact of Covid-19 on air sector and aviation see: OECD, *Policy Responses to Coronavirus (COVID-19), COVID-19 and the aviation industry: Impact and policy responses*, 15 October 2020, [<http://www.oecd.org/coronavirus/policy-responses/covid-19-and-the-aviation-industry-impact-and-policy-responses-26d521c1>] Accessed on 15 April 2021.

¹⁰ For more see: Eurocontrol, *COVID-19 impact on the European air traffic network*, [<https://www.eurocontrol.int/covid19>] Accessed on 20 May 2021.

¹¹ European Commission, *Overview of the State aid rules and public service obligations rules applicable to the air transport sector during the COVID-19 outbreak*, p. 2, [https://ec.europa.eu/competition/state_aid/what_is_new/air_transport_overview_sa_rules_during_coronavirus.pdf] Accessed 15. April 2021, hereinafter: Overview.

¹² Particular national reports available at: Eurocontrol, *COVID-19 impact on the European air traffic network*, [<https://www.eurocontrol.int/covid19>] Accessed on 20 May 2021.

¹³ European Commission, *Overview...*, *op. cit.*, p. 1.

from the Commission: *Temporary Framework for State Aid Measures to Support the Economy in the Current Covid-19 Outbreak* (hereinafter: *Temporary framework*)¹⁴. The EU Commission also authorised numerous Member States aid schemes to airline companies. Generally, EU enabled member states to support, directly or indirectly, (in form of wage subsidies, suspension of payments of corporate taxes or in any other way) air transport sectors, and all undertakings and sectors whose businesses were affected by the pandemic.¹⁵

So, despite the fact that officially, competition law enforcement in EU during corona crisis remained fully applicable and unchanged, in reality EU competition law and State aid rules were in many aspect suspended or relaxed.

In that sense, the intention of this paper is to provide a detailed analysis of the EU temporary framework for the air transport sector during COVID-19 crisis. Authors will first analyse the specific policy justifications for State aid in air sector and legal basis for State aid in air sector during pandemic. The central part of the paper is the analysis of the Temporary framework for State aid with the special emphasises of the national overview of the State aid measures provided by the Member States during pandemic. Paper also examines types of the State aid allocated by the Member States (such as France, Austria, Sweden and Croatia) to the flag carriers. In the conclusion, authors are raising question whether allocated State aid were in favour of flag carriers and discriminatory for private airline companies.

2. Specific policy justifications for State aid in air sector during the Covid-19 crisis

The air transport sector is, as other business sectors, subject to the general Competition law and State aid rules. Member States are generally, prevented from granting financial support (State aid) to airline undertakings since this could cause disruptions in the market competition and inter-state –trade within EU, harmful for European economy and consumers.¹⁶ However, the COVID-19 outbreak created unprecedented crisis and had a major negative impact on European airline industry.¹⁷ Namely, according to some estimations, out of more than 191,000 employees who have lost their jobs during COVID 19 crisis,¹⁸ approximately 23 % of them were

¹⁴ Communication from the Commission Temporary Framework for State Aid Measures to Support the Economy in the Current Covid-19 Outbreak, (OJ C 91I, 20.3.2020).

¹⁵ For more about the EU response during pandemic see: European Commission, *Coronavirus response* [https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response_en] Accessed on 19 May 2021.

¹⁶ For more about the notion of State aid see: Wendland, B., *Public funding for research infrastructures and EU State aid Rules key issues, case examples and state aid reform*, European State Aid Law Quarterly, No. 3, 2013, p. 524.

¹⁷ Overview of the State aid rules and public service obligations rules applicable to the air transport sector during COVID 19 outbreak, EU Commission, Updated overview of the State aid rules and public service obligations rules applicable to the air and maritime transport sector during the COVID-19 outbreak, 25. 3. 2021. (https://ec.europa.eu/transport/media/news/2021-03-25-updated-overview-state-aid-rules-and-public-service-obligations-rules_en) p. 1.

