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**State aid law as applied to the airline industry:  
pandemic crisis and long-term perspectives**

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## Executive Summary of the Dissertation

This dissertation investigates **EU State aid law applicable to the airline industry** so as to ascertain its effectiveness in dealing with market shocks and environmental challenges. By looking at the case-law and Commission's practice on **State aid awarded to the aviation sector during the pandemic**, the research inquires whether the EU State aid policy needs to be adjusted in order to **minimize distortions** within the EU internal market and to ensure that public spending is consistent with the **long-term environmental objectives** of the European Union.

First, the relevant international and EU legal framework is assessed (**Part I**) and then a database of decisions and rulings on pandemic-related aid to the airline industry is displayed (**Part II**). The lessons learned from this study are then further elaborated as to explore future trends in EU State aid law enforcement and litigation (**Conclusions**).

**Part I** initially outlines the international legal framework pertaining the economic regulation of civil aviation, and highlights how it has been **influenced by the principle of State sovereignty** over airspace.

- The 1944 Chicago Convention establishes a general principle of *non-discrimination* among contracting States rather than *fair competition* among carriers, leaving the regulation of airline competition up to bilateral Air Service Agreements (ASAs) between States, while WTO rules are not applicable to air services (**I, § 1**).

Tracing back the origins of the **single aviation market (I, § 2)**, it is worth noting that:

- At the dawn of European integration, air transport was subject to a peculiar legal regime, distinct from the general Common Transport Policy. Landmark rulings by the **Court of Justice progressively extended the application of the Treaties to air transport**, specifically competition and State aid rules (**I, § 2.1**). This case-law, coupled with the amendments introduced by the 1986 European Single Act, **set the legal precedent for liberalization (I, § 2.2)**, while the success of US deregulation provided an economic rationale.
- Setting the pre-pandemic scenario, both the 1987-1992 **liberalization** of air services within the EU (**I, § 2.3**) and the establishment of an **EU external aviation policy** are examined, with a special focus on the ECJ's and the Commission's contributions (**I, § 2.4**).
- The extension of the EU fundamental freedoms as well as the enforcement of competition rules reshaped European civil aviation allowing also the emergence of **Low-Cost Carriers (LCCs)** and the restructuring of flag carriers, several of which merged into **'Pan-European' airline groups (I, § 2.5)**.

As air transport became increasingly efficient and affordable, **passenger traffic grew at an exponential rate**: 4,46 billion passengers were carried worldwide in 2019, almost five times more than those carried in 1989. The fact that this number is

expected to exceed 10 billion by 2050, however, **puts the market structure and the environmental sustainability of the industry into question (I, § 3).**

- From an environmental perspective, civil aviation is a ‘hard to abate’ industry, as no zero-carbon technology seems ready-to-market in the near future. The aviation industry currently produces around 2.5% of global GHGs emission.
- Without regulatory intervention, the constant market growth would lead **aviation-related GHGs emissions by 2050 to be at least be three times higher than those recorded in 2015.**
- The steep decline in passenger traffic in the year 2020 due to the pandemic, and the sudden collapse of the (apparently) stable market models we were used to, highlighted the need to rebuild the industry on more sustainable eco-friendly grounds (I, § 3.1).
- So far, international efforts to curb aviation-related GHGs emissions resulted in the adoption of the Carbon Offsetting and Reduction Scheme for International Aviation (**CORSIA**) (I, § 3.2).
- Yet, CORSIA as well as the recent ICAO’s long-term aspirational goal are **not sufficient, because they mainly focus on offsetting or stabilizing emissions (I, 3.3)**; priority, instead, should be given to a net reduction, as the extension of **EU Emission Trading Scheme** to civil aviation aims to achieve on a regional scale (I, § 3.2).

As huge investments are required, public spending might well overcome market failures in the roll-out of new technologies, whereas a business-as-usual approach to subsidies might reinforce a carbon lock-in effect. It is thus in this perspective that this research is rooted. **EU State aid law, seen both as a limit and as a tool to allow a possible future turnaround of the airline industry**, is examined in its substantive as well as procedural dimensions (I, § 4.1).

- The notion of State aid traces back on established jurisprudence, which is therefore assessed in every component (I, § 4.2.1-4.2.5). Among them, the considerations on **selectivity (I, § 4.2.3)** and **distortion to competition (I, § 4.2.4)** provide an indispensable background for the appraisal of pandemic-related aid.
- While State aid allocation is prohibited as a general rule (Article 107(1) TFEU), certain categories of aid are compatible with the internal market *de jure* or exceptionally allowed after the Commission’s discretionary assessment (Articles 107(2)-(3) TFEU) (I, § 4.3.1).

This dissertation hence focuses on the **exemptions applicable in case of market shocks**, identifying precedents in CJEU’s case-law and Commission’s practice. Regarding «**aid to make good the damage caused by natural disasters or exceptional occurrences**» (Article 107(2)(b) TFEU):

- There is an established practice on damage compensation aid both in the agricultural and the aviation sectors (I, § 4.3.2).
- Airlines benefited from damage compensation aid after the **9/11 terrorist attacks** and after the **Icelandic volcano Eyjafjallajökull’s eruption** in 2010. In both cases, however, aid was given only to airlines holding a **license**

issued by the relevant Member State, thus contradicting the initial call for measures equally applicable to all EU carriers (I, § 4.3.3).

**Discretionary exemptions** proved crucial in shifting State aid regime from a *rigid* prohibition mechanism to a *dynamic* tool of EU policy (I, § 4.3.4), as shown by the relevant categories examined:

- **Aid remedying to «a serious disturbance of the economy of a Member State»** (Article 107(3)(b) TFEU). The first examples date back to the oil crisis in the mid-1970s and to the Greek industrial crisis in late 1980s. The **2008 financial crisis** saw a change in the Commission’s practice with the first adoption of **temporary frameworks**, an approach that was then **replicated** in the aftermath of the pandemic and the Ukraine war (I, 4.3.5).
- **Aid supporting «the development of certain economic activities»** (Article 107(3)(c) TFEU). As the scope of this category is broad, the research focused on: i) **sectorial aid to aviation**, in which references to high-speed train substitutability might have wider implications for intramodality and sustainability (I, 4.3.6); ii) **rescuing and restructuring aid**, for the need to adjust the ‘one-time, last-time’ principle and the notion of ‘undertaking in difficulty’ to external market shocks (I, 4.3.7); iii) **environmental aid** (I, 4.3.8).
- As State aid can be **exempted only if compatible with EU law as a whole** – thus including EU environmental law – it seems possible to argue that **even a measure which is not ‘labelled’ as environmental should be assessed for its sustainability too**. This reasoning is coherent with the principle of integration and the ‘polluter-pays’ principle and can rely, as an analogy, on the ‘Do Not Significant Harm’ criteria set out in EU Taxonomy and RRF regulations; yet, such an approach has not been endorsed by the CJEU (I, 4.3.8).

State aid law pertaining to the aviation industry is then appraised in its external dimension, namely the issue of **foreign subsidies to non-EU airlines** that compete with EU carriers in connecting Europe with the rest of the world.

- As introducing (and enforcing) fair competition clauses in ASAs has proved extremely complex, the EU relies on an *ad hoc* **trade defence instrument** and the recent FSR regime (applicable to foreign investments in EU carriers).
- Those regimes have never been applied to the sector so far, thus their main outcome was to provide the Commission a **deterrence tool** in external aviation relations (I, § 4.4).

**Part II** assesses the Commission’s practice and CJEU case-law concerning State aid given to airlines during the pandemic.

- Relying on economic data, the research illustrates why **this crisis is not comparable to previous ones** (cf. **Figures 1-2**), either caused by epidemics (SARS, avian flu and H1N1 swine influenza) or other external factors (oil crisis in the mid-1970s, the Gulf war in the 1990s and, more recently, the Russian aggression to Ukraine) (II, § 1 and **Figure 3**).
- Compared to 2019 records, the pandemic globally reduced passenger traffic on a scale ranging from – 60% (2020) to – 29% (2022), with **an overall USD**

**871 billion loss of carriers' gross operating revenues** (2020-2022 time frame).

- Some 900 COVID-related measures were approved by the Commission in years 2020-2022, and **more than 100 addressed the aviation sector**. The dissertation focuses on airlines, as they received the largest share of public money (**Figure 4**), even if also aid to other segments of the industry (e.g., airports) is analysed.

The database collecting Commission's decisions reveals **a widespread financial support to the aviation industry by EU Member States**.

- France and Germany make up around 60% of the total amount of aid given out, followed by the Netherlands (9%), Portugal, Finland, Italy, Sweden, Denmark and Spain (ranging from 3-5% respectively) (**II, § 2, Figure 5**).
- These figures generally reflect **each country's gross value-added contribution by aviation to the GDP**; nevertheless, remarkable exceptions represented by States providing much less (Ireland, Spain, Greece) or much more money (Finland, Latvia) are identified and discussed (**II, § 2, Table 1**).

The relevant Commission's decisions are then **examined according to their legal basis**.

- Damage compensation aid (Article 107(2)(b) TFEU) was given in more than **half of cases in form of a direct grant** (21 out of 42 measures, followed by loans and guarantees, capital injections and equity instruments and tax allowances). Most of the decisions required holding a national operating license as an eligibility criterion, except for 'all airlines' schemes, as further discussed (**II, § 3.1**).
- Relevant aid approved under Article 107(3)(b) TFEU is examined after an overview of the aid instruments listed in the Temporary Framework (TF), showing that: *i*) albeit the *extrema ratio* nature, **most of the measures consist in recapitalizations** (14), followed by liquidity injections (12) and subsidized interest rates for loans (7); *ii*) frequently, **more than one instrument has been combined** in a single decision (**II, § 3.2, Table 2**).
- The practice on airlines that were already in **financial difficulties before the outbreak of the pandemic** (Article 107(3)(c) TFEU) reflects some issues in the application of the Rescue and Restructuring aid guidelines in the pandemic context, as well as the assessment of the recipient's corporate structure; examples of support to airlines subject to public service obligations have been illustrated too (see, e.g., SATA cases) (**II, § 3.3**).

An in-dept appraisal of the relevant jurisprudence (so-called **Ryanair cases**) (**II, § 4**) pointed out the following elements:

- **Definition of fair eligibility criteria in aid schemes:** Following an overview of schemes available to airlines holding an EU operating licence issued by the Member State concerned (**II, Table 3**), the cases concerning the Swedish and French schemes are examined (**II, § 4.1.1-4.1.2**), and a critical appraisal is made to the General Court's and CJEU's stand on **selectivity**

**and non-discrimination** (II, § 4.2.1 cf. II, § 4.1.3) as well as on weighing up positive and negative effects of the aid (also in light of AG Pitruzzella's opinion on the cases: II, § 4.2.2). The comparison with schemes available to all airlines connecting a given Member State reveals that **less distortive alternatives were, indeed, available** (II, § 4.2.3 and Table 4).

- **Relevance of EU law as a whole in the Commission's compatibility assessment:** The General Court's reasoning on the Italian scheme case stresses the need for a holistic approach to State aid control, requiring the Commission to assess **compliance with other areas of EU legislation such as labour law**. In order to carry out such an evaluation, the Commission has to consider the case context and the case-law cited by the complainant, an aspect which shows the importance of involving interested parties in State aid procedures (II, § 4.2.3).
- **Individual aid as combined with other aid measures:** In the *SAS (damage compensation)* cases (II, § 4.3.1, as compared to the *Spanish scheme* and *Brussels airlines* cases, II, § 4.3.2), the CJEU upholds that the same firm can receive pandemic aid **both from a scheme and from an individual measure**. According to the Court, damage compensation can be awarded also as individual aid; otherwise, limiting application of Article 107(2)(b) TFEU to aid schemes **may deter a Member State from using this instrument at all**, due to its budgetary constraints. This reasoning, however, is **contradicted by empirical evidence on the 'all airlines' schemes**, generally adopted by Member States with relatively small economies and instead of larger individual measures (II, § 4.3.3). A comparison with *Finnair I* and other cases suggests that **Member State's air connectivity influenced the Commission's appraisal**, although the Court rejected such an objective justification as redundant (II, § 4.3.4).
- **Groups receiving aid from more than one Member State:** The *KLM I-II* and *Air France* rulings reaffirm that identifying the recipient of aid is crucial when assessing the aid compatibility, especially when groups incorporating former flag carriers receive aid from several Member States (II, § 4.4.1 and 4.4.3). In order to avoid transfer of public money within the group and possible aid cumulation, **it seems preferable to set a ceiling on the funds that the group can receive**, regardless of the Member State granting the aid; a good example of this solution is provided by the *Austrian Airlines* and *SAS* cases, where **Member States' co-ordination** in designing the measure seemed more in line with the principle of sincere cooperation (II, § 4.4.5).
- **Aid to airlines already in difficulty before the outbreak of the pandemic:** Albeit annulled for a failure in stating reasons on the group corporate structure, the *TAP* case illustrates the issue of an airline already struggling before the outbreak of the pandemic (II, § 4.4.2). A comparison with the annulment of the *Condor* decision and the upholding of measures given to Alitalia, TAROM and Blue air shows that **intensity and timing of the aid** cannot be overlooked (II, § 4.4.2 and Tables 8-10).
- **Aid to airlines with a significant market power:** The *Deutsche Lufthansa* case (II, § 4.5.1) clarifies several features of the aid granted under the TF, stressing **the last resort nature of public capital injections** and the need to

limit their intensity as much as possible (II, § 4.5.2). The assessment of significant market power (SMP) and its related structural commitments suggests, once again, **the importance of the relevant market definition in State aid law** (II, § 4.5.3-4.5.4). Then, a comparison with other public capital injection decisions indicates that **interpreting SMP as a synonym of dominant position** might unduly circumscribe the number of cases in which commitments are required (II, § 4.5.5).

- **Aid subject to environmental commitments:** In its pandemic practice, the Commission **merely referred** to EU green and digital transition objectives when describing the monitoring phase, without specifying how this appraisal should be carried out. Only the *KLM* decision provides for clear and measurable targets concerning the airline's carbon footprint, while Austria and France imposed a **reduction of short-haul flights** on the beneficiaries. In this regard, the Commission's decision on the French ban on routes covered by high-speed train in less than 2.5 hours proves that **such regulatory measures must be designed in a non-discriminatory way** (II, § 5).

In the **Conclusions**, the following remarks on the EU airline sector are made:

- The pandemic brought **back to open light the political and economic ties between Member States and their former flag carriers**, as reflected by the design and allocation of aid;
- Allocation of aid among Member States suggests **an increased market fragmentation within the EU internal aviation market**; only closer coordination between Member States on aid allocation may reduce the risks of distortions; this obligation stems from the duty of sincere cooperation;
- The Commission's practice on pandemic-related aid to aviation shows a mere reference to EU green and digital transition objectives, while **only a few aid measures had been conditioned to more detailed 'green obligations'** (II, § 6; **Conclusions**, § 1).

The case study of pandemic-related aid to aviation has major **implications for State aid law as a whole**:

- **Entitling competitors to challenge decisions approving State aid** favours a more effective judicial review on the Commission's appraisal and may foster the **private enforcement of State aid law**;
- the Commission's **duty to state reasons cannot be watered down by the contingencies of a market shock**; in this case, the Commission cannot merely refer to its previous guidance, but must carry out a thorough factual analysis of the case;
- if market access is harmonized at EU level and firms compete on a transnational basis (as occurs in the internal aviation market), then aid **eligibility criteria based on nationality seem hardly be necessary and proportionate to the objective** (**Conclusions**, § 1).

Finally, it is possible to set out the following **proposals**:

- in order to ensure that public spending goes in the same direction with the EU environmental goals, the Commission might introduce, *ex ante*, an

assessment under the **Do Not Significant Harm (DNSH) criteria** and, *ex post*, more detailed obligations in **monitoring phase** and promote **aid transparency**;

- the Commission could define – *ex ante* and on a sectorial basis – the scope of the exemptions applicable during a crisis; these **‘on demand’ temporary frameworks should provide for non-discriminatory eligibility criteria and facilitate Member States’ coordination** in case of multiple awards of aid to trans-European groups;
- as an alternative, the Commission could **establish a series of general principles applicable ‘horizontally’ in the face of a market shock**, setting a strict hierarchy among different forms of aid and encouraging combination between public and private investment; such a policy document might also introduce a sort of ‘State aid Taxonomy’ by **classifying the compatibility of each measure’s model with the DNSH criteria**;
- *de jure condendo*, the Commission should be entitled to **design uniform aid schemes for the whole internal market** and allocate resources consequently. Hence, such a development would require a shift in public economic intervention within the EU, **progressively replacing State aid with EU funding**. Such a trend finds seminal examples in the Next Generation EU package and in the Green Deal Industrial Plan (**Conclusions, § 2-3**).

## List of abbreviations

ASA	Air Service Agreement
ASEAN	Association of Southeast Asian Nations
CC	Chicago Convention 1944
CG	EU General Court
CJEU	Court of Justice of the European Union
CORSIA	Carbon Offsetting and Reduction Scheme for International Aviation
CTP	Common Transport Policy
DNSH	Do Not Significant Harm
EASA	European Union Aviation Safety Agency
EC	European Community
EBIT	Earnings Before Interest and Taxes
ECAA	European Common Aviation Area
EEA	European Economic Area
EEC	European Economic Community
EU	European Union
EU-ETS	European Union's Emission Trading Scheme
FSC	Full-Service Carrier
FSR	Foreign Subsidies Regulation
GATS	General Agreement on Trade in Services
IASTA	International Air Services Transit Agreement
ICAO	International Civil Aviation Organization
IPCEI	Important Project of Common European Interest
KP	Kyoto Protocol
LCC	Low-Cost Carrier
LTAG	Long Term Aspirational Goal
MEO	Market Economy Operator
OECD	Organization for Economic Co-operation and Development
PCA	Paris Climate Agreement
PSO	Public Service Obligation
RPK	Revenue-Passenger Kilometre
RRF	Recovery and Resilience Facility
SGEI	Services of General Economic Interest
SMP	Significant Market Power
TEU	Treaty on the European Union
TF	Temporary Framework
TFEU	Treaty on the Functioning of the European Union
UNFCCC	United Nations Framework Convention on Climate Change
WTO	World Trade Organization

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## Introduction

The COVID-19 pandemic<sup>1</sup> had serious repercussions on air transport: carriers have been facing a crisis that cannot be compared to those, albeit significant, of past decades. In the most serious phases of the emergency, the disruption to air connectivity due to travel restrictions left millions of passengers on ground and caused also severe problems to the weaker category of persons travelling by air, preventing many of them to enjoy even their fundamental rights<sup>2</sup>.

During the pandemic, the collapse in passenger demand resulted in a full-blown sector crisis. European Union (EU) Member States, as well as other jurisdictions, such as the United States of America, the Gulf States and China, chose to subsidize carriers in order to ensure their financial survival.

As a general rule, State aid is prohibited within the EU (Article 107(1) TFEU), so any financial support to airlines must comply with limited exemptions, applicable *de jure* (Article 107(2) TFEU) or after the Commission's discretionary assessment (Article 107(3) TFEU).

Should an external shock break out such as a pandemic, aid can be awarded as compensation for damage caused by «exceptional occurrences» (Article 107(2)(b) TFEU), as a remedy to «a serious disturbance of the economy of a Member State» (Article 107(3)(b) TFEU) or as a measure that supports «the development of certain economic activities» (Article 107(3)(c) TFEU). The European Commission provided further guidance pertaining to these provisions in its *Temporary Framework for State Aid Measures to Support the Economy in the Current Emergency of COVID-19* (hereinafter: «Temporary Framework» or «TF»)<sup>3</sup>, which has been amended several times and is applicable to various sectors of the economy, including air transport.