¹⁸ International airport review, *The true cost of the COVID-19 crisis for aviation: Its people*, 21 February 2021, [<https://www.internationalairportreview.com/article/153359/true-cost-covid-19->

employed in the EU air sector. Massive negative demand shocks threatened the financial sustainability of whole sector and brought challenge to the airline industry¹⁹. Smaller, private airline companies were particularly vulnerable to demand shocks caused by containment measures as well as voluntary practice of social distancing and avoiding travel.

Since air transport sector is strategically important economic sector that employs almost five million people in EU (pilots, cabin crew, airport operators, and on-site enterprises) and amounts for €300 billion, or 2.1% of EU gross domestic products²⁰, EU recognized the need to act promptly and to prevent job losses and massive bankruptcy scenario.

In addition, air transport as a public service sector is vital for ensuring security of supply for essential products such as medical equipment, food or drugs, for ensuring basic connectivity needs across the territories (e.g. islands, remote areas)²¹ or operating specific flights²² related to COVID 19 outbreak.

Therefore, EU approved the various support measures Member States may use in line with EU State aid rules in order to support air transport industry.

All support measures can be divided in two broad categories: 1/ those for which Member States did not need a Commission's approval and which are not subject to mandatory notification and 2/ so called "notifiable State aid" which are subject to Commission's approval.

3. The EU State aid regime in air sector during pandemic

Immediately after the outbreak of the pandemic, the Commission issued a couple of communications and instructions emphasizing that the Member States can choose from a wide range of State aid to support their air undertakings and noting that the control and granting of State aid in all sectors will be more efficient and flexible during the pandemic. As a result, the already lenient regime of State aid in the air sector became more flexible, while the process of granting State aid o air undertakings became quicker and less formal. In this sense, the Commission focused on intensified guidelines to Member States for the efficient realization of State aid.

crisis-aviation-people] Accessed on 4 April 2021. Official web site of the European Transport Worker's Federation, *Civil aviation* [https://www.etf-europe.org/our_work/civil-aviation] Accessed on 4 April 2021.

¹⁹ State Support to teh Air Transport Sector: Monitoring developments related to Covid 19 crisis, OECD, April 22 2021. (<https://www.oecd.org/corporate/State-Support-to-the-Air-Transport-Sector-Monitoring-Developments-Related-to-the-COVID-19-Crisis.pdf>.) p. 5.

²⁰ Air transport survival during the pandemic, European Parliament, Niestadt, M., November 2020, p. 2.

²¹ See on that: Murray, F., *The European Union and Member State Territories: A New Legal Framework Under the Treaties*, TMC Asser Press, Springer, The Hague, 2012, p. 4.

²² Passengers transport had to be maintained in order to ensure repatriation in cases where this was necessary to send persons or to bring them back to their home states during the pandemic. For more about repatriation in the EU see: Beusse, M., *Repatriation Policies and Practices; A comparative overview of the repatriation policies and practices of other EU Member States*, Tallinn, 2009, p. 1. [<https://ec.europa.eu/migrant-integration/index.cfm?action=media.download&uuid=299ECC14-A0B0-774C-D3A44B5898CECD11>] Accessed on 4 May 2021.

As it is already aid, Member State were able to grant State aid without prior notification to the Commission (so-called: State aid exempted from notification) or with prior notification and approval of the Commission (so-called: notifiable State aid).

3.1 State aid exempted from notification

The first type of State aid in the air transport sector during the pandemic is State aid exempted from notification. Member States can grant this type of State aid to airline undertakings with immediate effect. Prior notification and approval of the Commission is not required.

Those measures were available to all sectors during pandemic not only to air transport sector. Those measures apply to all undertakings in difficulty and are aimed at mitigating the negative effects of the Covid-19 crisis. Such State aid is granted in the form of salary subsidies for the workers, tax reductions or social grants.²³

In addition to the above, special set of State aid were available for those airline companies who are providing services of general economic interest. This State aid is granted in the form of compensations that support the undertakings in the air transport sector whose services and infrastructure are offered to the health services or other public services. Financial aid from the Member State were particularly important in those situations where, because of decrease in passengers and routs, economic activity of airline companies was not economically viable.

However, even prior to the pandemic, these services were under a more lenient State aid control i.e. they will not be considered as State aid if the Altmark criteria or Market Economy Operator test are fulfilled.²⁴ This regime was made even more flexible during the pandemic, as the public tender for the most affordable air undertaking for the provision of such services have been additionally relaxed and informal, while the deadlines for the selection of the most favourable applicants have been shortened with the introduction of the possibility of the extension of the existing contracts for such services with the same undertakings, although this would be strictly prohibited prior to the pandemic.²⁵

Other forms of State aid that do not have to be notified during the pandemic include the financial support granted directly to consumers. This refers to refunds for the travellers for cancelled flights or for tickets that they could not use due to the restrictions of traffic.²⁶

²³ Buendia, J., L.; Dovalo, A., *State Aid versus COVID-19: The Commission Adopts a Temporary Framework*, European State Aid Law Quarterly (ESTAL), Vol. 2020, No. 1, 2020, p. 3.

²⁴ For more see: Maczkovics, C., *How Flexible Should State Aid Control Be in Times of Crisis?* European State Aid Law Quarterly (ESTAL), Vol. 2020, No. 3, 2020, p. 278; *Overview, op. cit.*, p. 8.

²⁵ For more see: *Overview, op. cit.*, p. 5.

²⁶ See: *Passenger Rights And Package Travel*, European Commission, May 26, 2020 (<https://ec.europa.eu/info/sites/default/files/faqs-travel-transportation.pdf>).

Within the air transport sector, there are also types of State aid that are governed by *de minimis* Regulation²⁷ and public aid which falls under the General Block Exemption Regulation (hereinafter: GBER").²⁸

All the rules that applied prior to the pandemic remain in force, with the relaxation of the conditions for the issuance of such aid, and the extension of the timeframe for the issuance of such aid until 31 December 2023.

3.2 Notifiable State aid

The other type of State aid in the air sector during the pandemic is notifiable State aid. This type of State aid in the air sector has to be notified to the Commission and approved if it is found to be compatible with the EU State aid rules.²⁹ During the pandemic, such aid can be granted through the national schemes or on the individual basis, based on the explicit instructions of the Commission.³⁰ The legal basis for the issuance of such notifiable aid is in articles 107(2)(b) of the TFEU, 107(3)(c) of the TFEU and 107(3)(b) of the TFEU.³¹

The first legal basis for granting State aid in the air sector during the pandemic is Article 107(2)(b) of the TFEU. This aid can be approved to airline companies as a compensation for the damage caused by the exceptional occurrence of the COVID-19 outbreak. In other words, this article allows Member States to grant State aid to airline companies and other undertakings from air sector to compensate only the damages caused by epidemiological restrictions during the pandemic.³² However, despite the clear applicability of this article to air transport sector, the question arose in practice of the scope of the damages that can be covered by State aid granted to air transport undertakings. In response to this question, the Commission has issued a clarification with the conditions for the approval of this aid and the interpretation of the term *exceptional occurrence* in the context of the Covid-19 crisis.³³ In this sense, State aid can be granted under this article only to those air transport undertakings who could not provide services because of imposed restrictive

²⁷ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1, hereinafter: *de minimis* Regulation.

²⁸ 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 Text with EEA relevance, OJ L 187, 26.6.2014, p. 1-78. See also: *ibid. de minimis* Regulation; Buendia, J., L.; Dovalo, A., *op. cit.*, pp. 3-7.

²⁹ Buendia, J., L.; Dovalo, A., *op. cit.*, p. 4.

³⁰ Maczkovics, C., *op. cit.*, p. 275.

³¹ See: Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1; Wendland, B., *op. cit.*, p. 523.