Between 2020 and 2022, the European Commission approved 94 aid measures to airline industry<sup>4</sup>. In most cases, the beneficiaries were carriers with a

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<sup>1</sup> As well known, severe acute respiratory syndrome by coronavirus 2 (SARS-CoV-2) is the pathogen responsible for the new coronavirus disease of 2019 (COVID-19): World Health Organization (WHO), *Naming the Coronavirus Disease (COVID-19) and The Virus That Causes It*, Technical guidance, 11.2.2020, [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it).

<sup>2</sup> Air travel disruption, for example, impacted on seafarers: after some months of quarantine spent onboard vessels, hundreds of thousands of them were forced to stay on their vessels much beyond the term of their working periods due to the impossibility to repatriate and to being replaced by their colleagues. On the legal implications deriving from this issue, see: F. MUNARI, *To What Extent Do the Contemporary International Law of the Sea, International Maritime Law, and International Labor Law Address Public Health Threats such as Pandemics?*, in *Ocean Yearbook*, vol. 35, 2021, p. 388-422.

<sup>3</sup> Commission, Communication of 19 March 2020, 2020/C 91 I/01, amended last on 28 October 2022, OJ C 423, 7.11.2022, p. 9. Consolidated text is available at the following address [https://competition-policy.ec.europa.eu/state-aid/coronavirus/temporary-framework\\_en](https://competition-policy.ec.europa.eu/state-aid/coronavirus/temporary-framework_en).

<sup>4</sup> Excluding amendments and prolongations, 42 decisions were adopted in 2020, 35 decisions in 2021 and 17 in 2022: European Commission, Staff Working Document Accompanying the Report on Competition Policy 2020, SWD(2021) 177 final, 7.7.2021, p. 82; Id., Staff Working Document Accompanying the Report on Competition Policy 2021, SWD(2022) 188 final/2, 26.8.2022, p. 76; Id., Staff Working Document Accompanying the Report on Competition Policy 2022, SWD(2023) 76 final, 4.4.2023,

stable relationship to the Member State granting aids (i.e., former flag carriers). As a consequence, competitors not receiving public support - especially, low-cost carriers (LCCs) - sought annulment of these decisions before the General Court of the Court of Justice of the European Union (CJEU): in the first rulings on the matter, the EU General Court (GC) endorsed the Commission's policy, although it did highlight some weaknesses in the reasoning supporting the decision-making, resulting in some decision being annulled.

As a new State aid policy is taking shape, a revised level playing field for European airlines is needed. Due to the different levels of fiscal capacity in the Member States, competition may be distorted if the aids granted are subject to nationality requirements. Similar risks arise when an airline group receives aid from multiple Member States or when aid is given to airlines already in difficulty before the outbreak of the pandemic.

In any case, taxpayer support in favour of EU carriers seems *prima facie* justified by the exceptional nature of the pandemic. Recovery after pandemic, however, resulted in profits for both airlines receiving and not-receiving the aid<sup>5</sup>, shedding doubts on the need to foster an industry which was growing at an unsustainable rate even before the corona<sup>6</sup>.

By considering both the economic and the environmental perspective, these doubts seem to be justified: to effectively combat climate change, States should also consider the environmental impact of the subsidies they give out. This, coupled with the need to offset risks related to the disruption of air connectivity, points to the need for a new sectoral regulatory framework. As huge investments are required, public spending might overcome market failures in the roll-out of new technologies, whereas a business-as-usual approach to subsidies might reinforce a carbon lock-in effect.

The conundrum between *laissez-faire* and regulation, however, must be assessed considering the specific governance structure of civil aviation and the stakeholders' initiatives too. International instruments such as the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) aim at

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p. 84. In 2020-2021, the Commission approved a total of approximately 700 pandemic-related measures (excluding extension decisions), amounting to EUR 3.13 trillion (Id., SWD(2022) 188 final/2, cit., p. 24), while other 217 decisions were adopted in 2022, corresponding to EUR 29 billion (Id., SWD(2023) 76 final, cit., p. 25).

<sup>5</sup> See International Air Transport Association (IATA), Airline Profitability Outlook Strengthens, press release no. 26, 5.6.2023; carriers not benefitting from aid, such as Ryanair, recorded in the first half of 2022 its biggest after-tax profit until then: G. Duthheil, *Ryanair puts the global pandemic behind it*, in *Le Monde*, 9.11.2022. [https://www.lemonde.fr/en/economy/article/2022/11/09/ryanair-puts-the-global-pandemic-behind-it\\_6003521\\_19.html](https://www.lemonde.fr/en/economy/article/2022/11/09/ryanair-puts-the-global-pandemic-behind-it_6003521_19.html).

<sup>6</sup> If the past few decades are examined, the number of passengers transported has grown about 2.6 times that of the GDP: conversely, in the air freight sector the increase has been largely in line with GDP growth. See A. MURPHY, *Aviation and climate: who acts?*, in F. MUNARI (ed.), *Cambiamenti climatici e trasporti. Un approccio interdisciplinare*, Rome, 2017, p. 125 ff.; World Bank, ICAO 2018. Civil Aviation Statistics of the World and ICAO staff estimates, 2018, <https://data.worldbank.org/indicator/IS.AIR.PSGR?end=2018&start=1970&view=chart&year=2018>; Boeing, 2018. World Air cargo Forecast 2018-2037, [https://www.boeing.com/resources/boeingdotcom/commercial/about-our-market/cargo-market-detail-wacf/download-report/assets/pdfs/2018\\_WACF.pdf](https://www.boeing.com/resources/boeingdotcom/commercial/about-our-market/cargo-market-detail-wacf/download-report/assets/pdfs/2018_WACF.pdf).

reducing air transport environmental footprint, but they might be not enough, without putting some constraints to the freedom to conduct business. Technological development in areas such as Sustainable Aviation Fuels (SAFs) and engine design has the potential to reshape the market towards decarbonization, but requires strong financial support by States in order to become commercially viable.

As the link between fair competition and positive actions to fulfil environmental or industrial goals is becoming apparent, EU State aid law can be seen both as a limit and as a tool to allow a possible future turnaround of the airline industry. Therefore, learning from the pros and cons of ‘pandemic aid’ might help in drawing up the sectorial State aid policy for the next decade.

### **Research questions, structure and methodology**

In light of the above, the research has been developed by setting the following questions:

1. Is the current State aid legal framework effective in dealing with market shocks and environmental challenges faced by the airline industry?
2. Should the EU policy on State aid to the aviation sector be adjusted, minimizing market fragmentation and adding the environmental impact in the compatibility assessment?
3. How the pandemic case-law concerning the airline market can influence the future enforcement of State aid law as a whole?

Consequently, the research will be subdivided into two parts.

Part I provides a general overview of the legal framework pertaining the economic regulation of civil aviation, highlighting how it has been influenced by the principle of State sovereignty over airspace at international level and by the State aid prohibition at the EU one. The gradual integration in the EU aviation market is examined both in its internal and external dimensions, as a result of ‘liberalization packages’ and negotiation of new air service agreements. As the business model resulting from these regulatory changes is impacted by the decarbonization challenges the industry is currently facing, a general overview of the applicable international and EU climate change law is provided. Then, the analysis focuses on the EU State aid legal framework, by assessing the CJEU’s case-law and Commission guidance interpreting the notion of aid and the exemptions to State aid prohibition.

Part II addresses State aid responses to market shocks; after clarifying why the pandemic differs from previous crises in the sector, the European Commission’s practice on COVID-19-related aids to EU airlines is examined. A database collecting more than one hundred Commission’s decisions provides some insights on the Member States’ approach in terms of legal basis, type of aid and intensity of support *vis-à-vis* the importance of air transport for their economies.

The Commission's practice and the related CJEU's case-law (so-called 'Ryanair cases', named after the applicant) show that pandemic aids increased market fragmentation, shedding a light on the weaknesses of the State aid law framework currently applicable to the aviation industry, especially in overlooking the specific features of the airline market as well as the environmental impact of the aids.

In the concluding chapter, the two elements above put in a wider perspective, trying to identify the impact of the pandemic case-law on the evolution of State aid control. Some proposals will then be made for a State aid 'crisis' regime adjusted to a future EU industrial policy and to align State aid control with environmental objectives.

This research follows the classical legal research methodology, having its foundations on air law and European Union law. Since neither the 1944 Chicago Convention nor the World Trade Organization (WTO) framework expressly address airline subsidies, the main source of reference is EU primary law pertaining to air transport (Article 100 TFEU) and to State aid (Articles 107 ff. TFEU). These provisions, though, contain only general principles that have to be applied to the airline sector, according to CJEU's case-law and Commission practice, consisting both of guidance documents, interpreting EU law in a way which is binding for the Commission itself, and of decisions on single State measures.

Regarding the latter, a database collecting 94 decisions adopted between 2020 and 2022 (56 individual aid measures to airlines, 17 aid schemes to airlines and 21 individual aid and schemes to airports and other operators) provides some insights on the legal basis and different design of the measures as well as on their economic size. When this database was completed in February 2024, 37 decisions had been challenged before the EU General Court and 26 rulings had been published so far. Ten GC rulings have been appealed before the Court of Justice, which in four cases upheld the decision. Other six appeals are pending and four opinions have been delivered by the Advocate General. This case-law will be assessed to shed light on underlying CJEU's principles and reasoning.

Academic literature has been extensively examined, both in the legal and in the economic field, in order to trace back the evolution of the legal framework and to identify possible future regulatory trends. Finally, legal acts and scientific reports pertaining to aviation's environmental impact were analysed in order to ascertain how the sustainability perspective might be added to future State aid control.

## Part I: The aviation market and its current regulatory framework

SUMMARY: 1. The principle of State sovereignty over the airspace and its impact on civil aviation economic governance - The EU internal aviation market - 2.1 The scope of the ‘special provision’ of Article 84.2 EEC Treaty (now Article 100.2 TFEU) - 2.2. Early legislative initiatives prior to liberalization - 2.3. The ‘liberalization packages’ - 2.4. From Open Skies rulings to ‘comprehensive’ agreements - 2.5. The outcomes of liberalization: new business models and market concentration - 3. Efforts on the way to achieve aviation sustainability - 3.1 Climate change and the need to rethink air transport - 3.2 Overview of the relevant international and EU environmental law - 3.3 The regime applicable to civil aviation - 4. EU State aid law - 4.1. General principles and main procedural rules - 4.2. The notion of aid under Article 107.1 TFEU - 4.2.1 State resources - 4.2.2 Economic advantage - 4.2.3 Selectivity - 4.2.4 Distortion to competition - 4.2.5 Effect on trade - 4.3. Relevant exemptions in Article 107, paras. 2-3 TFEU - 4.3.1 Introductory remarks - 4.3.2 Aid *de jure* compatible with the internal market under Article 107.2 TFEU - 4.3.3 In detail: damage compensation schemes in the aviation market - 4.3.4 Discretionary exceptions under Article 107.3 TFEU - 4.3.5 Aid remedying to a serious disturbance in the economy of the Member State - 4.3.6 Aid facilitating the development of certain economic activities. Sectorial aid to the aviation industry - 4.3.7 Rescuing and restructuring aid - 4.3.8 Environmental aid - 4.4. The external dimension of the level playing field: the attempt to counter-act third countries’ subsidies – 5. Concluding remarks

This Part provides an overview of the economic regulatory framework applicable to the civil aviation market, both at international and at EU level.

In terms of multilateral international law, the role of States in the industry economic governance reflects the principle on State sovereignty over the airspace above their territories, as laid down in 1944 Chicago Convention (the ‘Convention’ or ‘CC’). Notably, air transport services are excluded from the scope of WTO rules.

Consequently, access to markets relies on States by the signing of bilateral Air Service Agreements (ASAs). However, deregulation in the US and the liberalization process in the EU opened up, respectively, their domestic and regional markets: this paved the way for Open Skies agreements and ‘block’ agreements negotiated by the EU, which, to some extent, take fair competition into account.

The economic situation prior to the pandemic will be described, highlighting the sustainability concerns. Given that one of the industry priorities is the reduction of its relevant carbon footprint, the regulatory efforts made so far by ICAO and by the EU are also examined.

Then, the notion of aid and the relevant exemptions to State aid prohibition are analysed in order to identify the evolutionary trends in the enforcement and interpretation of Article 107 TFEU.

### 1. The principle of State sovereignty over the airspace and its impact on civil aviation economic governance

Since its origins, civil aviation has been relying on States for its development.

By applying the Latin maxim *cuius est solum eius est usque ad coelum et ad inferos*<sup>1</sup>, the Paris Convention<sup>2</sup> and then the Chicago Convention awarded every State «complete and exclusive sovereignty over the airspace above its territory»<sup>3</sup>. The principle of sovereignty over airspace, later recognized as customary international law<sup>4</sup>, differs from those governing other realms, such as seas<sup>5</sup> and outer space<sup>6</sup>; moreover, it reflects not only safety and security reasons<sup>7</sup>, but also economic

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<sup>1</sup> The brocard is traditionally attributed to the XIII century jurist Accursius, and states that property right extends vertically to include both the airspace and the substrata, see entry *Airspace*, in J. LAW (ed.), *A Dictionary of Law*, 8<sup>th</sup> ed., Oxford, 2015, <https://www.oxfordreference.com/display/10.1093/acref/9780199664924.001.0001/acref-9780199664924-e-165>; W. GULDIMANN, *Cuius est Solum, Eius est Usque ad Coelum*, in *Zeitschrift für Luft- und Weltraumrecht*, vol. 1, no. 3, 1952, pp. 213-233; G. PIENAAR, *The Spatial Aspect of Ownership of Immovable Property: The Cuius est Solum Principle*, in *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, vol. 52, no. 2, 1989, pp. 216-227.

<sup>2</sup> Convention Relating to the Regulation of Aerial Navigation, signed in Paris, 13 Oct. 1919, in *American Journal of International Law*, vol. 17, no. 4, 1923, pp. 195–212: «The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory». This principle had been previously discussed during the 1910 International Air Navigation Conference: Conférence Internationale de navigation aérienne, Procès-verbaux des séances et annexes, Paris, 18 mai – 29 juin 1910, 268 ff., available at: <https://archive.org/details/procsverbauxde00conf/page/268/mode/2up?view=theater>. For an historical background, see P. SAND, et al., *An Historical Survey of International Air Law before the Second World War*, in *McGill Law Journal*, vol. 7, no. 1, 1960, pp. 24-42; S. TRUXAL, *Economic and Environmental Regulation of International Aviation*, Abingdon, 2017, pp.6 ff.

<sup>3</sup> Article 1, Convention on International Civil Aviation concluded in Chicago on 7 December 1944, ICAO Doc. 7300. On the sovereignty principle, see, *ex multis*, P. HAANAPPEL, *The Law and Policy of Air Space and Outer Space*, Alphen aan den Rijn, 2003, pp. 1-3; S. TRUXAL, *Economic and Environmental Regulation*, cit., pp. 20 ff.

<sup>4</sup> International Court of Justice (ICJ), 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, at 14, para. 212: «As to superjacent air space, the 1944 Chicago Convention on International Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air space above its territory. [...] The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law».

<sup>5</sup> As known, a right of ‘innocent passage’ in territorial waters is recognized by Article 3 of the United Nations Convention on the Law of the Sea (UNCLOS), signed in Montego Bay, 10 December 1982, 1833 UNTS 397, while high seas are open to freedom of navigation and overflight, as State sovereignty over them is expressly excluded (Articles 87 and 89 UNCLOS). In detail, see L. SCHIANO DI PEPE, *Il diritto del Mare*, in S.M. CARBONE ET AL. (eds), *Istituzioni di diritto internazionale*, Turin, 2021, p. 450-496, esp. 476 ff.; S.N. NANDAN, S. ROSENNE, N.R. GRANDY (eds), *United Nations Convention on the Law of the Sea 1982. A Commentary*, Dordrecht, 1993, pp. 151 ff.; D. ROTHWELL, T. STEPHENS, *The International Law of the Sea*, 2<sup>nd</sup> ed., Oxford, 2016, p. 154 ff.

<sup>6</sup> As outer space is regarded as «a province of all mankind», it is «not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means», according to Articles 1 and 2 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 27 January 1967, 610 UNTS 205 (‘the Outer Space Treaty’). In detail, see T. MASSON-ZWAAN, M. HOFMANN, *Introduction to Space Law*, 4<sup>th</sup> ed., Alphen aan den Rijn, 2019, p. 18 ff.; O. DE O. BITENCOURT NETO, *Outer Space as a Global Commons and the Role of Space Law*, in K. SCHROGL, C. GIANNOPAPA, N. ANTONI (eds), *A Research Agenda for Space Policy*, Cheltenham, 2021, p. 1-18, esp. at 2–3.

<sup>7</sup> On aviation safety, see N. OZGUR, *Global Governance of Civil Aviation Safety*, Abingdon, 2023, p. 3 ff.; J. HUANG, *Aviation Safety Through the Rule of Law*, Alphen aan den Rijn, 2009, p. 6 ff. On the relationship between airspace control and national security see Articles 3(c) and 9 CC, and, in detail, R. ABEYRATNE, *Aviation Security. Legal and Regulatory Aspects*, Abingdon, 2018; for a recent example, cf. G. PRATAMA, *Shooting down Chinese high-altitude balloon: Unlawful use of force?*, in *Leiden Law Blog*, 13 Mar. 2023, <https://www.leidenlawblog.nl/articles/shooting-down-chinese-high-altitude-balloon-unlawful-use-of-force>.

protectionism<sup>8</sup>. Air connectivity, in fact, is considered a strategic asset because of its beneficial economic spill-overs on other industries<sup>9</sup>.

The protectionist approach can also be traced back in the operation of scheduled flights<sup>10</sup>, for which a «special permission» by the overflowed State is required<sup>11</sup>, and in the provision on cabotage, traditionally reserved to national operators<sup>12</sup>. Albeit more flexible in principle, the operation of commercial non-scheduled flights is subject to limitations too<sup>13</sup>.

In this vein, unsurprisingly the Convention does not expressly address airline competition, only mentioning in its Preamble that «international air transport services may be established on the basis of equality of opportunity and operated soundly and economically»<sup>14</sup>. This wording seems to refer more to *non-discrimination* among contracting States rather than to *fair competition* among carriers, as confirmed by Article 9 CC on prohibited areas<sup>15</sup> as well as by Article 44 CC on

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<sup>8</sup> For a detailed analysis of the Paris Convention and the position of the States that negotiated the Chicago Convention, see: S. TRUXAL, *Economic and Environmental Regulation*, cit., p. 3 ff.; P. MENDES DE LEON, *Introduction to Air Law*, 11th ed., Alphen aan den Rijn, 2022, p. 9 ff.

<sup>9</sup> For a public policy perspective, see G. BURGHOUWT, *Influencing Air Connectivity Outcomes*, IIF Discussion Paper No. 2017-24, 2017, esp. 10 ff., available at <https://www.itf-oecd.org/sites/default/files/docs/influencing-air-connectivity-outcomes.pdf>.

<sup>10</sup> According to ICAO Council, a *Scheduled International Air Service* has the following features: *i*) it crosses the airspace of more than one State; *ii*) it is performed for remuneration and offered to the public; *iii*) it is operated on a regular basis, usually following a public timetable (ICAO Council, *Report to Contracting States on the Definition of a Scheduled International Air Service and the Analysis of the Rights Conferred by Article 5 of the Convention*, Doc 7278, C/841, 10 May 1952). In detail, see R. ABEYRATNE, *Article 6*, in R. ABEYRATNE (ed), *Convention on International Civil Aviation A Commentary*, Cham, 2014, p. 107 ff.

<sup>11</sup> Article 6 CC: «No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization».

<sup>12</sup> Article 7 CC. «Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. [...]». The term cabotage has maritime roots and in aviation is referred to «the carriage of traffic between two points which are both located within the territory of one State, by a foreign carrier», see: B. CHENG, *The Law of International Air Transport*, in G. KEETON & G. SCHWARZENBERGER (eds), *The Yearbook of World Affairs*, London, 1962, p. 322. It is worth noting that in the EU the notion of cabotage has been surpassed by that of Community air carrier which is entitled to provide air service in the whole internal aviation market: 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, OJ L 293, 31.10.2008, p. 3–20.

<sup>13</sup> According to Article 5(2) CC, aircraft operating non-scheduled flights «if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable». The distinction between scheduled and non-scheduled flights is nowadays blurred: see B. SCOTT, A. TRIMARCHI, *Fundamentals of Aviation Law and Policy*, Abingdon, 2020, p. 84.

<sup>14</sup> Preamble, recital no. 3 of the Chicago Convention, cit.

<sup>15</sup> According to Article 9(a) CC, airspace restrictions for military or public safety may be imposed «provided that *no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other contracting States likewise engaged*» (emphasis added). At the same time, restrictions due to emergencies or other exceptional circumstances «shall be applicable *without distinction of nationality to aircraft of all other States*» (Article 9(b) CC, emphasis added). On this provision, see M. STEWART, *Freedom of Overflight: A Study of Coastal State Jurisdiction in International Airspace*, Alphen aan den Rijn, 2021, p. 163 ff., and for a reconstruction of the case history, L. RITCHIE, *Prohibited Areas in International Air Law*, IASL Repository, Montreal, 1969, at <https://escholarship.mcgill.ca>.

the objectives of the International Civil Aviation Organization (ICAO)<sup>16</sup>. The latter provision reveals a tendency for market coordination in order to «prevent economic waste caused by unreasonable competition»<sup>17</sup>, ultimately ensuring that «every contracting State has a fair opportunity to operate international airlines»<sup>18</sup>. Nevertheless, the potential negative impact of subsidies has been recognized by ICAO Member States both at the Fourth and at the Fifth Worldwide Air Transport Conferences<sup>19</sup>.

From the international trade law perspective, it is worth remembering that the provision of air transport services is not subject to the World Trade Organization (WTO) regime<sup>20</sup>. An Annex<sup>21</sup> to the General Agreement on Trade in Services (GATS)<sup>22</sup> clarifies that the latter does not apply to «traffic rights» nor to «services directly related to the exercise of traffic rights»<sup>23</sup>, except from some ancillary services (repair and maintenance, marketing and reservation systems)<sup>24</sup>. As far as subsidies and State aid are concerned, however, this sectorial exclusion does not have much impact, as Article XV GATS postpones the establishment of a multilateral anti-subsidy regime to subsequent negotiations, which have so far never produced a concrete outcome<sup>25</sup>.

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<sup>16</sup> As known, after its provisional establishment in 1945, ICAO is since 1947 a specialized agency of the United Nations Organization. On ICAO's history, see: D. MACKENZIE, *ICAO: A History of the International Civil Aviation Organization*, Toronto, 2010, esp. 81 ff. More recently, ICAO Assembly Resolution A38-14, 4 Oct. 2013, para. 7 stressed the need to develop competition law at contracting States' level.

<sup>17</sup> Art. 44(e) Chicago Convention, cit.

<sup>18</sup> Art. 44(f), *ibidem*. It is worth noting that many negotiating Parties of the Convention feared that, due to the post-war economic context, a more open market would have been dominated by US airlines, see: B. HUMPHREYS, *The Regulation of Air Transport*, Abingdon, 2023, p. 12 ff.

<sup>19</sup> See ICAO, Fourth Worldwide Air Transport Conference, ATCONF/4, 1994, conclusion: «State aids and subsidies per se were not necessarily unfair but some had the potential of being so [...]»; ICAO, Fifth Worldwide Air Transport Conference, ATCONF/5, 1995, Conclusions for agenda item 2.3 Part II(a), p. 11: «States should bear in mind that provision of State aids/subsidies which confer benefits on national air carriers but are not available to competitors in the same market may distort trade in international air services and may constitute unfair competitive practices». For further details, see: ICAO, *Policy and Guidance Material on the Economic Regulation of International Air Transport*, 4<sup>th</sup> ed., Doc 9587, 2017.

<sup>20</sup> For a comprehensive analysis of the international trade law framework, see R. WOLFRUM, P. STOLL (eds), *Max Planck Commentaries on World Trade Law*, Dordrecht, 2008; P. MENGOZZI (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, Milan, 1999; A. SANTA MARIA, *Il diritto internazionale dell'economia*, in S. M. CARBONE ET AL. (ed.), *Istituzioni di diritto internazionale*, Turin, 2021, p. 579 ff.

<sup>21</sup> Annex on Air Transport Services of the General Agreement on Trade in Services, [https://www.wto.org/english/tratop\\_e/serv\\_e/9-anats\\_.e.htm](https://www.wto.org/english/tratop_e/serv_e/9-anats_.e.htm).

On the evolution of negotiations concerning the aviation sector, see: WTO, *Review of the GATS Annex on Air Transport Services*, Communication from the European Communities and its Member States to the Council for Trade in Services, S/C/W/280, 28 February 2007.

<sup>22</sup> General Agreement on Trade in Services (GATS), Annex 1B of the Agreement Establishing the World Trade Organization, signed in Marrakesh on 15 April 1994, 1867 UNTS 3. On the scope of GATS see, recently, P. MAVROIDIS, *The General Agreement on Trade in Services*, in *The Regulation of International Trade*, Vol. 3, Cambridge, 2020, 191 ff.

<sup>23</sup> Article 2.1(a)-(b) Annex on Air Transport Services, cit.

<sup>24</sup> Article 2.3(a)-(c), *ibidem*.

<sup>25</sup> Article XV.1 GATS: «Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects». On the status of GATS negotiations, see WTO, *Negotiations on Trade in Services*, Report by the Chairman to the Trade Negotiations Committee, TN/S/36, 21 April 2011. Negotiations for a new plurilateral agreement (Trade in Services Agreement - TiSA) were launched in March 2013 between 23 WTO member States, including the EU, but were halted

Therefore, civil aviation's economic regulation relies on the allocation of traffic rights between the Convention contracting parties. These rights fall into general categories, the well-known 'Freedoms of the Air', defined – with reference to scheduled air services – by two multilateral treaties negotiated alongside the Convention, namely the International Air Services Transit Agreement (IASTA)<sup>26</sup> and the International Air Transport Agreement<sup>27</sup>.

IASTA recognizes two 'Technical Freedoms', i.e., the right to overfly the territory of another country without landing ('First Freedom')<sup>28</sup> and the right to land for non-traffic purposes (e.g., refuelling, maintenance, etc.; 'Second Freedom')<sup>29</sup>. As IASTA has been signed by most of the Chicago Convention parties, these first two Freedoms are widely accepted<sup>30</sup>. Moreover, the International Air Transport Agreement, albeit unsuccessful due to its limited number of signatories<sup>31</sup>, added the definition of three 'commercial Freedoms', namely the right to carry traffic from the home country of the airline to another country ('Third Freedom') and back ('Fourth Freedom') as well as the right to land in the territory of a first country and carry traffic on to a third country where passengers deplane ('Fifth Freedom')<sup>32</sup>. These rights can be exchanged via bilateral agreements as well as the 'so-called Freedoms' (from Sixth to Ninth Freedom), later listed by ICAO<sup>33</sup>.

More than 4,000 bilateral Air Service Agreements (ASAs) are currently in force between Chicago Convention signatories<sup>34</sup>. ASAs' regulatory approach

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in late 2016. The proposed text, however, excluded services related to the performance of traffic rights: P. MENDES DE LEON, *Introduction to Air Law*, cit., at 60.

<sup>26</sup> International Air Services Transit Agreement (IASTA), signed in Chicago on 7 December 1944, 84 UNTS 389.

<sup>27</sup> International Air Transport Agreement, signed in Chicago on 7 December 1944, 45 ILS 388.

<sup>28</sup> Article I.1(1) IASTA.

<sup>29</sup> Article I.1(2) IASTA.

<sup>30</sup> So far, there are 133 countries. See the updated UN webpage of the treaty: <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280156f42>. It is worth noting that Russia is not a party of IASTA and has a controversial position due to its charging fees for Siberian overflights via its flag carrier Aeroflot. Many States as well as the EU deemed the levying of such charges to breach Article 15 CC prohibiting transit fees. In detail, see: J. BAUR, *EU-Russia Aviation Relations and the Issue of Siberian Overflights*, in *Air and Space Law*, vol. 35, 2010, p. 225-247; E. CARPANELLI, *La pratica dei pagamenti per i diritti di sorvolo della siberia: ultimi sviluppi*, in *Diritto dei trasporti*, n. 1, 2012, p. 1-34. International restrictive measures against Russian invasion of Ukraine and related Russian countermeasures further impacted on flight routes across Siberia. On this topic, please refer to M. BARBANO, *La chiusura dello spazio aereo: il caso della misura restrittiva adottata dall'Unione europea nei confronti della Russia in occasione del conflitto ucraino*, in *Il Diritto dell'Unione europea*, no. 3-4, 2022, p. 547-582.

<sup>31</sup> It has been signed by eleven countries, excluding major aviation actors such as the US, see [https://www.icao.int/secretariat/legal/list%20of%20parties/transport\\_en.pdf](https://www.icao.int/secretariat/legal/list%20of%20parties/transport_en.pdf).

<sup>32</sup> Article I.1(3)-(5) International Air Transport Agreement, cit.

<sup>33</sup> See ICAO, *Manual on the Regulation of International Air Transport*, Doc. 9626, 2018, at IV-2-11. These Freedoms can be summarized as follows: carriage of traffic moving between two other countries via the home state of the airline (Sixth Freedom); carriage of traffic between the territory of the granting country and any third state without going via the home country of the airline (Seventh Freedom); carriage of traffic between two points in a foreign country on a route with origin or destination in the home country of the airline (Eight Freedom); carriage of traffic between two points in a foreign country on a route, which is unrelated to the home country of the airline (Ninth Freedom).

<sup>34</sup> European Parliament, *Competition in Air Transport*, PE 618.984, 2018, p. 23. According to Article 83 Chicago Convention and Assembly Resolution 38-40, States are required to register ASAs with the Council of ICAO. As a result of the latest ICAO Air Services Negotiation event (ICAN 2023), 521 new

changed consistently over time, from the ‘controlled competition’ of the US-UK 1946 Air Services Agreement (‘Bermuda I’)<sup>35</sup>, to the tighter restrictions of its 1977 renewed text (‘Bermuda II’)<sup>36</sup> and, eventually, to the ‘Open Skies’ model that took hold after the liberalization of domestic markets<sup>37</sup>.

ASAs confer to each contracting State the right to designate the carriers operating specific routes and may also impose limits on passenger capacity, flight frequency and fares<sup>38</sup>. Traditionally, ASAs allowed for the designation of only one carrier per State, resulting in route duopolies<sup>39</sup>. Moreover, the strategic nature of the airline industry resulted in ASAs clauses requiring carriers to remain under ‘substantial ownership and effective control’ of the nationals of the designating State<sup>40</sup>. As a consequence, a paradox emerges: albeit global in its nature, the market before liberalization was divided into segments corresponding to inter-State connections<sup>41</sup>. Unsurprisingly, European markets were dominated by ‘flag carriers’, called so because of their usual State-ownership<sup>42</sup>.

After the positive outcome of market liberalization both in the US and in the EU, showing that airline competition was beneficial for consumers and also to the industry as a whole, efforts were made to achieve the same results with international services. This resulted in the negotiation of the so-called Open Skies

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ASAs were signed by 97 countries (ICAO, *Over 500 new air service agreements signed*, press release, 29 Jan. 2024, <https://www.icao.int/Newsroom/Pages/Over-500-new-air-service-agreements-signed.aspx>). The full database of world’s ASAs is available online at ICAO World Air Service Agreements repository: <https://data.icao.int/WASA>. Regional regimes - such as the one in force within the European Union (EU) - are an exception that will be discussed later, *infra*, pp. [17] ff.

<sup>35</sup> Air Services Agreement Between the United States and the United Kingdom, signed in Bermuda, 11 February 1946, 45 ISL 395. For a background on Bermuda I and II negotiations, see B. HUMPHREYS, *The Regulation of Air Transport*, cit., p. 21 ff.

<sup>36</sup> Consolidated Air Services Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, signed in Bermuda, 23 July 1977, available at <https://2009-2017.state.gov/e/eb/rls/othr/ata/u/uk/176322.htm>.

<sup>37</sup> United States-Netherlands, Memorandum of Consultations, September 1-4, 1992. In detail, see P. MENDES DE LEON, *Before and After the Tenth Anniversary of the Open Skies Agreement Netherlands-US of 1992*, in *Air & Space Law*, vol. 27, 2002, p. 280–314. J. CORDES, *Flying the Open Skies: an Analysis and Historical Perspective of the U.S.-Netherlands Bilateral Air Transport Agreement of September 4, 1992*, in *Transnational Law*, vol. 6, 1993, p. 301 ff.

<sup>38</sup> It is worth remembering that tariffs were subject to ‘double approval’ regime (i.e., acceptance by both of the contracting States) and that the airlines trading body, the International Air Transport Association (IATA) provided a forum for tariff coordination via its Traffic Conferences. Until late 1970s these mechanisms benefitted from antitrust exemptions, see P.C. HAANAPPEL, *LATA Tariff Co-ordination and Competition Law*, in *Air & Space Law*, vol. 20, 1995, p. 82-86. On the current role of IATA, see: A. MASUTTI, *Diritto aeronautico*, Bologna, 2021, p. 44 ff.

<sup>39</sup> P. MENDES DE LEON, *Introduction to Air Law*, cit., p. 73 ff.

<sup>40</sup> See I. LELIEUR, *Law and Policy of Substantial Ownership and Effective Control of Airlines*, Abingdon, 2003, esp. 61 ff. The current EU regime is laid down by Article 2(9) Regulation (EC) No 1008/2008, cit., as interpreted by Commission, Interpretative guidelines on Regulation (EC) No 1008/2008 of the European Parliament and of the Council — Rules on Ownership and Control of EU air carriers, Commission Notice 2017/C 191/01. See also Id., Decision 95/404/EC of 19 July 1995 on a procedure relating to the application of Council Regulation (EEC) No 2407/92 (Swissair/Sabena). For a US perspective, see: Title 49 U.S.C. Sec. 40102(a)(15)(C).

<sup>41</sup> F. MUNARI, *Il diritto comunitario dei trasporti*, Milano, 1996, p. 121.

<sup>42</sup> Ibidem. On the consequences of State ownership for European airlines, see: R. DOGANIS, *The Airline Business*, 2<sup>nd</sup> ed., Abingdon, 2006, p. 223 ff.

agreements, allowing multiple airline designations and lifting restrictions on capacity and on frequency<sup>43</sup>.

However, before examining the current bilateral regime, it is worth to take a look at the EU internal market and assess how the enforcement of EU competition and State aid law affected the ‘pre-pandemic’ scenario.

## 2. The EU internal aviation market

### 2.1. The scope of the ‘special provision’ of Article 84.2 EEC Treaty (now Article 100.2 TFEU)

When European integration began, air transport was subject to a peculiar legal regime. Title IV of the Treaty establishing the European Economic Community (‘EEC Treaty’)<sup>44</sup> defined a Common Transport Policy (CTP) which was applicable only to railway, road and inland waterway transport, leaving up to the Council the power to adopt, with unanimous vote, appropriate actions for air and maritime transport<sup>45</sup>.

In Member States’ view, the Chicago Convention already provided a universal regime, so they saw no point in altering the *status quo* of bilateral relations in a sector, which, albeit strategic, was still in its infancy<sup>46</sup>. Moreover, as ASAs were adopted before the entry into force of the EEC Treaty, putting them into question might have been considered in contrast with the safeguard clause laid down in current Article 351 TFEU<sup>47</sup>.

It is worth noting, however, that in the famous Spaak Report, preceding the drafting of the EEC Treaty, transport services were considered as a whole and not per transport mode; the Report envisaged gradual overcoming of discrimination based on nationality and aspired for transport fares harmonization<sup>48</sup>. As far as competition law is concerned, Council Regulation (EEC) No. 141/62<sup>49</sup> excluded transport from the procedural rules laid down by

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<sup>43</sup> See *infra*, pp. [22] ff.

<sup>44</sup> Treaty establishing the European Economic Community, signed in Rome on 25 March 1957, available at <https://eur-lex.europa.eu/eli/treaty/teec/sign>. The amended provisions on CTP are now laid down in Title VI, Articles 90 ff. TFEU.

<sup>45</sup> Article 84.1-2 EEC Treaty. For a comment, see N. BELLINI, *Art. 84*, in R. QUADRI, R. MONACO, A. TRABUCCHI (eds), *Commentario al Trattato istitutivo della Comunità economica europea*, Milano, 1965, p. 588 ff.

<sup>46</sup> F. MUNARI, *Il diritto comunitario*, cit., p. 122.

<sup>47</sup> According to Article 351 TFEU, «rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties». If these agreements are not compatible with the Treaties, Member States are required to «take all appropriate steps to eliminate the incompatibilities established» (ibid.). For an analysis of the Union’s case law on ASAs, see R. MASTROIANNI, *Art. 351 TFEU*, in A. TIZZANO (ed.), *Trattati dell’Unione Europea*, 2<sup>nd</sup> ed., Milan, 2014, p. 2541 ff., esp. 2546-2547.

<sup>48</sup> Intergovernmental Committee on European Integration, The Brussels Report on The General Common Market (Spaak Report), Luxembourg, 1956, available at <http://aei.pitt.edu/995/>, esp. at p. 10 and p. 15. Cf. B. HUMPHREYS, *The Regulation*, cit., p. 59.

<sup>49</sup> Regulation (EEC) No 141/62 of the Council exempting transport from the application of Council Regulation No 17/62, OJ 124, 28.11.1962, p. 2751–2751.

Reg. (EEC) No. 17/62 for implementing current Articles 101 ff. TFEU<sup>50</sup>. The Commission also emphasized the role of airline subsidies in the Explanatory Memorandum attached in a 1962 draft regulation<sup>51</sup>.

That said, European integration in civil aviation was possible thanks to the judicial review by the then European Court of Justice (now CJEU, hereinafter referred also as ‘the Court’). In its 1974 *French Merchant Seamen* ruling, the Court stated that the general rules of the Treaties apply to air and maritime transport<sup>52</sup>, considering that only the freedom to provide services is expressly excluded from the scope of CTP<sup>53</sup>. A few years later, the Court confirmed that transport services are subject to State aid rules and regarded current Article 93 TFEU as an additional exemption to the general prohibition of granting aid, alongside the rules laid down in Articles 107 ff. TFEU<sup>54</sup>.

Nevertheless, an effective CTP was not possible until secondary legislation was adopted, as shown by the 1985 *Parliament v Council* judgment on failure to act<sup>55</sup>. The lack of implementing provisions also affected the enforcement of the ‘transitional’ rules on competition in then Articles 88-89 EEC Treaty (now Articles 104-105 TFEU)<sup>56</sup>.