³² *Overview*, *op. cit.*, p. 16-17. For more about on the proportionality test see: Ahlqvist, V., et al. *How to Estimate the COVID-19 Damages?: Economic Considerations for State Aid during a Time of Crisis*, European State Aid Law Quarterly (ESTAL), Vol. 2020, No. 2, 2020, p. 151.

³³ Maczkovics, C., *op. cit.*, p. 273.

measures (including undertakings under financial distress).³⁴ Furthermore, air transport undertakings in the process of applying for this kind of State aid must submit proof of the existence and extent of damage and the causal link between the restrictions related to the pandemic and the damage, while the Member States must ensure that the granted aid does not exceed the real amount of damage.³⁵

The second legal basis for State aid in the air sector during the pandemic is Article 107(3)(c) of the TFEU. This aid can be granted to air undertakings 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.³⁶

The third legal basis for State aid in the air sector during the pandemic is Article 107(3)(b) of the TFEU. This aid can be granted to air undertakings to remedy a serious disturbance in the economy of the Member State.³⁷ The Temporary Framework for State aid to support EU economic in the COVID-10 outbreak was adopted under the same legal basis. Nevertheless, the Commission emphasized that the Member States can issue State aid on the basis of the Temporary framework, but if it happens that they do not meet the requirements, they can grant state aid by reference to the direct application of Article 107(3)(b) of the TFEU.³⁸

Furthermore, it should be emphasized that the Member States were entitled to approve various types of support measures to each undertaking in line with EU State aid rules and Temporary Framework. The Commission also set up the maximum amount of State aid that can be allocated to one undertaking.³⁹

3.2.1 The Temporary Framework

The EU Commission adopted the Temporary Framework in March 2020.⁴⁰ It is a first, timely, and systematic response from the Commission on the application of State aid rules during pandemic. The intention of the Temporary Framework is to loosen the EU State aid regime during pandemic,⁴¹ and to enable Member States to

³⁴ For more details that should be provided for notifications of aid under Article 107(2)(b) TFEU see: https://ec.europa.eu/competition/state_aid/what_is_new/Notification_template_107_2_b_PUBLICATION.pdf The list of approved State aid is updated on a daily basis which allows the member states to follow all the developments in the policy of State aid approvals by the Commission. See also: https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html (5.5.21).

³⁵ For more how to calculate State aid see: Ahlqvist, V., et al., *op. cit.*, pp. 150-160.

³⁶ *Ibid.*

³⁷ *Ibid.*, p. 157; Maczkovics, C., *op. cit.*, p. 274.

³⁸ For more about the Temporary Framework see: Buendia, J., L.; Dovalo, *op. cit.*, p. 4.

³⁹ For more about calculation and cumulation of the State aid see: Ahlqvist, V., et al., *op. cit.*, p. 151; Staviczyk, P., *Cumulation of state aid*, European State Aid Law Quarterly (ESTAL), Vol. 1, 2015, p. 119.

⁴⁰ See section 2 subparagraph 18. Temporary Framework, *op. cit.*, p. 12; Linke, B., *Germany: COVID-19: Germany's COVID-19 Measures and State Aid Control*, European State Aid Law Quarterly, No. 1 (2020), p. 87; Buendia, J., L.; Dovalo, A., *op. cit.*, p. 7.

⁴¹ On this, see more at: https://ec.europa.eu/fisheries/cfp/state_aid_en, <https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance>. Additional information on

act promptly and to respond adequately to economic shock caused by COVID-19 outbreak.⁴²

The legal basis for the adoption of the Temporary framework as already has been mentioned is Article 1073(b) of the TFEU, which provides that the State aid will be granted for *removal of serious disorders in the economy of a member state* due to the Covid-19 outbreak.⁴³ This specifically means that the aid based on the Temporary Framework for air undertakings can only be granted to remedy liquidation shortage or solvency issues.⁴⁴ In other words, air transport undertakings that were in financial distress prior to the outbreak of the Covid-19 crisis, i.e. those that fell under the scope of the GBER on 31 December 2019, would not be eligible for State aid under the Temporary framework.⁴⁵