The major breakthrough, however, came from the *Nouvelles Frontières* judgement, in which the Court held that competition law was applicable to air transport<sup>57</sup>. At the same time, by amending Article 84.2 EEC Treaty, the 1986

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<sup>50</sup> More than a decade before the *French Merchant Marine* judgment, the European Commission recognized the application of the Treaties’ general rules to transport, including competition law: Commission, Memorandum of the general lines of the Common transport policy, COM (61) 50 final, 10 Apr. 1961, at <http://aei.pitt.edu/33840/4/A565.pdf>, paras. 33 ff. and paras. 62-63.

<sup>51</sup> See para. 4 of the Explanatory Memorandum to Commission, Draft Council Regulation suspending the application of Articles 85 to 94 of the Treaty establishing the European Economic Community to sea and air transport, EEC Bulletin, suppl. No. 11/62, p. 3-5: «In view of the special economic importance of airline companies and in order to promote technical development, Governments subsidize their airlines, particularly in the form of grants to balance their operational accounts». The proposal though, was not adopted by the Council.

<sup>52</sup> CJEU, 4 April 1974, *Commission v France (French Merchant Seamen)*, C-167/73, EU:C:1974:35. On the case background, see: D. MAZZARELLA, *The Integration of Aviation Law in the EC: Teleological Jurisprudence and the European Court of Justice*, in *Transportation Law Journal*, Vol. 20, 1991, p. 353 ff.

<sup>53</sup> Article 61 EEC Treaty, now Article 58 TFEU: «Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transports». It is worth recalling also the stand-still clauses in the former Articles 62 EEC (now abolished) and 75 EEC (currently 95 TFEU).

<sup>54</sup> CJEU, 12 October 1978, *Commission v Belgium (Belgian railway case)*, C-156/77, EU:C:1978:180, para. 10: «[T]he effect of the application of [Article 93 TFEU], which acknowledges that aid to transport is compatible with the Treaty only in well-defined cases which do not jeopardize the general interests of the Community, cannot be to exempt aid to transport from the general system of the Treaty concerning aid granted by the States and from the controls and procedures laid down therein».

<sup>55</sup> CJEU, 22 May 1985, *Parliament v Council*, C-13/83, EU:C:1985:220, on which see, P. FENNEL, *The Transport Policy Case*, in *European Law Review*, 1985 p.264-276; M. TUFANO, *Sui ritardi del Consiglio in materia di politica comunitaria dei trasporti*, in *Il Foro italiano*, vol IV, 1986, col. 253-263.

<sup>56</sup> In detail, see J. MILLIGAN, *European Union Competition Law in the Airline Industry*, Alphen aan den Rijn, 2017, p. 21.

<sup>57</sup> CJEU, 30 April 1986, *Ministère public v Asjes (Nouvelles Frontières)*, C-209/84, EU:C:1986:188. Bearing in mind that «where the Treaty intended to remove certain activities from the ambit of the competition rules, it made an express derogation to that effect», the Court upheld a strict interpretation of Article 84.2 EEC Treaty by saying that it is «intended merely to define the scope of Article 74 et seq. as regards different modes of transport» (ibidem, paras. 40-43). The compliance with competition rules of the airline tariff-

European Single Act made the decision-making process simpler as it allowed a qualified majority (rather than unanimity) vote on this topic<sup>58</sup>. These developments set the legal backdrop for liberalization, while the success of US deregulation provided an economic rationale<sup>59</sup>.

## 2.2. Early legislative initiatives prior to liberalization

The opening of the airline market to competition and the removal of barriers to entry is commonly defined as ‘liberalization’ in the EU, in order to highlight its gradual implementation compared to US ‘deregulation’ which was completed in a shorter time frame<sup>60</sup>. From a regulatory perspective, the EU single aviation market was created in three phases: liberalization, harmonization and active policy<sup>61</sup>. This process was completed through the adoption of three sets of legislation, known as ‘legislative packages’, issued from 1987 to 1992.

Interestingly enough, debate for the adoption of secondary legislation on the matter had already started in 1979 with the publication of the Commission’s *first memorandum* on air transport<sup>62</sup>. This policy document called for a larger freedom of access to intra-EU routes and tariff flexibility and, remarkably, stressed the need to strengthen State aid control<sup>63</sup>. Then, Directive 83/416/EEC made possible for airlines to operate on new routes without the restrictions imposed by ASAs, but covering only connections between minor airports and using small aircraft<sup>64</sup>.

In a *second memorandum* published in 1984, the Commission drew up the adoption of a legislative package addressing intra-EU bilateral agreements, tariff-setting regimes and the enforcement of competition rules<sup>65</sup>. Moreover, Annex IV

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fixing regime had been already put into question in an action for failure brought a few years before *Nouvelles Frontières*; the Court, however, rejected the action on procedural grounds, thus avoiding to take a stance on this sensitive matter, see: CJEU, 10 June 1982, *Lord Bethell v Commission*, C-246/81, EU:C:1982:224.

<sup>58</sup> Currently, Article 100.2 TFEU empowers the EU legislature to enact on sea and air transport according to the ordinary legislative procedure. For a detailed analysis of this provision, see L. SCHIANO DI PEPE, *Art. 100 TFEU*, in A. TIZZANO, (a cura di), *Trattati dell’Unione europea*, 2<sup>a</sup> ed., Milano, 2014, p. 994-1018.; T. MAXIAN RUSCHE, *Article 100 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, New York, 2019, p. 983-991.

<sup>59</sup> See, also for further reference, F. MUNARI, *Il diritto comunitario*, cit., p. 166.

<sup>60</sup> See Airline Deregulation Act of 1978, 49 Pub. L. No. 95-504, 92 Stat. 1705 and International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 35 (1980), 49. An assessment of US deregulation is outside the scope of this research. For a comprehensive analysis, please refer to: S. TRUXAL, *Competition and Regulation in the Airline Industry*, Abingdon, 2013, p. 21 ff.; B. HUMPHREYS, *The Regulation*, cit., p. 46 ff.; E. GIEMULLA, L. WEBER, *International and EU Aviation Law*, Alphen aan den Rijn, 2011, p. 132 ff.; B. HAVEL, *In Search of Open Skies: Law and Policy for a New Era in International Aviation*, Boston, 1997. For an economic perspective of the pros and cons of the deregulation policy, see: A. KAHN, *Airline Deregulation - A Mixed Bag, But a Clear Success Nevertheless*, in *Transportation Law Journal*, vol. 16, 1988, p. 229-252.

<sup>61</sup> F. MUNARI, *Il diritto comunitario*, cit., p. 5 ff.

<sup>62</sup> Commission, Contributions of the European Communities to the Development of Air Transport Service, Memorandum COM (79) 311, 6 July 1979, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51979DC0311&rid=9>.

<sup>63</sup> *Ibidem*, para. 32.

<sup>64</sup> Council Directive 83/416/EEC of 25 July 1983 concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States, OJ L 237, 26.8.1983, p. 19-24.

<sup>65</sup> Commission, Civil Aviation Memorandum No. 2; Progress towards the development of a Community Air Transport Policy, Communication COM(84) 72 final, 15 March 1984, available at <http://aei.pitt.edu/5374/>, esp. Annexes I-III.

of this memorandum provided a first set of guidelines concerning State aid control in the sector<sup>66</sup>. In 1986, the Commission proposed the adoption of new rules on tariff-setting<sup>67</sup> as well as amendments to Directive 83/416 aiming at easing market entry for new operators in view of the emerging hub-and-spoke business model<sup>68</sup>. The stage was set for subsequent liberalization.

### 2.3. The ‘liberalization packages’

The *first* liberalization package was adopted in 1987 and addressed the reduction of fare restrictions<sup>69</sup>, the harmonization of rules on access to intra-community routes<sup>70</sup> and provided a sectoral competition law regime<sup>71</sup>. Notably, this latest framework was limited to antitrust enforcement, and did not encompass State aid control. Moreover, the Commission was empowered to grant temporary block exemptions under the legal basis of current Article 101(3) TFEU<sup>72</sup>. As a consequence, revenue sharing, computer reservation systems and ground handling services were exempted from competition law enforcement<sup>73</sup>. Actually, the impact of this package on airline competition was minimal because the protectionist regulatory set-up remained substantially intact<sup>74</sup>.

The *second* package aimed at further harmonization in *i*) tariff-setting within the EC<sup>75</sup> and in *ii*) access to intra-EC routes<sup>76</sup>. Regarding the former (i), the

<sup>66</sup> Ibidem, Annex IV - State Aids to Air Transport. Policy Paper and Guidelines.

<sup>67</sup> Commission, Civil Aviation, Communication COM(86) 338 final/2, 1 July 1986, available at <http://aei.pitt.edu/4025/>.

<sup>68</sup> Id., Market Access in Civil Aviation, Proposal for a Council Directive amending for the second time Council Directive 83/416/EEC, COM(86) 424 final/2, 8 Sep. 1987, available at <http://aei.pitt.edu/4021/>, esp. para. 11.

<sup>69</sup> Council Directive 87/601/EEC of 14 December 1987 on fares for scheduled air services between Member States, OJ L 374, 31.12.1987, p. 12–18.

<sup>70</sup> Council Decision 87/602/EEC of 14 December 1987 on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States, OJ L 374, 31.12.1987, p. 19–26.

<sup>71</sup> See Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, OJ L 374, 31.12.1987, p. 1–8 and Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, OJ L 374, 31.12.1987, p. 9–11.

<sup>72</sup> Cf. Art. 2 and Annex, Regulation (EEC) No 3975/87, cit. and Art. 2 Council Regulation (EEC) No 3976/87, cit.

<sup>73</sup> See, respectively, Commission Regulation (EEC) No 2671/88 of 26 July 1988 on the application of Article 85 (3) of the Treaty to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices concerning joint planning and coordination of capacity, sharing of revenue and consultations on tariffs on scheduled air services and slot allocation at airports, OJ L 239, 30.8.1988, p. 9–12; Commission Regulation (EEC) No 2672/88 of 26 July 1988 on the application of Article 85(3) of the Treaty to certain categories of agreements between undertakings relating to computer reservation systems for air transport services, OJ L 239, 30.8.1988, p. 13; Commission Regulation (EEC) No 2673/88 of 26 July 1988 on the application of Article 85 (3) of the Treaty to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices concerning ground handling services, OJ L 239, 30.8.1988, p. 17.

<sup>74</sup> M. SCHMAUCH, *EU Law on State Aid to Airlines*, Berlin, 2012, p. 35.

<sup>75</sup> Council Regulation (EEC) No 2342/90 of 24 July 1990 on fares for scheduled air services, OJ L 217, 11.8.1990, p. 1–7. In detail, see J. MILLIGAN, *European Union Competition*, cit., p. 25

<sup>76</sup> Council Regulation (EEC) No 2343/90 of 24 July 1990 on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States, OJ L 217, 11.8.1990, p. 8–14.

principle of ‘double disapproval’ was introduced, according to which the tariff proposed by the airline would be accepted unless it were disapproved by both the Member States connected by the route. Regarding route access (ii), bilateral restrictions on capacity were removed.

Subsequently, third and fourth freedom rights were granted within the EC Member States, as well as limited fifth freedom rights<sup>77</sup>. Then, Regulation (EEC) 2344/90 extended the validity of the block exemptions already granted by the previous Regulation (EEC) 3976/87<sup>78</sup>, sometimes limiting their scope<sup>79</sup>. This factor, as well as the enlarged access to intra-EC routes, started to alter the relationship between Member States and their flag carriers previously supported by the Chicago framework<sup>80</sup>. Notably, these reforms took place during a period of economic uncertainty. In fact, the oil crisis following the Gulf war resulted in an increase in State aid, as further discussed later<sup>81</sup>.

In 1992 the EC introduced a *third* legislative package, completing the EC single aviation market framework. The backbone of this package consisted of three regulations which, respectively: *i*) established common criteria for the granting of operating licenses by Member States and required airlines be owned by a majority of EU nationals<sup>82</sup>; *ii*) lifted the last constraints on routes within the EU and granted EU carriers full cabotage rights from 1997 onwards<sup>83</sup>; *iii*) gave EU carriers the freedom to set their own fares, provided, however, they followed some safeguards to prevent unfair pricing<sup>84</sup>. Moreover, a regulation further extended the validity of

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<sup>77</sup> In detail, see M. SCHMAUCH, *EU Law*, cit., p. 36.

<sup>78</sup> See Council Regulation (EEC) No 2344/90 of 24 July 1990 amending Regulation (EEC) No 3976/87 on the application of article 85 (3) of the treaty to certain categories of agreements and concerted practices in the air transport sector, OJ L 217, 11.8.1990, p. 15–16 and the relevant Commission implementation: Commission Regulation (EEC) No 82/91 of 5 December 1990 on the application of Article 85 (3) of the Treaty to certain categories of Agreements, Decisions and concerted practices concerning ground handling services, OJ L 10, 15.1.1991, p. 7–8; Commission Regulation (EEC) No 83/91 of 5 December 1990 on the application of Article 85 (3) of the Treaty to certain categories of Agreements between undertakings relating to computer reservation systems for air transport services, OJ L 10, 15.1.1991, p. 9–13; Commission Regulation (EEC) No 84/91 of 5 December 1990 on the application of Article 85 (3) of the Treaty to certain categories of Agreements, Decisions and concerted practices concerning joint planning and coordination of capacity, consultations on passenger and cargo tariffs rates on scheduled air services and slot allocation at airports, OJ L 10, 15.1.1991, p. 14–18.

<sup>79</sup> E.g., favouring slot allocation to new entrants and removing the exemption on revenue sharing (pooling agreements), see Article 4 Commission Regulation (EEC) No 84/91, cit.

<sup>80</sup> Cf. M. SCHMAUCH, *EU Law*, cit., p. 37.

<sup>81</sup> According to estimates, aid to European airlines due to this amounted to USD 11 billion: Commission, Report on the evaluation of aid schemes established in favour of Community air carriers, SEC(92) 431 final, 19 March 1992, available at <http://aei.pitt.edu/4822/1/4822.pdf>. In detail, see R. DOGANIS, *The Airline Business*, cit., p. 245.

<sup>82</sup> Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers, OJ L 240, 24.8.1992, p. 1–7. On the current ownership and control regime, see Article 4(f) Regulation (EC) No 1008/2008, cit. and Commission, Interpretative guidelines on Regulation (EC) No 1008/2008, cit.

<sup>83</sup> Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ L 240, 24.8.1992, p. 8–14.

<sup>84</sup> Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services, OJ L 240, 24.8.1992, p. 15–17.

block exemptions<sup>85</sup>. All these legal acts have been now repealed by Regulation (EC) 1008/2008, which added also specific requirements for pricing transparency<sup>86</sup>.

Regulation (EEC) 2408/92 – i.e., the most important piece of legislation of the package functioning as market regulation instrument – also provided a set of rules on Public Service Obligations (‘PSO’), to subsidize essential air connections to remote areas of Europe, which otherwise would not be economically sound for airlines to provide<sup>87</sup>. However, due to want of political consensus and in line with the Treaties’ general provisions, the EU legislature maintained a neutral position on State-owned carriers, leaving the task of ensuring a level playing field *vis-à-vis* private operators to State aid control<sup>88</sup>. Even without requiring privatization, however, the new legal framework had a huge impact on the functioning, buoyancy and structure of the market<sup>89</sup>.

The evolving EU internal aviation market, however, cannot be properly assessed without also looking at its external dimension. Once again, the Court of Justice had a pivotal role in setting the foundations for further integration.

#### 2.4. From Open Skies rulings to ‘comprehensive’ agreements

As is well-known, the EU legal system is based on the principle of conferral, establishing that «the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein»<sup>90</sup>. As powers relating to transport policy are shared between the EU and its Member States<sup>91</sup>, advancements in EC harmonization gradually reduced Member States’ regulatory autonomy.

However, Treaties did not say how this transfer of powers would impact external relations, which are crucial for transport services, given their transnational

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<sup>85</sup> See Council Regulation (EEC) No 2410/92 of 23 July 1992 amending Regulation (EEC) No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, OJ L 240, 24.8.1992, p. 18 and Council Regulation (EEC) No 2411/92 of 23 July 1992 amending Regulation (EEC) No 3976/87 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, OJ L 240, 24.8.1992, p. 19–20.

<sup>86</sup> The consolidated text of Regulation (EC) 1008/2008 is available at <http://data.europa.eu/eli/reg/2008/1008/2020-12-18>.

<sup>87</sup> Article 4 Regulation (EEC) No 2408/92, cit. On the notion of PSO, see *infra*, p. [37] ff.

<sup>88</sup> M. SCHMAUCH, *EU Law*, cit., p. 39. See Article 345 TFEU: «The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership».

<sup>89</sup> See *infra*, pp. [25] ff.

<sup>90</sup> Article 5(2) of the Treaty on the European Union (TEU). In detail, see M. KLAMERT, *Article 5 TEU*, in M. KELLERBAUER ET AL. (eds), *The EU Treaties*, cit., p. 61-78, esp. at 65 ff.; H. BLANKE, S. MANGIAMELLI, *Article 5*, in Id. (eds), *The Treaty on European Union. A commentary*, Heidelberg, 2013, p. 255-286.

<sup>91</sup> See Article 4.2.g TFEU. When competences are shared between the EU and its Member States, the latter cannot enact anymore after the EU has adopted its legislation (Article 2(2) TEU). On EU competences in air transport, see P. MENDES DE LEON, *Introduction to Air Law*, cit., p. 114-115; M. COLANGELO, V. ZENO-ZENCOVICH, *Introduction to European Union Transport Law*, Roma, 2019, p. 78 ff.; L. SCHIANO DI PEPE, *Art. 100 TFEU*, in A. TIZZANO, (ed), *Trattati*, cit., p. 994-1018, esp. 1008 ff.; T. MAXIAN RUSCHE, *Article 100 TFEU*, in M. KELLERBAUER ET AL. (eds), *The EU Treaties*, cit., p. 983-991, esp. 989 ff.; C. TUO, *Il trasporto aereo nell’Unione europea tra libertà fondamentali e relazioni esterne*, Turin, 2008, p. 128 ss.; G. BOI, *Gli accordi di traffico aereo: la nuova frontiera degli Open Skies*, in VV.AA., *Il nuovo diritto aeronautico. In ricordo di Gabriele Silingardi*, Milan, 2002, p. 65 ff.

nature. In the landmark *AETR* ruling, the Court 'filled the gap' by clarifying that when Treaties set out specific objectives for the EC, they should also give institutions appropriate powers, even if not explicitly mentioned in the Treaties themselves. Consequently, the EC (and later EU) was entrusted with the power to negotiate international agreements in matters where the Treaties establish the EC competences to adopt internal rules<sup>92</sup>.

Yet, as previously stated, the 'harmonization' achieved for internal European air services was in sharp contrast with the fact that external EU routes were still regulated by ASAs and individually negotiated by Member States. This model was also used to set out the *Open Skies* agreements, a new generation of ASAs between the US and their partners that aimed at lifting regulatory barriers to overseas connections<sup>93</sup>.

The compatibility of these agreements with EU law was questioned before the ECJ: in its 2002 *Open Skies* rulings<sup>94</sup>, the Court specified that negotiating ASAs with third countries fell under the EU's external action power, according to the single aviation market implementation<sup>95</sup>. Consequently, Open Skies clauses allowing only the designation of airlines owned and controlled by nationals of the signatory Member State were found to be discriminatory on the grounds of nationality<sup>96</sup>. These cases impacted on the Commission's strategies<sup>97</sup>, and determined the roll out of an EU external aviation policy based on 'three pillars': *i*) restoring legal certainty in ASAs provisions; *ii*) developing a Common Aviation Area with neighbouring countries; *iii*) signing comprehensive agreements with key partners<sup>98</sup>.

According to the *first pillar*, more than a thousand bilateral agreements signed by Member States with third countries needed to be re-negotiated<sup>99</sup>. In particular, amendments to designation clauses could be made either through each Member State's bilateral negotiation or through 'horizontal' agreements negotiated by the Commission acting on the mandate from all Member States and the relevant third country. In both cases, the objective was to introduce a 'Community clause',

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<sup>92</sup> CJEU, 31 March 1971, *Commission v Council (European Agreement on Road Transport – AETR)*, Case 22-70, EU:C:1971:32, paras. 28 ff.

<sup>93</sup> These agreements, among other things, removed capacity restrictions, allowed multiple designations and let airlines free to set their fares: B. I. SCOTT, A. TRIMARCHI, *Fundamentals*, cit., p. 102 ff. For further reference see, *above*, para. 1, at [12] ff.

<sup>94</sup> CJEU, 5 November 2002, *Commission v the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany*, cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98.

<sup>95</sup> See, for all, CJEU, 5 November 2002, *Commission v Belgium (Open Skies)*, C-471/98, EU:C:2002:628, paras.90-93.

<sup>96</sup> Special reference was made to the freedom of establishment: *ibidem*, paras. 134 ff.

<sup>97</sup> Commission, The consequences of the Court judgments of 5 November 2002 for European air transport policy, Communication COM(2002)649 final, 19 Nov. 2002; *Id.*, Relations between the Community and third countries in the field of air transport, Communication COM(2003) 94 final, 26 Feb. 2003.

<sup>98</sup> Commission, Developing the agenda for the Community's external aviation policy, Communication COM(2005) 79 final, 11 March 2005.

<sup>99</sup> Commission, The EU's External Aviation Policy - Addressing Future Challenges, Communication COM(2012) 556 final, 27 Sept. 2012, p. 15 ff.

allowing all EU airlines established in the territory of the Member State in question to apply for any available traffic rights<sup>100</sup>.

Then, in line with the *third pillar*, these provisions were replaced by mixed agreements signed by the EU and its Member States, on the one hand, and the relevant third country, on the other.

That said, it is now possible to outline the impact of EU legislation on the civil aviation market.

## 2.5. The outcomes of liberalization: new business models and market concentration

Lifting barriers to market entry, as well as the enforcement of competition rules by the Commission, led to a more contested aviation market. On the one hand, flag carriers were still benefiting from controlling most slots at congested EU airports<sup>101</sup>. On the other hand, liberalization enabled the emergence of low-cost carriers (LCCs)<sup>102</sup>. This business model focused on point-to-point connections between high-demand destinations (mostly tourist attractions), in order to maximize load factor<sup>103</sup>. At the same time, LCCs managed to reduce costs by eliminating ‘frill’ ancillary services, such as free catering, and by operating from regional airports, which applied lower charges. The latter element raised competitive concerns, as LCCs were able to bring their leisure traffic to the negotiating table in exchange to a preferential treatment by regional airports, resulting in multiple Commission decision declaring unlawful aid as well as an extended CJEU’s case-law<sup>104</sup>. Moreover, benefiting from EU fundamental

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<sup>100</sup> Regulation (EC) no. 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries OJEU L 157/2004, p. 7–17. See also: Commission decision of 29 March 2005 on approving the standard clauses for inclusion in bilateral air service agreements between Member States and third countries jointly laid down by the Commission and the Member States, C(2005)943, Id., Information Note, EU external aviation policy: why does the EU want to modify air service agreements between its member States and partner countries?, 12 Oct. 2005, [https://transport.ec.europa.eu/system/files/2016-09/2005\\_10\\_12\\_info\\_note\\_faq\\_en.pdf](https://transport.ec.europa.eu/system/files/2016-09/2005_10_12_info_note_faq_en.pdf) and the Model Horizontal Agreement available at: [https://transport.ec.europa.eu/system/files/2016-09/draft\\_horizontal\\_agreement\\_en.pdf](https://transport.ec.europa.eu/system/files/2016-09/draft_horizontal_agreement_en.pdf).

<sup>101</sup> On the impact of liberalization on slot availability, see: L. VAN HOUTEN, *Flexing the slot regime: airport slot coordination in light of evolving market realities: a regulatory perspective*, IIASL Repository, Leiden, 2021, available at <https://hdl.handle.net/1887/3247125>, esp. p. 38 ff.

<sup>102</sup> This business model was not entirely new, as already in the 1970s Sir Laker’s Skytrain was pioneering ‘no-frills’ airline service, using second-hand, single-class aircraft and selling seats on a first come, first served basis, until the plane was full. Despite its initial success, however, the Skytrain did not survive regulatory constraints and competitive pressure from incumbent airlines. In detail, see: S. TRUXAL, *Competition*, cit., p. 27 ff.; R. SHAW, *Laker Airways Skytrain: the world’s first LCC*, in *Airliners*, July 2007, p. 42–46; M. ABE, *Skytrains: Competitive Pricing, Quality of Service and the Deregulation of the Airline Industry*, in *Rivista internazionale di economia dei trasporti*, vol. 6, 1979, p. 41–47.

<sup>103</sup> For an economic perspective, see: B. HUMPHREYS, *The Regulation*, cit., p. 108 ff.; B. VASIGH, FLEMING, T. TACKER, *Introduction to Air Transport Economics*, Abingdon, 2018, p. 408 ff.; R. DOGANIS, *The Airline Business*, cit., p. 147 ff.; U. MARCHESE, *Lineamenti e problemi di economia dei trasporti*, Genoa, 2000, p. 475 ss.; E. MUSSO, *Trasporti: l’economia, la storia, le imprese, l’ambiente*, Turin, 2023, p. 360 ff.

<sup>104</sup> This brought to State aid allegations, on which the CJEU elaborated an extended case-law. See the famous Charleroi ruling: EU General Court, 17 December 2008, *Ryanair v Commission (Charleroi airport)*, T-196/04, EU:T:2008:585, and, more recently, CJEU, 17 November 2022, *Volotea and Easyjet v Commission*, cases C-331/20 and C-343/20, EU:C:2022:886; Id., 8 February 2023, *Carpatair v. Commission*, T-522/20, EU:T:2023:51. In academic literature, see: V. POWER, *Ryanair v. European Commission: The European Court of*

freedoms, LCCs managed to establish their business in Member States that provided more favourable tax regimes and lower labour costs<sup>105</sup>.

LCCs' lower fares stimulated new demand, and made air transport in Europe substantially more accessible for all kind of passengers, in contrast with the previous business model which was only affordable for a limited group of consumers<sup>106</sup>. Increased competitive pressure also required legacy carriers (so-called 'Full-Service Carriers' or FSCs) to adjust *their* business model: routes were re-designed according to the hub-and-spoke model to maximize economies of scale<sup>107</sup>, while the business focus shifted onto market segments with higher profit margins, such as long-haul flights and business travel<sup>108</sup>. Many European FSCs anyway merged to gain enough scale and efficiency: this created 'Pan-European' airline groups<sup>109</sup>. Other flag carriers, however, fell into crisis and had to be restructured or bailed out by governments; in some cases, these struggling companies continued to suffer until the outbreak of the pandemic<sup>110</sup>.

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*First Instance's Judgment on Alleged State Aid at Charleroi Airport*, in *Issues in Aviation Law and Policy*, vol. 8, 2009, p. 183-216; A. LYKOTRAFITI, *Low Cost Carriers and State Aids: A Paradox? Reflections on the Ryanair/Charleroi Case*, in *European State Aid Law Quarterly*, vol. 7(2), 2008, p. 214-229; D. DIVERIO, *Gli aiuti di Stato al trasporto aereo e alle banche*, Milano, 2010, p. 55 ff.; E. MALAVOLTI, F. MARTY, *State aid to low-cost airlines: Worthwhile if durable?*, in A. GRAHAM ET AL. (eds), *Air Transport and Regional Development Policies*, Abingdon, 2020, p.206-226. See also: N. JEANNE ET AL., *Analysis of state aid to selected Ryanair airports*, Transport & Environment Report, July 2019, [https://www.transportenvironment.org/wp-content/uploads/2021/07/2019\\_07\\_Report\\_analysis\\_state\\_aid\\_Ryanair\\_airports.pdf](https://www.transportenvironment.org/wp-content/uploads/2021/07/2019_07_Report_analysis_state_aid_Ryanair_airports.pdf).

<sup>105</sup> In general terms, see: A. BITETTO, "Low cost" e dominio (abusato?) dei cieli, in *Mercato concorrenza regole*, 2015, p. 513 ff. On LCCs' labor management, see: L. HUNTER, *Low Cost Airlines: Business Model and Employment Relations*, in *European Management Journal*, vol. 24, 2006, p. 315-321; A. TRIMARCHI, *International Aviation Labour Law*, Abingdon, 2022, p. 103 ff. The relationship between Ryanair and Ireland provides an interesting example: S. SAEED, *Ryanair protests put Irish labor law in the spotlight*, in *Politico*, 6 Ago. 2018, <https://www.politico.eu/article/ryanair-strike-august-flight-cancel-protests-put-irish-labor-law-in-the-spotlight/>.

<sup>106</sup> According to estimates, between 1990 and 2013, the number of intra-EU15+2 flights increased by 80%, while the number of routes increased by 138% over the same period: International Transport Forum (ITF), *Liberalisation of Air Transport*, ITF Research Reports, Paris, 2019, p. 259.

<sup>107</sup> As well-known, an economy of scale occurs when «the average costs per unit of output decrease with the increase in the scale or magnitude of the output being produced by a firm»: R. S. KHEMANI, D. M. SHAPIRO, *Glossary of Industrial Organisation Economics*, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, Paris, 1993, p. 39. In fact, airline operating costs decrease as more seats per aircraft are sold (i.e., load factor). The hub-and-spoke model conveys traffic from shorter feeder routes (i.e., the spokes) to create enough demand for long-haul connections departing from the hub airport: cf. R. TOH, R. HIGGINS, *The Impact of Hub and Spoke Network Centralization and Route Monopoly on Domestic Airline Profitability*, in *Transportation Journal*, vol. 24, 1985, p. 16-27.

<sup>108</sup> See E. MUSSO, *Trasporti*, cit., p. 359; G. COOK, B. BILLIG, *Airline Operations and Management*, Abingdon, 2017, p. 65 ss.; E. PELS, *Optimality of the hub-spoke system: A review of the literature, and directions for future research*, in *Transport Policy*, vol. 104, 2021, at A1-A10.

<sup>109</sup> E.g., Lufthansa (incorporating, among others, Austrian, Brussels, Eurowings and Swiss airlines), Air France-KLM and International Airlines Group (IAG - British Airlines, Iberia, Vueling, Air Lingus and Level). On industry concentration, see S. TRUXAL, *Competition*, cit., p. 13 ff.

<sup>110</sup> See, among many, Monarch, Alitalia and Airberlin cases: UK Department for Transport, *Airline insolvency review*, Final report, 9 May 2019; P. BENINTENDI, *Bankrupt in Europe: A Case Study of Three Recent Airline Insolvencies*, in *Air & Space Law*, vol. 44, n. 3, 2019, p. 241-260; A. GIACCO, L. STECCHETTI, *La saga Alitalia e il mantello dello Stato salvatore*, in *Mercato Concorrenza Regole*, no. 2, 2020, p. 305-331; L. STANGHELLINI, *Caso Alitalia e procedure concorsuali*, in *Analisi Giuridica dell'Economia*, n. 2, 2010, p. 383 ff.; M. BARBANO, *Le sentenze del Tribunale dell'Unione sulla vicenda Air Berlin (cause T-240/18 e T-296/18): to O&D or not to O&D?*, in *Quaderni AISDUE*, no. 1, 2021, p. 135-144.

In the end, fierce competition between LCCs and FSCs blurred the clear distinction between the different services offered<sup>111</sup>, and, eventually, many legacy airlines incorporated their own LCC into their group<sup>112</sup>. Moreover, Malta offers the example of an LCC opening a subsidiary in joint venture with a national government, a remarkable countertrend to the ‘flag carrier’ policy traditionally pursued by Member States<sup>113</sup>.

In light of the above, it is not surprising that the market saw an exponential growth: 4,46 billion passengers were carried worldwide in 2019, almost five times more than those carried in 1989<sup>114</sup>; until the outbreak of the pandemic, this figure was expected to exceed 10 billion by 2050<sup>115</sup>. This apparent success, however, puts into question the sustainability of the industry that has to be addressed taking into account the environmental perspective.

### 3. Efforts on the way to achieve sustainable aviation

#### 3.1 Climate change and the need to rethink air transport

While the first steps of climate science date back to the discoveries of Joseph Fourier and Svante Arrhenius in the 19<sup>th</sup> Century<sup>116</sup>, only in the current millennium scientists belonging to the Intergovernmental Panel on Climate Change (IPCC) have been able to gradually determine and then clearly demonstrate a correlation between carbon dioxide emissions caused by human activities and the rise in the Earth’s surface temperature<sup>117</sup>. As a consequence, we are seeing an

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<sup>111</sup> See K. HENRICKSON, W. WILSON, *The Convergence of Low-Cost and Legacy Airline Operations*, in J. BITZAN, J. PEOPLES, W. WILSON (eds), *Airline Efficiency*, Bingley, UK, 2016, p. 355-375; A. MAGDALINA, M. BOUZAIMA, *An empirical investigation of European airline business models: Classification and hybridisation*, in *Journal of Air Transport Management*, vol. 93, 2021, Art. 102059, esp. p. 7-8. In some cases, FSC proved resilient in sustaining competition on prices: N. AVOGADRO ET AL., *A tale of airline competition: When full-service carriers undercut low-cost carriers fares*, in *Journal of Air Transport Management*, vol. 92, 2021, Art. 102027, p. 7.

<sup>112</sup> See e.g. Eurowings (formerly Germanwings, Lufthansa group) and Vueling (IAG). On the Germanwings case study, see: S. BOELKE, *Strategic Marketing Approaches within Airline Management*, Hamburg, 2015, p. 60 ff.

<sup>113</sup> This is the case of Malta Air, formed in 2019 as a joint venture between Ryanair and the Maltese government; it operates aircraft registered in Malta and competes with the flag carrier Air Malta (still controlled by the Maltese State): I. Martin, *Ryanair subsidiary Malta Air and Air Malta ‘can live happily ever after’*, in *Times of Malta*, 11.6.2019; Air Malta, A short history, <https://airmalta.com/en/about/about-air-malta/history#:~:text=Air%20Malta%20is%20set%20up,starting%20from%201st%20April%201973>.

<sup>114</sup> According to ICAO estimates, the number of passengers carried at a global level in 1989 was 983,208,800, while reaching 4,46 billion in 2019. For further data and figures, see World Bank, Air transport, passengers carried, World Bank Open Data, at <https://data.worldbank.org/indicator/IS.AIR.PSGR>.

<sup>115</sup> See industry estimates provided by Air Transport Action Group (ATAG), Waypoint 2050, 1<sup>st</sup> ed., 2020, at [https://aviationbenefits.org/media/167187/w2050\\_full.pdf](https://aviationbenefits.org/media/167187/w2050_full.pdf), p. 4.

<sup>116</sup> See J. FOURIER, *Memoire sur les Temperatures du Globe Terrestre et des Espaces Planetaires*, in *Memoires de l’Academie Royale des Sciences de l’Institute de France*, vol. VII, 1827, p. 570-604, whose English translation is accessible at: <https://geosci.uchicago.edu/~rtp1/papers/Fourier1827Trans.pdf>; S. ARRHENIUS, *On the influence of carbonic acid in the air upon the temperature of the ground*, in *The London, Edinburgh, and Dublin Philosophical Magazine and Journal of Science*, vol. 41:251, 1896, p. 237-276, DOI: 10.1080/14786449608620846. A timeline of history of climate science can be accessed at <https://scied.ucar.edu/learning-zone/how-climate-works/history-climate-science-research>.

<sup>117</sup> See Intergovernmental Panel on Climate Change, Climate Change 2014: Synthesis Report. Fifth Assessment Report, Geneva, 2014 and, more recently, Id., Climate Change 2023, AR6 Synthesis Report, 2023, at <https://www.ipcc.ch/report/ar6/syr/>.

almost irreversible alteration to our climate's equilibrium, with harmful consequences for life on Earth as we know it.

Very significant data has been collected so far: between 2011–2020, global surface temperature reached 1.1°C well above 1850–1900 figures<sup>118</sup>. This rise has been «unequivocally caused» by human activities, especially in terms of greenhouse gases (GHGs) emissions<sup>119</sup>. The true significance of this findings is now plain for all to see, as the increased frequency of extreme climatic events, such as floods, droughts and heatwaves<sup>120</sup>.

Since every human activity has an impact on the environment and, to a certain extent, on GHGs emissions, combating climate change requires a holistic, multidisciplinary approach<sup>121</sup>. In fact, the emission containment targets set by scientists – that is containing the rise in the Earth's surface temperature within 2°C compared to pre-industrial levels – cannot be reached without rethinking economics and our society's functioning as a whole.

The correlation between the different levels of analysis is well exemplified by the air transport sector. Air transport, in fact, requires a high consumption of fossil fuel – i.e., kerosene – and accounts for about 2.5 per cent of global GHGs<sup>122</sup>, a figure which goes up to 3.8 per cent in terms of European emissions only<sup>123</sup>. In other words, if we think of the aviation industry as a country itself, it would be among the top ten in the world for CO<sub>2</sub> emissions into the atmosphere<sup>124</sup>.

In addition to carbon dioxide, aviation also contributes to global warming in terms of nitrogen oxides, water vapour and sulphate particles and carbonaceous particles emissions, which, according to some studies, negatively affect climate as well<sup>125</sup>.

Absent any measure or sharp technological innovation to reduce GHGs, shortly before the outbreak of the COVID-19 pandemic, the constant increase in passenger traffic led scientists to estimate that, by 2050, aviation-related GHGs

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<sup>118</sup> IPCC, AR6 Synthesis Report, cit., p. 4.

<sup>119</sup> Ibidem. The likely range of total human-caused global surface temperature increase from 1850–1900 to 2010–20197 is 0.8°C to 1.3°C, with a best estimate of 1.07°C (ibid.).

<sup>120</sup> See, e.g., Climate Change Service, The European heatwave of July 2023 in a longer-term context, Copernicus Programme, 20 July 2023, <https://climate.copernicus.eu/european-heatwave-july-2023-longer-term-context>; in detail, cf. G. ALIMONTI, L. MARIANI, F. PRODI, ET AL., *A critical assessment of extreme events trends in times of global warming*, in *European Physical Journal Plus*, vol. 137, 2022, p. 112 ff.

<sup>121</sup> See F. MUNARI, L. SCHIANO DI PEPE, *Tutela transnazionale dell'ambiente*, Bologna, 2012, p. 142 ff.

<sup>122</sup> International Transport Forum (ITF), *Decarbonising Air Transport: Acting Now for the Future*, ITF Policy Paper No. 94, Paris, 2021, p. 11.

<sup>123</sup> See, also for further data, Commission, *Reducing emissions from aviation*, 2021, [https://ec.europa.eu/clima/policies/transport/aviation\\_en](https://ec.europa.eu/clima/policies/transport/aviation_en).