The Temporary Framework is divided into five parts. It applies to the State aid scheme in any sector.⁴⁶ Although the text of the Temporary framework does not explicitly state that these measures also apply to air transport, it is clear that they are applicable since air transport was reduced almost exclusively to occasional transport of passengers and goods and humanitarian flights almost overnight due to the limited movement of passengers and goods between member states.⁴⁷

It is worth noting that the Temporary framework is a soft law (non-binding) legal instrument.⁴⁸ Member States are not obliged to apply it. However, it is a document with great practical importance for the Member States. It provides useful guidance on how Commission applies Article 107(3) (b) of the TFEU when faced with the Member States request to approve State aid measure.⁴⁹

The first version of Temporary Framework was applicable to all the notifiable State aid in the period from 31 March 2020 until 31 December 2021.⁵⁰ From its adoption, the Temporary Framework was amended and prolonged five times.⁵¹ The new prolongations are aimed at ensuring continuity of financial support

the approved State aid is also available at: <https://ec.europa.eu/competition/elojade/iseff/>. Also see on the State aid control: https://ec.europa.eu/competition/state_aid/overview/index_en.html.

⁴² The framework was adopted on 19.3.2020. The text is available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0320\(03\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0320(03)).

⁴³ See Article 107(3)(b) TFEU; Maczkovics, C., *op. cit.*, pp. 271-272.

⁴⁴ Maczkovics, C., *op. cit.*, p. 275; Buendia, J., L.; Dovalo, A., *op. cit.*, p. 3.

⁴⁵ *Ibid.* Maczkovics, C.

⁴⁶ *Ibid.*, p. 271-272.

⁴⁷ *Overview, op. cit.*, p. 16.

⁴⁸ Buendia, J., L.; Dovalo, A., *op. cit.*, p. 4.

⁴⁹ See section 3.2.; Buendia, J., L.; Dovalo, A., *op. cit.*, p. 4.

⁵⁰ *Ibid.*

⁵¹ All changes available at: 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 Text with EEA relevance, OJ L 187, 26.6.2014, pp. 1-78; Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of Treaty of Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, pp. 1-8; Communication from the Commission Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 112 I/01, C/2020/2215, OJ C 112I, 4.4.2020, pp. 1-9; Communication from the Commission Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 164/03,

to those undertakings who need it as well as those businesses affected by the crisis are not cut off from the necessary support. They also demonstrate the Commission's willingness to apply State aid rules during pandemic in pragmatic and flexible way. Namely, the Commission was issuing authorized decisions on State aid within 24 to 48 hours. In addition, the Commission provided information and guidance to interested parties.⁵²

Under the current consolidated version of the Temporary Framework State aid can be granted in the form of: *direct grants, repayable advances or tax advantages (i)*,⁵³ *public guarantees on loans (ii)*,⁵⁴ *loans on subsidized interest rates (iii)*,⁵⁵ *guarantees and loans channelled through credit institutions or other financial institutions (iv)*⁵⁶ and *short-term export credit insurance (v)*.⁵⁷

Under the Temporary Framework, the maximum amount of support to one undertaking is limited to total amount of 1,800,000 EUR⁵⁸, including de Minimis aid⁵⁹ and any other type of aid.⁶⁰

4. National overview of the approved notifiable State aid in the air sector during Covid-19 crisis

Since the beginning of the pandemic, almost all Member States have approved State aid to national airline companies under the set of relaxed rules of *State Aid exempted from notification and notifiable aid*.⁶¹ Considering the fact that notifiable State aid is particularly problematic from the perspective of market competition, the following sections analyse such State aid given by the Member States to national airline companies during the pandemic.

C/2020/3156, OJ C 164, 13.5.2020, pp. 3-15; Communication from the Commission Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 218/03, C/2020/4509, OJ C 218, 2.7.2020, pp. 3-8; Communication from the Commission 4th Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance 2020/C 340 I/01, C/2020/7127, OJ C 340I, 13.10.2020, pp. 1-10; Communication from the Commission Fifth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance 2021/C 34/06, C/2021/564, OJ C 34, 1.2.2021, pp. 6-15.