<sup>124</sup> ICAO, *Trends in Emissions that affect Climate Change*, 2019, [https://www.icao.int/environmental-protection/Pages/ClimateChange\\_Trends.aspx](https://www.icao.int/environmental-protection/Pages/ClimateChange_Trends.aspx). See also A. MURPHY, *Aviation and climate: who acts?*, in F. MUNARI (ed.), *Cambiamenti climatici*, cit., p. 125 ff.

<sup>125</sup> In 2018, non-CO<sub>2</sub> emissions accounted for more than half (66%) of the estimated aviation net warming effect (due to Effective Radiative Forcing); however, the level of uncertainty from the non-CO<sub>2</sub> effects is 8 times larger than that of CO<sub>2</sub>: EASA-EEA-Eurocontrol, *European Aviation Environmental Report 2022*, Cologne, 2023, p. 11.

emissions would at least be three times higher than those recorded in 2015<sup>126</sup>. The steep decline in passenger traffic in the year 2020<sup>127</sup> has highlighted the need to rebuilt the industry on more sustainable grounds<sup>128</sup>.

However, before addressing the regulatory initiatives applicable to civil aviation, it is worth looking at the international and EU regulatory framework on climate change, albeit briefly.

### 3.2 Overview of the relevant international and EU environmental law

The idea of protecting the environment as an intrinsic, *per se* valuable legal asset has gradually come to the forefront and become a priority in the field of international law<sup>129</sup>. In terms of climate change, the basis for this premise is the United Nations Framework Convention on Climate Change (UNFCCC)<sup>130</sup>, concluded during the 1992 United Nations Conference on Environment and Development (UNCED) in Rio<sup>131</sup>. The UNFCCC has wide consensus - to date, 196 contracting States plus the European Union ratified it - but it provides for rather limited and, in any case, somewhat vaguely defined commitments<sup>132</sup>. The main purpose of the UNFCCC, in fact, is to create a multilateral forum, i.e., the Conference of Parties (COP) to discuss further climate agreements. Based on these

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<sup>126</sup> ICAO, *Trends in Emissions*, cit.

<sup>127</sup> According to ICAO estimates, by around 60 per cent less than in 2019: ICAO, 2020 passenger totals drop 60 percent as COVID-19 assault on international mobility continues, press release, 15 January 2021.

<sup>128</sup> See F. MUNARI, *Lifting the veil: COVID-19 and the need to re-consider airline regulation*, in *European Papers*, no. 5, 2020, p. 533-559; S. GOESSLING, A. HUMPE, *The global scale, distribution and growth of aviation: Implications for climate change*, in *Global Environmental Change*, 2020, p. 65 ff.

<sup>129</sup> In general terms, see P. BIRNIE, A. BOYLE, C. REDGWELL, *International Law and the Environment*, 3<sup>rd</sup> ed., Oxford, 2009; D. BODANSKY, A. BOYLE, D. FREESTONE, *International Law & Sustainable Development*, Oxford, 1999; M. FITZMAURICE, D. FRENCH (eds), *International Environmental Law and Governance*, Leiden, 2015; P. SANDS, *Principles of International Environmental Law*, 2a ed., Cambridge, 2003 and, with a focus on climate change, J. BRUNNÉE, L. RAJAMANI, *International Climate Change Law*, Oxford, 2017; L. REINS J. VERSCHUUREN (eds), *Research Handbook on Climate Change Mitigation Law*, Cheltenham, 2022. On the evolution of the subject matter, see E. SCOTFORD, *Environmental Principles and the Evolution of Environmental Law*, Oxford, 2017; F. MUNARI, *Tutela internazionale dell'ambiente*, in S.M. CARBONE ET AL. (eds), *Istituzioni di diritto internazionale*, Turin, 2021, p. 497-535, esp. 499 ff.

<sup>130</sup> United Nations Framework Convention on Climate Change, signed in New York, 9 May 1992, 1771 UNTS 107.

<sup>131</sup> UNFCCC is linked also with two other conventions negotiated at the Rio Conference, the UN Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, 1760 UNTS 79 and the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Paris, 14 October 1994, 1954 UNTS 3.

<sup>132</sup> According to Art. 2 UNFCCC, the ultimate objective of the Convention is «to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner».

agreements, the 1997 Kyoto Protocol (KP)<sup>133</sup> and subsequently the 2015 Paris Climate Agreement (PCA)<sup>134</sup> were negotiated and executed.

The first binding commitments to reduce GHGs emission were laid down in the Kyoto Protocol, founded on the principle of common but differentiated responsibilities<sup>135</sup>. In fact, developed countries (listed in Annex B) undertook the obligation to reduce – or, at least, limit the rise in – their emissions compared to 1990 levels; conversely, no binding commitments were envisaged for all other contracting States. The Protocol introduced a certain degree of flexibility allowing Annex B States to meet their targets without a direct reduction in emissions. Thanks to the creation of an emission trading system, States that planned to produce less greenhouse gases were able to trade their emissions allowances with those that planned to exceed theirs<sup>136</sup>.

This resulted in the creation of a ‘market’ that allowed States that planned to produce less greenhouse gases to trade their emissions ‘allowances’ with those that planned to exceed theirs. This market-based approach, as we shall see, has been adopted, albeit with some peculiarities, by the EU. The KP limited timeframe and binding commitments reflected the transnational regime concerning the ozone layer, which had a positive outcome thanks to its limited scope and the availability of market-ready technologies<sup>137</sup>. On the contrary, the KP addressed very different phenomena for its technological and economic implications, and was signed in a changed political landscape<sup>138</sup>. The lack of understanding of these elements ultimately resulted in its failure<sup>139</sup>.

This negative outcome affected the structure of the subsequent Paris Agreement, concluded at the 21st Conference of Parties (COP21) and enforced in 2020. The Agreement, in fact, sets the collective goal of keeping global warming well below 2° C, preferably by +1.5° C<sup>140</sup> and leaves it to individual States to determine their own emission reduction obligations (known as Intended Nationally Determined Contributions - INDCs). In this way, an attempt was made to overcome the contrast between compliant and non-compliant countries that

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<sup>133</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, signed in Kyoto, 11 December 1997, 2303 UNTS 162.

<sup>134</sup> Paris Climate Agreement, signed in Paris, 12 December 2015, 3156 UNTS, at [www.unfccc.int/files/essential\\_background/convention/application/pdf/english\\_paris\\_agreement.pdf](http://www.unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf).

<sup>135</sup> On the topic, see T. HONKONEN, *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements*, Alphen aan den Rijn, 2009, esp. p. 126 ff.

<sup>136</sup> This market approach, as it will be discussed below, has been taken up, albeit with some peculiarities, in the EU.

<sup>137</sup> See Vienna Convention for the Protection of the Ozone Layer, signed in Vienna on 22 March 1985, 1513 UNTS 293 and Montreal Protocol on Substances that Deplete the Ozone Layer, signed in Montreal on 16 September 1987, 1522 UNTS 29. In detail, see F. MUNARI, L. SCHIANO DI PEPE, *Tutela transnazionale*, cit., p. 259 ff.

<sup>138</sup> On the topic, see S. MINAS, V. NTOUSAS (eds.), *EU Climate Diplomacy Politics, Law and Negotiations*, London, 2018; D.G. VICTOR, *The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming*, Princeton-Oxford, 2001. Cf., e.g., the decision of the United States of America (at the time the world’s leading country in terms of emissions) not to ratify it.

<sup>139</sup> On the link between scientific knowledge and international environmental protection: F. MUNARI, *L’inadeguata percezione della scienza nel diritto internazionale dell’ambiente e l’esigenza di un cambiamento di paradigma*, in *Rivista Giuridica dell’Ambiente*, no. 2, 2023, p. 443-472.

<sup>140</sup> Art. 2(a) PCA, cit.

negatively impacted the KP implementation. The greater flexibility allowed by this mechanism is combined with transparency obligations on States, aiming at monitoring the attainment of INDCs<sup>141</sup>.

Compared to the rest of the world, the level of environmental protection is substantially higher in the European Union<sup>142</sup>, and being more ambitious the EU considers international standards as a baseline for setting its own targets. Combating climate change is listed among the Union's environmental objectives<sup>143</sup>, for which EU Institutions are entitled to take preventive action<sup>144</sup>, to harmonize legislation and standards<sup>145</sup> and to ensure cooperation at international level<sup>146</sup>. Analysis of available scientific data and assessment of potential benefits and costs of action are among the factors that the Union must take into account when setting its climate policy<sup>147</sup>, which has to be integrated with all the other EU policies<sup>148</sup>. As a consequence, climate objectives may allow for limiting the freedom of enterprise and for a strict interpretation of the rules governing the internal market, as shown by the EU Taxonomy<sup>149</sup>.

Pursuant to the Kyoto Protocol, the EU undertook the obligation to reduce its emissions by 8% compared to 1990 levels by 2008-2012<sup>150</sup>. This target, however, was set by considering the EU as an aggregate entity and differentiated among the Member States in relation to their different stages of development (so-called 'effort sharing')<sup>151</sup>. Then, the EU set a target of 20% emission reduction by 2020 as compared to 1990 values<sup>152</sup>, while the current goals are 55% reduction by

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<sup>141</sup> See UNFCCC Secretariat, Nationally determined contributions under the Paris Agreement – Synthesis Report, FCCC/PA/CMA/2022/4, 26.10.2022.

<sup>142</sup> Article 191(2) TFEU. Environmental protection is considered among the Union's essential objectives by an established case-law: CJEU, 7 February 1985, *Procureur de la République v ADBHU*, C-240/83, EU:C:1985:59, para. 13 and, more recently, Id., 15 January 2013, *Križan and Others*, C-416/10, EU:C:2013:8, para. 114.

<sup>143</sup> Article 191.1 TFEU. In detail, see S. GARBEN, *Article 191 TFEU*, in M. KELLERBAUER ET AL. (eds), *The EU Treaties*, cit., p. 1516-1525. In general, on EU environmental policy, see G. VAN CALSTER, L. REINS, *EU Environmental Law*, Cheltenham, 2017; J. VAN ZEMEN, A. ROWELL, *A Guide to EU Environmental Law*, Oakland, 2020; L. KRÄMER, *EU Environmental Law*, 8<sup>th</sup> ed., London, 2016; F. MUNARI, L. SCHIANO DI PEPE, *Tutela transnazionale*, cit., p. 142 ff.

<sup>144</sup> Article 191(2) subpara. 1 TFEU.

<sup>145</sup> Article 191(2), subpara. 2 TFEU.

<sup>146</sup> Article 191(4) TFEU.

<sup>147</sup> Article 191(3) TFEU.

<sup>148</sup> Article 11 TFEU. On impact of the principle of integration on the internal market, see: J. NOWAG, *Environmental Integration in Competition and Free-Movement Laws*, Oxford, 2016; B. SJAFJELL, A. WIESBROCK (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously*, Abingdon, 2015; N. DE SADELEER, *EU Environmental Law and the Internal Market*, Oxford, 2014.

<sup>149</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198, 22.6.2020, p. 13–43 («EU Taxonomy Regulation»)

<sup>150</sup> Cf. Art. 4 KP, cit.

<sup>151</sup> Pursuant the so-called 1998 Burden Sharing Agreement, the specific percentages per Member State are listed in Annex 1 of COM(1999)230 final of 19.05.1999. Effort sharing is currently regulated by Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 140, 5.6.2009, p. 136–148.

<sup>152</sup> Article 1, Decision 2009/406/EC, cit.

2035 and carbon neutrality by 2050 (i.e., zero net emissions compared to the same 1990 benchmark)<sup>153</sup>.

In order to implement the above-mentioned commitments, the EU adopted its own market-based mechanism, the Emission Trading Scheme (ETS). According to the ETS Directive 2003/87/EC, amended in several occasions<sup>154</sup>, businesses operating in carbon-intensive sectors are allocated emission allowances<sup>155</sup>. The ETS is implemented by initially providing free allowances to businesses and then gradually reducing their availability according to emission targets until all of them have to be purchased via an auction<sup>156</sup>. So, firms that expect to pollute more will be able to buy additional allowances from companies that give up their own. In accordance with the ‘polluter pays’ principle, GHGs emissions, which are a negative externality in economic terms, may become part of the firm’s costs, thus encouraging efficiency gains in production processes<sup>157</sup>.

The EU ETS implementation involves four trading phases and is currently in its phase IV (2021-2030)<sup>158</sup>, which has been recently revised<sup>159</sup>. Since its introduction in 2005, EU ETS contributed to a 42.8% emission reduction in the sectors covered<sup>160</sup>.

Having thus sketched out the general regulatory framework on combating climate change, it is possible to underline the peculiarities of its implementation in the aviation sector.

### 3.3 The regime applicable to civil aviation

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<sup>153</sup> Articles 2 and 4.1 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999, OJ L 243, 9.7.2021, p. 1–17 («European Climate Law»).

<sup>154</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, p. 32–46. The latest amendments were introduced in 2023 as part of the Fit for 55 legislative proposal package of the Commission; consolidated text is available at: <http://data.europa.eu/eli/dir/2003/87/2023-06-05>.

<sup>155</sup> See European Commission, EU ETS Handbook, Brussels, 2015, available at [https://climate.ec.europa.eu/system/files/2017-03/ets\\_handbook\\_en.pdf](https://climate.ec.europa.eu/system/files/2017-03/ets_handbook_en.pdf). On the functioning of EU ETS, see A. ELLERMAN, F. CONVERY, C. DE PERTHUIS, *Pricing Carbon: The European Union Emissions Trading Scheme*, Cambridge, 2010; B. HANSJEURGENS (ed), *Emissions Trading for Climate Policy. US and European Perspectives*, Cambridge, 2005.

<sup>156</sup> Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community, OJ L 302, 18.11.2010, p. 1–41, as amended lastly in 2019 (consolidated text available at: <http://data.europa.eu/eli/reg/2010/1031/2019-11-28>).

<sup>157</sup> As known, negative externalities arise when pollution is not adequately priced, so that the undertaking concerned does not face the full cost of pollution. On the contrary, a positive externality occurs when an investment benefits market participants other than the investor, thus leading undertakings to underinvest: cf. Commission, Guidelines on State aid for climate, environmental protection and energy 2022, Communication 2022/C 80/01, para. 34. For an economic analysis, see: R. CORNES, T. SANDLER, *The Theory of Externalities, Public Goods, and Club Goods*, Cambridge, 1986; J. TIROLE, *Some Economics of Global Warming*, in *Rivista di Politica Economica*, Vol. 98, No. 6, 2008, p. 9–42.

<sup>158</sup> The previous phases were: Phase 1 (2005-2007); Phase 2 (2008-2012); Phase 3 (2013-2020). In detail, see Commission, ETS Handbook, cit., p. 4 ff.

<sup>159</sup> See the legislative measures of the Fit for 55 package published in OJ, L 130, 16.5.2023, p. 1 ff.

<sup>160</sup> Commission, Questions and Answers - Emissions Trading – Putting a Price on carbon, 14 July 2021.

Due to the global nature of the market and to the role played by the principle of State sovereignty over the airspace, reducing emissions from civil aviation requires close international cooperation. In this regard, ICAO represents an appropriate forum, as setting environmental standards for aviation at a global level is part of its mission<sup>161</sup>.

Though the first ICAO environmental initiatives concerned noise reduction<sup>162</sup>, aviation engine emissions have been in ICAO policy agenda since 1973<sup>163</sup> and the Kyoto Protocol explicitly recalled ICAO role in reducing GHGs emissions generated by civil aviation<sup>164</sup>. Consequently, ICAO Assembly set in 2010 a medium-term aspirational goal of improving fuel efficiency by 2% per year and to achieve carbon neutral growth from 2020. As these were collective global targets, they initially relied on voluntary initiatives by States<sup>165</sup> to be combined with a market-based mechanism<sup>166</sup>, later implemented in the form of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSLA)<sup>167</sup>, as it will be further discussed.

Being aware that the above-mentioned medium-term aspirational goals were not enough to meet the Paris Agreement temperature containment target, ICAO Assembly adopted in 2022 a long-term aspirational goal (LTAG) of net-zero carbon emissions by 2050 (i.e., offsetting all aviation-related emissions)<sup>168</sup> together with initiatives aiming at improving aircraft technologies, operational efficiency and sustainable aviation fuels (SAFs)<sup>169</sup>.

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<sup>161</sup> Environmental issues are addressed through the Committee on Aviation Environmental Protection (CAEP), a Technical Committee established by ICAO Council in 1983. See <https://www.icao.int/environmental-protection/pages/caep.aspx>. For an overview of ICAO role in addressing climate change, see K. HAAG, *International action and the role of ICAO*, in F. FICHERT, P. FORSYTH, H. NIEMEIER (eds), *Aviation and Climate Change*, Abingdon, 2020, p. 104-116, esp. p. 108 ff.; A. PIERA, *Getting to global Cooperation: The ICAO and Climate Change*, in P. FITZGERALD, MD TANVEER AHMAD (eds), *Sustainable development, international aviation, and treaty implementation*, Cambridge, 2018, p. 247-281.

<sup>162</sup> See ICAO, Assembly Resolution A16-3 of 1968.

<sup>163</sup> See ICAO, Assembly Resolution A18-11 of 1971. It is worth noting, however, that initially the focus was on local air quality and on specific pollutants.

<sup>164</sup> See Article 2, para. 2, Kyoto Protocol, cit.

<sup>165</sup> ICAO then developed a strategy based on Members' voluntary planning and reporting via State Action Plans (see ICAO, Assembly Resolution A37-19 of 2010; support was reaffirmed in Resolutions A38-18 of 2013, A39-2 of 2016 and A40-18 of 2019).

<sup>166</sup> ICAO Assembly Resolution A38-18 of 2013.

<sup>167</sup> ICAO Assembly Resolution A39-3 of 2016. In detail on the topic, see S. TRUXAL, *Economic and Environmental Regulation of International Aviation*, Abingdon, 2017, p. 157 ff.; T. WALKER, A.S. BERGANTINO ET AL. (eds), *Sustainable Aviation: Greening the Flight Path*, Cham, 2020; A. DE MESTRAL, P. FITZGERALD, MD TANVEER AHMAD (eds), *Sustainable development, international aviation, and treaty implementation*, Cambridge, 2018; F. FICHERT, P. FORSYTH, H. NIEMEIER (eds), *Aviation and Climate Change*, Abingdon, 2020; E. CARPANELLI, *Between global climate governance and unilateral action: The establishment of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSLA)*, in J. WALULIK (ed), *Harmonizing regulatory and antitrust regimes for international air transport*, Abingdon, 2020, p. 125-141; F. MUNARI, *Lifting the veil: COVID-19 and the need to re-consider airline regulation*, in *European Papers*, No. 5, 2020, p. 533-559, esp. 534.

<sup>168</sup> See, ICAO, Assembly Resolution A41-21 of 2022, paras 6 ff.

<sup>169</sup> For a comprehensive analysis of the solutions available, see ICAO, 2022 Environmental Report, Montreal, 2022 and its Special Supplement on the Long-Term Aspirational Goal, as well as International Transport Forum (ITF), *Decarbonising Air Transport: Acting Now for the Future*, ITF Policy Papers, No. 94, Paris: OECD, 2021. Cf. also the adoption of an ICAO Global Framework for Aviation Cleaner Energies at the Third ICAO Conference on Aviation and Alternative Fuels (CAAF/3) held in Dubai during

Currently, International Standards and Recommended Practices (SARPs) on the environmental impact of civil aviation are set out in Annex 16 to the Chicago Convention, which consists of four volumes, addressing, respectively, Aircraft noise (Vol. I), Aircraft Engine Emissions (Vol. II), Aeroplane CO<sub>2</sub> Emissions (Vol. III) and CORSIA (Vol. IV)<sup>170</sup>.

The adoption of CORSIA represented a major breakthrough in ICAO efforts, as it introduced a scheme for regulating international civil flights emissions, so as to stabilize these emissions at the values recorded in 2019: this is referred to as carbon neutral growth (CNG)<sup>171</sup>. The implementation of CORSIA is divided into three phases: the pilot phase (2021 to 2023) and the first phase (2024 to 2026) are voluntary participation<sup>172</sup>, while the second phase (2027 to 2035) is mandatory participation for all ICAO Member States.

CORSIA applies to carriers (i) that operate international flights between participating countries, (ii) whose aircraft have a maximum take-off mass of more than 5,700 kg and (iii) that emit more than 10,000 tonnes of CO<sub>2</sub> per year. Flights for humanitarian, medical assistance or fire-fighting operations are excluded from the emission calculation. Under CORSIA, each operator must meet an emission offset obligation (calculated according to the growth rate of the sector), and participates in a market for trading carbon units. Compliance to the Scheme relies on monitoring, reporting and verification obligations, further clarified by the latest amendment to Annex 16, Vol. IV<sup>173</sup>.

The market-based system set out in CORSIA has similarities to the EU ETS: in this regard, applying the ETS to aviation was envisaged in 2008, thus well before the CORSIA agreement<sup>174</sup>. Many US carriers challenged their inclusion in

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UNFCCC COP 28 (ICAO, *Global Framework for SAF, LCAF and other Aviation Cleaner Energies*, adopted by CAAF/3 on 24 November 2023, available at [https://www.icao.int/Meetings/CAAF3/Documents/ICAO%20Global%20Framework%20on%20Aviation%20Cleaner%20Energies\\_24Nov2023.pdf](https://www.icao.int/Meetings/CAAF3/Documents/ICAO%20Global%20Framework%20on%20Aviation%20Cleaner%20Energies_24Nov2023.pdf)).

<sup>170</sup> All volumes of Annex 16 are accessible online at: <https://elibrary.icao.int/>.

<sup>171</sup> Due to the outbreak of the pandemic, the baseline year has been changed from 2020 to 2019. On COVID-related adjustments to CORSIA, see G. GORDON-HARPER, *CORSIA Baseline Adjustment in Response to COVID-19: A Blessing or a Curse?*, IISD Policy Brief, 8.9.2020, <https://sdg.iisd.org/commentary/policy-briefs/corsia-baseline-adjustment-in-response-to-covid-19-a-blessing-or-a-curse/>.

<sup>172</sup> Voluntarily participations in CORSIA increased from 88 States in 2021, to 115 States from 1 January 2023, see ICAO, *The Postal History of ICAO. Annex 16 – Environmental Protection*, 2023, [https://applications.icao.int/postalhistory/annex\\_16\\_environmental\\_protection.htm](https://applications.icao.int/postalhistory/annex_16_environmental_protection.htm).

<sup>173</sup> ICAO, Annex 16 – Volume IV: Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), 2<sup>nd</sup> ed., 2023, at <https://elibrary.icao.int/>. Technical guidance is provided by the Environmental Technical Manual - Volume IV, 3<sup>rd</sup> ed., Doc 9501, 2023 and five implementation elements (listed at <https://www.icao.int/environmental-protection/CORSIA/Pages/implementation-elements.aspx>). In this vein, see also the ICAO Carbon Emissions Calculator (ICEC) providing a publicly accessible methodology for estimating flight emissions at the individual passenger level (accessible at <https://www.icao.int/environmental-protection/Carbonoffset/Pages/default.aspx>; on methodology, cf. ICAO Carbon Emissions Calculator Methodology, version 11.8, 2018). ICEC will be further developed in collaboration with the digital private sector (ICAO, ICAO and Google to collaborate on improving methodology for calculating flight carbon emissions, press release, 7 Dec. 2023).

<sup>174</sup> See Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ L 8, 13.1.2009, p. 3–21, implemented by Commission Decision 2009/450/EC of 8 June 2009 on the detailed interpretation of the aviation activities listed in

the ETS because of its extraterritorial repercussions<sup>175</sup>, but the Court of Justice confirmed its legitimacy in the famous *ATAA (Clean Skies)* ruling<sup>176</sup>. Nonetheless, in order to facilitate negotiations with ICAO, which would later lead to the adoption of CORSIA, the EU adopted exemptions to limit ETS compliance obligations to intra-EU flights only until the implementation of CORSIA<sup>177</sup>. After further delays<sup>178</sup>, currently the extension of the EU ETS to extra-EU connections is expected to take place from 1 January 2027<sup>179</sup>, while aircraft operators are required to monitor and report their emissions from intra-EU flights since 2019<sup>180</sup>.

All in all, this legislation is an important step to making aviation more environmentally sustainable<sup>181</sup>. However, in terms of the international market, these regulations are still not enough since they mainly focus on offsetting or stabilizing emissions, when, instead, priority should be given to a policy committed to net reduction. Greater sensitivity and awareness to environmental protection is emerging in Europe, thanks to the leading role taken by the EU in the ‘ecological transition’. This eco-friendly vision is shown by the strategy for sustainable mobility<sup>182</sup> as well as by the legislation introduced in the ‘Fit for 55’ package, which

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Annex I to Directive 2003/87/EC of the European Parliament and of the Council, OJ L 149, 12.6.2009, p. 69–72.

<sup>175</sup> P. MANZINI, A. MASUTTI, *The Application of the EU ETS System to the Aviation Sector: From Legal Disputes to International Retaliations?*, in *Air & Space Law*, vol. 37, no. 4-5, 2012, p. 307–324.

<sup>176</sup> CJEU, 21 December 2011, *Air Transport Association of America v. Secretary of State for Energy and Climate Change*, C-366/10, EU:C:2011:864. For an analysis of the judgement, see E. DENZA, *International Aviation and the EU Carbon Trading Scheme: Comment on the Air Transport Association of America Case*, in *European Law Review*, 2012 p.314-326; A. GATTINI, *Between Splendid Isolation and Tentative Imperialism: The EU's Extension of its Emission Trading Scheme to International Aviation and The ECJ's Judgment in the ATA Case*, in *International and Comparative Law Quarterly*, 2012 p. 977-991; G. DE BAERE, C. RYNGAERT, *The ECJ's Judgment in Air Transport Association of America and the International Legal Context of the EU's Climate Change Policy*, in *European Foreign Affairs Review*, 2013 p. 389-409.

<sup>177</sup> Regulation (EU) No 421/2014 of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions, OJ L 129, 30.4.2014, p. 1–4.

<sup>178</sup> See Regulation (EU) 2017/2392 of the European Parliament and of the Council of 13 December 2017 amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021, OJ L 350, 29.12.2017, p. 7–14.

<sup>179</sup> See Directive (EU) 2023/958 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC as regards aviation's contribution to the Union's economy-wide emission reduction target and the appropriate implementation of a global market-based measure, OJ L 130, 16.5.2023, p. 115–133.

<sup>180</sup> See, respectively, Commission Delegated Regulation (EU) 2019/1603 of 18 July 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council as regards measures adopted by the International Civil Aviation Organisation for the monitoring, reporting and verification of aviation emissions for the purpose of implementing a global market-based measure, OJ L 250, 30.9.2019, p. 10–13; Commission Delegated Regulation (EU) 2019/1603 of 18 July 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council as regards measures adopted by the International Civil Aviation Organisation for the monitoring, reporting and verification of aviation emissions for the purpose of implementing a global market-based measure, OJ L 250, 30.9.2019, p. 10–13.

<sup>181</sup> In this vein, it is worth noting that, thanks to improvements in fuel efficiency over recent years, the amount of fuel burned per passenger dropped by 24% between 2005 and 2017: see Commission, *Reducing emissions from aviation*, 2021, at [https://climate.ec.europa.eu/eu-action/transport-emissions/reducing-emissions-aviation\\_en](https://climate.ec.europa.eu/eu-action/transport-emissions/reducing-emissions-aviation_en).

<sup>182</sup> Commission, *Sustainable and Smart Mobility Strategy – putting European transport on track for the future*, COM(2020) 789 final, 9 Dec. 2020.

envisages the gradual elimination of free emission quotas for airlines<sup>183</sup>, whose impact on State aid law rules will be addressed *infra*<sup>184</sup>.

#### 4. EU State aid law

##### 4.1. General principles and main procedural rules

By establishing its internal market, the Union aims to develop «a highly competitive social market economy»<sup>185</sup>. This means providing firms with a level playing field with both harmonised legislation<sup>186</sup> and competition rules that address the actions of operators in the market<sup>187</sup>. While the misuse of market power by firms is sanctioned by antitrust law, State aid law ensures that public intervention in the economy is without prejudice to the free movement of goods and provision of services<sup>188</sup>. Without this kind of legislation, firms operating in one Member State may have an unfair advantage over competitors located elsewhere in the Union, just because of a different degree of Member State intervention capable of altering – due to protectionist interests – the competitiveness in the relevant market and distorting trade within the EU. In economic terms, antitrust and State aid rules combined allow market entrance of new competitors as well as the exit of the less efficient ones, ultimately ensuring innovation and optimal allocation of resources<sup>189</sup>.

The first example of subsidy restrictions at European level can be found in the Treaty of Paris establishing European Coal and Steel Community (ECSC)<sup>190</sup>, which unconditionally prohibited subsidies to coal and steel industries. Besides, in the EEC Treaty, a general prohibition encompassing all sectors was paired with exemptions applying to certain categories of aid<sup>191</sup>. This solution recognizes subsidies as a tool for economic policy and that States should be entitled to award them when in line to the Union’s interests, so as to safeguard the ‘social’ dimension

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<sup>183</sup> See Commission, Fit for 55: delivering the EU's 2030 Climate Target on the way to climate neutrality, COM(2021) 550 final, 14 July 2021, p. 6 and Directive (EU) 2023/958, cit.

<sup>184</sup> See, *infra*, pp. [138] ff.

<sup>185</sup> Article 3(3) TEU.

<sup>186</sup> See Article 114 TFEU.

<sup>187</sup> Competition law is hereby considered in its broad meaning, comprising both antitrust and State aid law, see F. JACOBS, *Introduction*, in A. BIONDI, P. EECKHOUT, J. FLYNN (eds.), *The law of state aid in the European Union*, Oxford, 2004, p. vii.

<sup>188</sup> Together with competition rules, State aid control complement fundamental freedoms, see Spaak Report, cit., p. 55-57. In detail, see J. PIERNAS LÓPEZ, *The Concept of State Aid Under EU Law: From internal market to competition and beyond*, Oxford, 2015, p. 38 ff.

<sup>189</sup> On the objectives of State aid policy, with a specific focus on market barriers to exit, see: V. MINERVINI, *Insolvency, Competition, and the Theory of the firm*, in *European Business Law Review*, vol. 32, 2021, p. 743-768, esp. 753 ff.; A. PEZZOLI, *La politica della concorrenza ai tempi del virus e la rilegittimazione dell'intervento pubblico*, in *Mercato Concorrenza Regole*, no. 1, 2020, p. 139-155; V. DI BUCCI, *The Modernisation of State Aid Control and Its Objectives: Clarity, Relevance, Effectiveness*, in *Italian antitrust review*, no. 3, 2014, p. 7-23; C. PAULUS, *Competition Law versus Insolvency Law*, in *Unif. L. Rev.*, 2013, p. 1-13.

<sup>190</sup> Article 4.c ECSC. On the origins of State aid law, see J. PIERNAS LÓPEZ, *The Concept of State Aid*, cit., p. 34; T. MAXIAN RUSCHE, in M. KELLERBAUER ET AL. (eds), *The EU Treaties*, cit., p. 1111-1166, esp. at 1117 ff.

<sup>191</sup> See Articles 87-89 EEC Treaty.

of market economy<sup>192</sup>. As the matter is exclusively subject to the EU's purview<sup>193</sup>, the Commission is given discretionary powers to distinguish between lawful and unlawful aid<sup>194</sup>.

State aid law is regulated by Articles 107-109 TFEU<sup>195</sup>, which will be examined below alongside the relevant secondary legislation and Commission's guidelines.

In terms of procedural rules<sup>196</sup>, State aid control is regulated by Article 108 TFEU, which has direct effect<sup>197</sup>, and by Regulation (EU) No. 1589/2015 (the 'Procedural Regulation')<sup>198</sup>. The legal framework is completed by Implementing Regulation (EC) No. 794/2004<sup>199</sup> as well as Commission's guidance on simplified procedure<sup>200</sup> and its best practices<sup>201</sup>. The procedure is under the Commission's

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<sup>192</sup> Cf. M. CINI, *State aid control from a political science perspective*, in L. HANCHER, J. PIERNAS LÓPEZ (eds), *Research handbook on European State aid law*, Cheltenham, 2021, p. 1-14, esp. 5 ff.

<sup>193</sup> Article 3(1)(b) TFEU.

<sup>194</sup> It is worth recalling that, in principle, State aid provisions in the Treaty do not have direct effects: CJEU, 22 March 1977, *Steinike und Weinlig*, C-78/76, EU:C:1977:52, para. 9. In detail, see: F. MUNARI, C. CELLERINO, *Art. 107 TFUE*, in A. TIZZANO (ed.), *Trattati dell'Unione Europea*, 2<sup>nd</sup> ed., Milan, 2014, p. 1073-1190, esp. 1144.

<sup>195</sup> Compared to the previous discipline, the Treaty of Lisbon introduced only very limited changes *re* aid compensating the consequences of Germany's breakup (Article 107(2)(c) TFEU), aid to outermost regions (Article 107(3)(a) TFEU), as well as Commission's power to adopt block exemptions pursuant to Council's enabling regulation (Article 108(4) TFEU).

<sup>196</sup> In detail on the procedural rules governing State aid control, see T. MAXIAN RUSCHE, *Article 108 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds), *The EU Treaties*, cit., p. 1171; E. RIGHINI, F. TOMAT, *State aid procedures*, in L. HANCHER, J. PIERNAS LÓPEZ (eds), *Research handbook*, cit., p. 249-268; M. SCHMAUCH, *EU Law*, cit., p. 191 ff.; P. WERNER, *Art. 108 TFEU*, in F. SAECKER, J. MONTAG (eds), op. cit., p. 1509 ff.; F. MUNARI, C. CELLERINO, *Art. 108 TFUE*, in A. TIZZANO (ed.), *Trattati*, cit., p. 1164-1190; M. SERPONE, *La disciplina degli aiuti di Stato*, in C. CATRICALÀ, C. CAZZATO, F. FIMMANÒ (eds), *Diritto anti-trust*, Milan, 2021, p. 1142; P. PIRODDI, *La procedura della commissione relativa agli aiuti di Stato nuovi*, in L.F. PACE (ed), *Dizionario Sistematico della Concorrenza*, 2<sup>nd</sup> ed., Milan, 2020, p. 727 ff.; G. TESAURO, P. DE PASQUALE, F. FERRARO (eds), *Manuale di Diritto dell'Unione europea*, p. 289 ff.; R. ADAM, A. TIZZANO, *Diritto dell'Unione europea*, Turin, 2014, p. 650 ff.; C. SCHEPISI (ed), *La 'modernizzazione' della disciplina sugli aiuti di Stato*, Turin, 2011.

<sup>197</sup> On the direct effect of the current 108(3) TFEU, see CJEU, 15 July 1964, *Costa v ENEL*, 6/64, EU:C:1964:66, esp. pp. 595-596 and, more recently, Id., 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, para. 88 and the case-law cited. In fact, it is worth noting that secondary legislation on State aid procedure has been adopted only in 1999. In detail, see T. MAXIAN RUSCHE, *Article 108 TFEU*, cit., p. 1171.

<sup>198</sup> Adopted under the legal basis of Article 109 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, OJ L 248, 24.9.2015, p. 9-29.

<sup>199</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.4.2004, p. 1-134. The consolidated text is available at <http://data.europa.eu/eli/reg/2004/794/2016-12-22>.

<sup>200</sup> Commission, Notice on a Simplified procedure for the treatment of certain types of State aid, OJ C 136, 16.6.2009, p. 3-12. Over the period 2010-17, the simplified procedure had only been applied in just over fifty cases (T. MAXIAN RUSCHE, *Art. 108*, cit., p. 1172), but it has been widely used for the approval of pandemic aid, as will be discussed below, *infra*, pp. [76] ff.

<sup>201</sup> European Commission, Code of Best Practice for the conduct of State aid control procedures OJ C 136, 16.6.2009, p. 13-20. For a comment, see T. LÜBBIG, *The New Best Practices Code for State Aid: A Check against Reality*, in *Journal of European Competition Law & Practice*, vol. 10, 2019, p. 3 ff.; T. WILSON, *New Code of Best Practices for State Aid Procedures*, in *Kluwer Competition Law Blog*, 10 August 2018.

exclusive competence while the Council can intervene only in exceptional circumstances<sup>202</sup>.

State aid measures consist of either *individual aid*, if the resources are given to a specific business - or listed group of undertakings - of a certain sum and duration; or *aid schemes*, such as, any act that, without further implementation, awards individual aid to «undertakings defined within the act in a general and abstract manner» or awarding aid «to one or several undertakings for an indefinite period of time or for an indefinite amount» without a link to a specific project<sup>203</sup>.

EU primary law distinguishes between existing and new aid.

On the one hand, *existing aid* comprises measures implemented before Treaties (or accession Treaties) are enforced and are currently still applicable<sup>204</sup>. Existing aid is subject to the constant review of the Commission and is protected as a general rule, while any change and abolition is only for the future. If, as a preliminary conclusion, the Commission finds the aid is not - or is no longer - compatible with the internal market, a formal investigation is opened<sup>205</sup>. After this assessment, if the aid is deemed unlawful, the Member State shall abolish or alter the measure within a certain period of time set by the Commission. A State's non-compliance may result in a special infringement procedure<sup>206</sup>.

On the other hand, *new aid* encompasses all the other measures and may not be introduced without the Commission's prior authorization - which is known as 'standstill clause'<sup>207</sup>. If the Commission deems the aid to not be compatible with the internal market, it must be recovered *ex tunc*. The breach of the standstill clause is sanctioned even if the aid is eventually considered lawful<sup>208</sup>.

Even in the case of new aid, the assessment is made via a two-step procedure. After the notification, the Commission has, as a general rule, two

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<sup>202</sup> Article 108(2) TFEU: «On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances».

<sup>203</sup> Article 1(d) Reg. (EU) 2015/1589, cit.

<sup>204</sup> Article 108(1) TFEU. The regime for existing aid applies also to: i) aid authorized by the Commission or by the Council; ii) notified aid, if the Commission has not adopted a decision two months after notification; iii) measures which did not qualify as aid when adopted, but fell later under the definition of aid due to the evolution of the internal market; iv) aid granted according to a block exemption regime. In detail, see: F. MUNARI, C. CELLERINO, *Art. 108 TFEU*, cit., p. 1166 ff.

<sup>205</sup> Article 108(1) TFEU and Article 21 Reg. (EU) 2015/1589, cit. Due to the lack of a standstill clause in this provision, the Member State is not required to suspend the implementation of the aid.

<sup>206</sup> See Article 108(2) TFEU: «If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct». Therefore, there is no need to complete the pre-litigation phase before accessing the Court.