⁵² Maczkovics, C., *op. cit.*, p. 272.

⁵³ See chapter 3.1. of the Temporary framework, *op. cit.*; Buendia, J., L.; Dovalo, A., *op. cit.*, p. 4.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ See section 3.1. of the Temporary framework, *op. cit.* Also see: *Overview, op. cit.*, p. 16.

⁵⁹ *Overview, op. cit.*, p. 16

⁶⁰ *Ibid.*

⁶¹ This State aid in the air sector was granted on the basis of the direct application of Article 107(2)b, Article 107(3)b TFEU, Article 107(3)c TFEU and State Aid granted under the Temporary Framework.

4.1 State aid approved under Article 107 2(b) of the TFEU

According to the available official data from the Commission, since the beginning of the pandemic, most of the State aid approved by the Commission to the air sector was granted under the Article 107(2)(b) TFEU.⁶²

Out of the totally 18 authorised State aid, 15 were aimed at compensating damages caused by the coronavirus outbreak. Portugal approved State aid for liquidity support in one instance, while France granted recapitalisation aid and the deferral of certain taxes for the air undertakings, to mitigate the economic impact of coronavirus outbreak. Most beneficiaries of this type of aid were air undertakings providing air services (such as airlines) while air undertakings with air infrastructure were not as represented.⁶³

4.2 State aid approved under Article 107 3(b) and Article 107 3(c) of the TFEU

There was no State Aid that was approved to air transport sector under Article 107(3)b TFEU 2021. There is only one State Aid adopted under Article 107(3)c TFEU in 2020 in the amount of €133 million in Portugal in order to liquidity support to SATA airline and opens investigation into other public support measures.⁶⁴

4.3 State aid approved under the Temporary framework

The Commission approved 23 notifiable State aid under the Temporary Framework. 13 State aid were given to airports for liquidity; 1 for deferring payment by airports of concession fees to mitigate economic impact of coronavirus outbreak (Belgium); 3 for long term loans (Cyprus, Finland, Sweden); 2 for recapitalisation (France, Latvia); 1 for urgent liquidity support (France), 1 for airlines starting or resuming operations at airport following the coronavirus outbreak (Romania) and 2 for loan guarantee (Romania, Sweden).⁶⁵

⁶² Such as German, France, Italy, Portugal, Finland, Ireland, List of approved State aids available at: https://ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework_hr/20.5.21.

⁶³ The amounts of granted State aid in the air sector during pandemic under Article 107 2(b), per Member State: 12 million and €255.5 million in Portugal; €350 million in Finland; €137 million in Sweden; €26 million in Ireland; €120 million Greece; €29.8 million Slovakia ;€130 million Italy; €106.7 million and €30.2 in France and one to deferring payment; €20 million UK and Scotland;€11.7 million Croatia;€4.4 million and €1 million in Romania; €32 million Poland;€150 million Austria; €550 million German.

⁶⁴ European Commission, *Factsheet - List of Member State Measures approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework* [https://ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework_hr] Accessed on 20 May 2021.

⁶⁵ The amounts of granted State aid in the air sector during pandemic under the Temporary Framework, per Member State: €2.2 million and €290 million and one to deferring payment in Belgium, €4.4 million in Bulgaria; €22.2 million and €6.3 million in Cyprus; €1.36 billion in Germany;€6 million

In most cases, State aid was given as a direct support to airports and not the air carriers.⁶⁶

4.4 National State aid tracker: example of France, Austria, Sweden, Portugal and Croatia

France

France is an example of the EU country that approved most State aids to air transport companies. It approved State aid to the air sector in five instances, based on several legal bases and in different forms.⁶⁷

Under Article 107(2)b TFEU France granted €106.7 million of restructuring aid to Air France and €30.2 of compensation for damages suffered due to the coronavirus outbreak in favour of the French airline Corsair. France also granted State aid in the form of tax deferrals for airlines to mitigate economic impact of the coronavirus outbreak.

Under the Temporary Framework, France granted €4 billion to recapitalise Air France and €7 billion in urgent liquidity support to the same airline. France is the only Member State that has used State aid during the pandemic for restructuring of the national flag carrier and such a policy should be commended, although it is apparent that the beneficiaries of the French pandemic State aid in the air sector were mostly national flag carriers and the national airport.

Austria

Austria is another EU country that strongly supported national airline companies during the pandemic. Namely, as a smaller but developed State, Austria approved 150 million EUROS under the Article 107(2)(b) TFEU as a loan to the Austrian flag airline Austrian Airlines AG in order to partly compensate the damages suffered by the company during the pandemic because of the travel restrictions.⁶⁸

Sweden

The Swedish government, similarly, to previously mentioned France and Austria also supported the SAS airline (a flag carrier) with a public guarantee of up to €137 million for the damage caused by the coronavirus outbreak under Article 107 (2)b of the TFEU.

and €24 million in Denmark, €286 million and €600 million in Finland; €4 billion and €7 billion in France; €26 million in Ireland; €39.7 million and €250 million in Latvia; €1.7 million and €62 million and €1 million in Romania; €16.3 Million and €5 million and €455 million in Sweden; €5 million in Slovenia.

⁶⁶ List of approved State aids available at: European Commission, *Factsheet - List of Member State Measures approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework* [https://ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework_hr] Accessed on 20 May 2021.

⁶⁷ *Ibid.*

⁶⁸ European Commission, *Factsheet - List of Member State Measures approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework* [https://ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework_hr] Accessed on 20 May 2021.

However, under the temporary framework, Sweden approved a €455 million Swedish guarantee scheme to support airlines affected by the coronavirus outbreak, followed by €16.3 Million Swedish subsidised loan scheme to support affected air traffic control services and a €5 million Swedish scheme to support companies active in air ambulance services in context of the coronavirus outbreak.⁶⁹

Sweden is an example of a State that supported Swedish private airline companies along with its national carriers and airports. However, it is not clear whether State aid was approved in a same amount to public and private airline companies and what long-term effects it may have on the competition on the Swedish air services and infrastructure market.

Portugal

In June 2020 the Commission approved 1.2 billion EUROS as a rescue loan to a major Portuguese network airline operating in Portugal. This undertaking was not eligible to receive State aid under the Temporary framework since it was facing financial difficulties before the COVID19 outbreak. This measure was therefore assessed and authorised under the Rescue Aid and Restructuring Guidelines⁷⁰.

Germany

In Germany, a German government established a relatively complex support scheme to support the German airline industry⁷¹. A rescue package for Lufthansa, a national flag carrier, included issuance of convertible debt as well as a straight capital increase⁷². Moreover, the Commission also approved 18.2 million EUROS to German Saarbrücken airport.⁷³

Croatia

Croatia is an example of a small and less developed EU Member State that also granted State aid to Croatia airlines, a flag carrier airline company.⁷⁴ Namely, the Commission approved the State aid for the Croatia Airlines in the amount of 11,7

⁶⁹ The data was collected and reproduced from the reports available at: European Commission, *Factsheet - List of Member State Measures approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework* [https://ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework_hr] Accessed on 20 May 2021.

⁷⁰ The impact of COVID-19: Navigating EU State aid, Competition Law Update, 22 October 2020, (<https://www.ashurst.com/en/news-and-insights/legal-updates/the-impact-of-covid-19-navigating-eu-state-aid/>) Accessed on 8 October 2020.

⁷¹ State Support to the Air Transport Sector: Monitoring developments related to Covid 19 crisis, OECD, 22 April 2021, p. 18. (<https://www.oecd.org/corporate/State-Support-to-the-Air-Transport-Sector-Monitoring-Developments-Related-to-the-COVID-19-Crisis.pdf>) Accessed on October 8 2021.

⁷² *Ibidem*, p. 21.

⁷³ The impact of COVID-19: Navigating EU State aid, Competition Law Update, *op. cit.*

⁷⁴ The EU has approved a series of aid programs to support the economy of the Republic of Croatia. For more details in that sense see: European Commission, *Croatia* [https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/jobs-and-economy-during-coronavirus-pandemic/state-aid-cases/croatia_en] Accessed on 5 May 2021.

million Euros as a compensation for the losses suffered by the company due to the COVID-19 pandemic under Article 107 2(b) TFEU. This State aid was in the form of non-refundable funds. Since the State aid is paid from the state budget of the Republic of Croatia, the government had to rebalance the budget to compensate the losses arising directly out of the pandemic and the travel restrictions caused by the COVID- 19. It is worth mentioning that the only beneficiary of the State aid in Croatia was a national flag carrier while other undertakings that provide air services in Croatia did not receive any aid.

5. Conclusion

The real extent to which Member States and governments throughout the world have supported their national air transport sector is notoriously difficult to quantify⁷⁵. However, even this short and superficial research has showed that national State aid measures to air transport companies vary in scope and time and were subject to different legal regime.

Conducted research showed that approved State aid in selected EU Member States were mostly granted under Article 107 2(b) of the TFEU and the Temporary framework. The State aid was in most cases granted as a compensation for damages caused by restrictions in relation to air transport.

The analysis also showed that larger and wealthier EU Member States provided stronger financial support to national flag carriers than newer and poorer EU Member States.

It is also evident that the beneficiaries of State aid in the air sector were in most cases flag carriers and flag airports. Low-cost carriers were discriminated and deprived from the possibility to participate in State aid scheme. Therefore, they suffered greater losses than flag carriers did. This has led to a dozen lawsuits against the European Commission and national airlines undertakings. Namely, Ryanair has filed 16 lawsuits against the Commission for approving state aid to national airlines such as Lufthansa, Austrian Airlines and Portugal's TAP. Although the European Court of Justice in February 2021 ruled that State aid granted by the French and Swedish governments – and approved by the European Commission – were in line with the sectoral rules and did not constitute discrimination, Ryanair is not giving up and it announced that is going to appeal to the European Court of Justice.

We are also witnessing the first victims of COVID-19 pandemic in air transport sector. Namely, UK airline company Flybe declared bankruptcy and according to IATA estimations, more airlines are expected to go bankrupt in the near future⁷⁶.

⁷⁵ State Support to the Airt Transport Sector: Monitoring developments related to Covid 19 crisis, OECD, 22 April 2021, p. 15 (<https://www.oecd.org/corporate/State-Support-to-the-Air-Transport-Sector-Monitoring-Developments-Related-to-the-COVID-19-Crisis.pdf>) Accessed on October 8 2021.

⁷⁶ See: Economic Performance of the Airline Industry, IATA; (<https://www.iata.org/en/iata-repository/publications/economic-reports/airline-industry-economic-performance---november-2020---report/>) Accessed on 11 October 2021.

Conducted research also showed that the most State aid related to short-term, “fire extinguishing” measures. In only few cases State aid has been given for recapitalization that was announced by the Commission as the most desirable long-term form of State aid in the air sector. It is also worth mentioning that none of the granted measures was aimed as an investment into green transition and similar renewable energy sources. It is obvious that the proclamations of the Commission that Member States should foster restructuring and *investments in the green (so-called carbon free) transition*, and that the green transition should be pursued through the grant of State aid remained dead letters on the page.

For the end, it can be concluded that the COVID 19 outbreak had undeniable negative effects on the air sector and its sustainability, which created an increased need for State aid in this sector perhaps more than ever before in the history of the EU. Although the state interventions were unquestionably necessary, there is a question of whether and to what extent it was granted without discrimination. It is also questionable whether the COVID 19 crisis was used as an excuse to treat State undertakings more favorably. Therefore, it remains to be seen whether allocated State aid will in long-term remedy or cause a disturbance in air transport sector in Europe.

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