<sup>207</sup> Article 108(2) TFEU. On the notification procedure, see recently, R. VAN DRUENEN, P. ZWAAN, E. MASTENBROEK, *Getting State Aid Approved by the European Commission: Explaining the Duration of Preliminary Investigations in the State Aid Notification Procedure*, in *Journal of Common Market Studies*, vol. 60, 2022, p. 545–561.

<sup>208</sup> In this case, in fact, «the national court must therefore, applying Community law, order the aid recipient to pay interest in respect of the period of unlawfulness», the so-called CELF interest: CJEU, 12 February 2008, *CELF I*, C-199/06, EU:C:2008:79, para. 52.

months to ascertain if the measure falls under the scope of State aid law. The preliminary assessment may end without objections, if the measure is not deemed aid or is deemed compatible with the internal market<sup>209</sup>. Furthermore, when raising objections, the Commission opens a formal investigation procedure lasting, as a general rule, no more than 18 months<sup>210</sup>.

At the end of the investigation, the Commission may decide, alternatively, that the measure is i) not a State aid; ii) aid compatible within the internal market; iii) aid compatible within the internal market subject to certain obligations that must be fulfilled; iv) unlawful aid, incompatible with EU law.

In the latter case, the Member State has to recover the amount of the unlawful aid from the recipient<sup>211</sup>. Recovery is exempted if the investigation started 10 years after the aid was granted<sup>212</sup> or in case of ‘absolute legal impossibility’<sup>213</sup>. Approval of new aid to the same undertaking is only possible if the previous unlawful aid has been paid back in the meantime<sup>214</sup>.

According to Article 108(4) TFEU, the Commission may adopt regulations exempting certain categories of aids from the notification procedure, therefore providing an *ex ante* evaluation of aid compatibility. This legal basis has been used for the adoption of Reg. (EC) No. 651/2014 (General Block Exemption Regulation, GBER)<sup>215</sup> and other sectorial block exemption regulations<sup>216</sup>. Currently, the vast majority of State aid has been granted via block exemptions<sup>217</sup>.

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<sup>209</sup> Interested parties may nevertheless challenge the decision for annulment before the EU General Court, as will be discussed *infra*, pp. [121] ff.

<sup>210</sup> Pursuant Articles 6 and 24.1 Reg. (EU) 2015/1589, cit., Member States and all the interested parties may submit observations to the Commission.

<sup>211</sup> In detail, see P. PIRODDI, *La procedura della commissione relativa agli aiuti di Stato illegali e l'obbligo di recupero*, in L.F. PACE (ed), op. cit., p. 745-761.

<sup>212</sup> Article 17 Reg. (EU) 2015/1589, cit.

<sup>213</sup> CJEU, 11 September 2014, *Commission v Germany (Biria)*, C-527/12, EU:C:2014:2193, para. 49. According to the mutual sincere cooperation principle a dialogue with the Commission must be established by the Member State concerned.

<sup>214</sup> CJEU, 9 March 1994, *Textilwerke Deggendorf (TWD) v Germany*, C-188/92, EU:C:1994:90, paras 25 ff.

<sup>215</sup> See recital no. 70 and Article 51, 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, OJ L 187, 26.6.2014, p. 1–78.

<sup>216</sup> See the Agricultural Block Exemption Regulation (ABER) and the Fishery Block Exemption Regulation (FIBER): Commission Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union, OJ L 193, 1.7.2014, p. 1–75; Commission Regulation (EU) 2022/2473 of 14 December 2022 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union, OJ L 327, 21.12.2022, p. 82–139. It is worth noting that land transport benefits from a derogation that takes into account article 93 TFEU as well: Council Regulation (EU) 2022/2586 of 19 December 2022 on the application of Articles 93, 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of State aid in the rail, inland waterway and multimodal transport sector, OJ L 338, 30.12.2022, p. 35–39.

<sup>217</sup> According to Commission’s most recent data, Member States implemented 2,365 new GBER, 296 new ABER and 29 new FIBER measures in 2021, corresponding altogether to 83% of all new State aid measures; excluding pandemic-related measures, 93% of total new non-crisis measures have been

## 4.2. The notion of aid under Article 107.1 TFEU

According to 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 favouring 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».

Therefore, a measure is deemed as State aid when: *i)* it is granted by the State through public resources; *ii)* it confers an advantage to the recipient; *iii)* it is selective, as it favours certain undertakings or productions; *iv)* it distorts or threatens to distort competition; *v)* it affects trade between Member States. All these conditions have to be met cumulatively: if not, the measure falls outside the Commission's scrutiny and the Member State is free to implement it<sup>218</sup>.

As highlighted by the Court of Justice, the notion of aid is broad - beyond the concept of subsidies in international law<sup>219</sup> - and based on effects rather than on causes or aims<sup>220</sup>. As a consequence, for instance, the social security purpose of the measure does not affect the assessment under Article 107(1) TFEU<sup>221</sup>. Moreover, aid definition is objective, which means that the Commission cannot use its soft law instruments to narrow the scope of the prohibition<sup>222</sup>. In fact, Commission's guidelines on the exercise of its discretionary powers are binding for this institution, as far as they do not contradict Treaty rules<sup>223</sup>.

### 4.2.1 State resources

The first condition - «granted by a Member State or through State resources» - consists of two prongs that, despite the wording 'or' in the provision, must be jointly fulfilled<sup>224</sup>: *a)* the *imputability* of the aid, and *b)* the use of *State*

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implemented under the GBER. In detail see Commission, State aid Scoreboard 2022, 24.4.2023, available at [https://competition-policy.ec.europa.eu/state-aid/scoreboard\\_en](https://competition-policy.ec.europa.eu/state-aid/scoreboard_en), p. 12.

<sup>218</sup> On the stand-still clause and the *ex ante* notification procedure, see *infra* p. [38].

<sup>219</sup> This interpretation has been emphasized since the first case on the prohibition stated in the ECSC Treaty, see ECJ, 23 February 1961, *Steenkolenmijnen Limburg v High Authority*, C-30/59, EU:C:1961:2, p. 19 ff.

<sup>220</sup> CJEU, 2 July 1974, *Italy v Commission (Italian Textiles)*, Case C-173/73, EU:C:1974:71, para 13.

<sup>221</sup> On social security, see CJEU, 17 June 1999, *Belgium v Commission (Maribel)*, C-75/97, EU:C:1999:311, para. 25; Id., 5 October 1999, *France v Commission*, C-251/97, EU:C:1999:480, para. 37; Id., 12 December 2002, *Belgium v Commission (Cockerill)*, C-5/01, EU:C:2002:754, para 46. The same reasoning applies to environmental goals, cf. T. MAXIAN RUSCHE, *Art. 107*, cit., p. 1120 and *infra*, pp. [49] ff. and [129] ff.

<sup>222</sup> EU General Court, 12 September 2013, *Germany v Commission*, T-347/09, EU:T:2013:418, para. 51: «si la Commission est tenue par les encadrements et les communications qu'elle adopte en matière d'aides d'État, c'est uniquement dans la mesure où ces textes ne s'écartent pas d'une bonne application des normes du traité CE, lesdits textes ne pouvant être interprétés dans un sens qui réduise la portée des articles 87 CE et 88 CE ou qui contrevienne aux objectifs visés par ceux-ci». The most recent guidance is provided by Commission, Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, OJ C 262, 19.7.2016, p. 1–50.

<sup>223</sup> CJEU, 13 June 2002, *The Netherlands v Commission*, C-382/99, para. 24; Id., 2 December 2010, *Holland Malt v Commission*, C-464/09, EU:C:2010:733, para. 46.

<sup>224</sup> See Opinion of AG Jacobs, 26 October 2000 in Case C-379/98, *PreussenElektra*, EU:C:2001:160, paras. 113–133.

*resources*. In order to avoid any circumvention of the prohibition, both these concepts are broadly interpreted by the Court.

The aid is considered attributable to the State (*sub a*), irrespective of the jurisdiction, be it central, local, municipal, etc. - and to the nature of the body in question (e.g., formally regulated by private law but under public control)<sup>225</sup>. At the same time, the State origin of the funds (*sub b*) regards any transfer of money ultimately deriving from a public law entity<sup>226</sup>. Therefore, this requirement is fulfilled even if the undertaking receives public funding through private bodies appointed by the State to administer the aid<sup>227</sup>.

Regarding the sector under scrutiny, if the airport is a public entity, any decision to transfer its resources to an airline may qualify as State aid<sup>228</sup>.

#### 4.2.2 Economic advantage

The aid then must favour an undertaking by providing an economic *advantage* that the recipient would not have otherwise gained in normal market conditions (*sub ii*)<sup>229</sup>. This occurs when the measure reduces the financial burden on the undertaking in question<sup>230</sup>. The assessment is made by comparing the recipient's market position before and after the adoption of the measure and to those of its competitors<sup>231</sup>. The advantage may be either direct or indirect, such as a transfer of resources to consumers that ultimately favours certain firms<sup>232</sup>.

The economic advantage condition is rejected if the State carried out the measure – in its role of shareholder, vendor or creditor<sup>233</sup> – under conditions that a private investor in the State's same position would have accepted<sup>234</sup>. This safeguard is known as Market Economy Operator (MEO) and reflects the principle of equal treatment between public and private ownership stated in Article 345 TFEU<sup>235</sup>. Due to its economic nature, the Commission enjoys a wide margin of

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<sup>225</sup> See CJEU, 14 October 1987, *Germany v Commission*, C-248/84, EU:C:1987:437, para. 17; Id., 21 March 1991, *Italy v Commission (Lanerossi)*, C-303/88, EU:C:1991:136, para. 11; Id., 16 May 2002, *France v Commission*, C-482/99, EU:C:2002:294, para. 55; EU General Court, 24 March 2011, *Flughafen Leipzig-Halle*, T-443/08, EU:T:2011:117, para. 143.

<sup>226</sup> CJEU, 17 March 1993, *Sloman Neptun*, C-72/91, EU:C:1993:97, para. 19. Even a serious risk that the measure would result in additional financial burden to the State's budget is deemed enough to fulfil this requirement: CJEU, 19 March 2013, *Bouygues*, Joined Cases C-399/10 and C-401/10, EU:C:2013:175, para. 106.

<sup>227</sup> CJEU, 22 March 1977, *Steinike und Weinlig*, C-78/76, EU:C:1977:52, para. 21.

<sup>228</sup> Commission, 2014 Aviation Guidelines, cit., para. 40.

<sup>229</sup> CJEU, 11 July 1996, *Syndicat français de l'Express international (SFEI)*, Case C-39/94, EU:C:1996:285, para. 60.

<sup>230</sup> M. SCHMAUCH, *EU Law*, cit., p. 95.

<sup>231</sup> Irrespective of the final outcome of the measure, even if the undertaking resulted worse off after an *ex post* evaluation: R. ADAM, A. TIZZANO, *Diritto dell'Unione europea*, Turin, 2014, p. 645.

<sup>232</sup> EU General Court, 4 March 2009, *Italy v Commission*, T-424/05, EU:T:2009:49 para.108; Id., 15 June 2010, *Mediaset SpA v Commission*, T-177/07, EU:T:2010:233, at para.75.

<sup>233</sup> See, e.g., CJEU, 21 March 2013, *Buczek Automotive*, C-405/11 P, EU:C:2013:186, paras 31-32.

<sup>234</sup> See CJEU, 17 November 2022, *Volotea v Commission*, C-331/20 and C-343/20, EU:C:2022:886, paras 53 ff.; EU General Court, 17 December 2008, *Ryanair v Commission (Charleroi airport)*, T-196/04, para. 59.

<sup>235</sup> CJEU, 5 June 2012, *Commission v EDF*, C-124/10, EU:C:2012:318, para. 78.

discretion when applying the MEO test<sup>236</sup>. The conditions of the MEO test are met when the granting State is compensated for its funding in a way that ensures a reasonable margin of profit<sup>237</sup>. The assessment is made by adopting the perspective of a long-term investor<sup>238</sup> which applies the standard conditions negotiated in the market in question<sup>239</sup>.

Long-term investment profitability and reliability of the survey provided in the business plan are crucial when applying the MEO test to airport and airlines<sup>240</sup>, while social, regional-policy and sector considerations should be left out of the scope of the test<sup>241</sup>.

Furthermore, the Commission's guidance clarified that the transfer of public resources from an airport to an airline may satisfy the MEO test if *a*) the price charged for the airport services corresponds to the market price or *b*) if *ex ante* analysis shows a return for the airport in terms of increased profit<sup>242</sup>.

The element of advantage is excluded also in the area of Services of General Economic Interest (SGEI)<sup>243</sup>, when the State is offsetting the costs of an undertaking discharging a Public Service Obligation (PSO)<sup>244</sup>. In this case, in fact, public support is limited to compensating service costs, thus balancing the

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<sup>236</sup> Further on MEO, see M. CYNDECKA, *The Market Economy Investor Test in EU State Aid Law*, Alphen aan den Rijn, 2016, esp. 84 ff.; N. ROBINS, L. PUGLISI, *The market economy operator principle: an economic role model for assessing economic advantage*, in L. HANCHER, J. PIERNAS LÓPEZ (eds), *Research handbook on European State aid law*, Cheltenham, 2021, p. 15-39; M. EBNER, E. GAMBARO, *The Notion of State Aid*, in A. SANTA MARIA, C. BISCARETTI DI RUFFIA (eds.), *Competition and State Aid – An Analysis of the EC Practice*, Alphen aan den Rijn, 2007, p. 17 ff., esp. 24; H. FRIEDERISZICK, L. ROELLER, V. VEROUDEN, *European State Aid Control: an economic framework*, in P. BUCCIROSSI (ed.), *Handbook of antitrust economics*, Cambridge, 2008, p. 625–669, esp. 628.

<sup>237</sup> CJEU, 21 March 1991, *Italy v Commission (Alfa Romeo)*, C-305/89, EU:C:1991:142, para. 20; Id., 14 September 1994, *Spain v Commission*, Joined Cases C-278/92, C-279/92 and C-280/92, EU:C:1994:325, paras. 20-22, and EU General Court, 12 December 2000, *Alitalia v Commission*, T-296/97, EU:T:2000:289, para. 84.

<sup>238</sup> CJEU, *Lanerossi*, C-303/88, cit., paras. 21-22.

<sup>239</sup> EU General Court, 6 March 2003, *Westdeutsche Landesbank v Commission*, T-228/99 and T-233/99, EU:T:2003:57, para 255: «[T]he use of an average return must be consistent with the notion that an informed private investor, that is, an investor who wishes to maximise his profits but without running excessive risks in comparison with other participants in the market, would, when calculating the appropriate return to be expected for his investment, in principle require a minimum return equivalent to the average return for the sector concerned».

<sup>240</sup> Commission, 2014 Aviation Guidelines, cit., paras 50-51.

<sup>241</sup> Ibidem, para 49.

<sup>242</sup> Ibidem, para. 53 ff.

<sup>243</sup> Services of general economic interest (SGEI) are commercial services of general economic utility (e.g., transport, energy, communications) subject to public-service obligations. According to Article 14 TFEU, the Union and the Member States, each within their respective powers ensure that such services operate on the basis of economic and financial conditions, which enable them to fulfil their missions. See also Article 106 TFEU (*infra*) and Protocol (No 26) on services of general interest, OJ C 115, 9.5.2008, p. 308–308.

<sup>244</sup> CJEU, 24 July 2003, *Altmark*, C-280/00, EU:C:2003:415; even before, cf. Opinion of AG Tizzano, 8 May 2001 in case C-53/00, *Ferring*, EU:C:2001:253, paras 56 ff. Recently, see CJEU, 8 September 2022, *Lux Express Estonia*, C-614/20, EU:C:2022:641. For a comprehensive analysis, see D. GALLO, *Public Services and EU Competition Law*, Abingdon, 2022, p. 69 ff.

economic disadvantage *vis-à-vis* the competitors that are not burdened by the PSO<sup>245</sup>.

In the famous *Altmark* ruling, the Court clarified that PSO compensation does not qualify as aid if the following conditions are met: *a*) there must be actually a PSO, with clearly defined obligations, to discharge; *b*) the compensation must be calculated by using objective and transparent criteria, to be established in advance; *c*) the compensation cannot exceed all the costs incurred, including a reasonable margin of profit for discharging the obligation; *d*) a public procurement procedure should select the undertaking operating at the minimum cost for the community and if this is not possible, the compensation must be determined by considering the costs incurred by a typical firm able to discharge the relevant PSO, taking into account a reasonable profit<sup>246</sup>. *Altmark* criteria have been further elaborated by the Commission<sup>247</sup>.

If these cumulative requirements are not met, the measure falls under the scope of Articles 107(1) TFEU and therefore the Member State has to notify it to the Commission. Nevertheless, in this case other Treaty exemptions might be relevant, such as Article 106(2) TFEU on competition rules applicable to State monopolies<sup>248</sup> and Article 93 TFEU on aid to intermodal land transport<sup>249</sup>. With reference to air transport<sup>250</sup>, specific rules are set out by Regulation (EC) No. 1008/2008<sup>251</sup> and Decision 2012/21/EU<sup>252</sup>; the Commission's sector framework<sup>253</sup> has recently been adjusted to address air connectivity issues caused by COVID-19 pandemic<sup>254</sup>.

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<sup>245</sup> R. ADAM, A. TIZZANO, *Diritto dell'Unione europea*, cit., p. 646.

<sup>246</sup> CJEU, *Altmark*, C-280/00, paras. 89-93.

<sup>247</sup> See Commission, Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012, p. 4–14; Id., European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, p. 15–22.

<sup>248</sup> Article 106(2) TFEU «Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them».

<sup>249</sup> Article 93 TFEU: «Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service». This provision is not applicable to air transport according to Article 100.1 TFEU, see *supra*, pp. [18] ff. Article 93 TFEU has been implemented by Council Regulation (EU) 2022/2586, cit.

<sup>250</sup> On the evolution of PSO regime applicable to air transport see G. WILLIAMS, *European experience of Public Service Obligations*, in G. WILLIAMS, S. BRAATHEN (eds), *Air Transport Provision in Remoter Regions*, Abingdon, 2010, p. 99 ff.; A. ANTONINI, *Gli oneri di pubblico servizio e gli aiuti di Stato nel trasporto aereo*, in *Diritto dei Trasporti*, vol. 13, 2000, p. 67-83; C. TUO, *Il trasporto aereo nell'Unione europea tra libertà fondamentali e relazioni esterne*, Torino, 2008, p. 81 ff.; A. MASUTTI, *Diritto aeronautico*, cit., p. 131.

<sup>251</sup> Articles 16 ff. Reg. (EC) No. 1008/2008, cit.

<sup>252</sup> Article 2(1)(d)-(e), Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.1.2012, p. 3–10.

<sup>253</sup> Commission, 2014 Aviation Guidelines, cit., paras 69 ff.

<sup>254</sup> Id., Overview of the State aid rules and public service obligations rules applicable to the air transport sector during the COVID-19 outbreak, 2020, [https://competition-policy.ec.europa.eu/state-aid/coronavirus/adjustments-and-rules-specific-sectors\\_en](https://competition-policy.ec.europa.eu/state-aid/coronavirus/adjustments-and-rules-specific-sectors_en). Cf. also *infra*, p. [86] ff.

### 4.2.3 Selectivity

Once it is clear that the measure gives the recipient an economic advantage, the Commission has to verify whether this advantage is *selective* (*sub iii*), i.e., that the aid only impacts certain undertakings or categories of undertakings<sup>255</sup>. On the contrary, all the measures of general or social economic policy are not deemed to be selective, but, nevertheless, may be regulated at EU level according to Treaty provisions on taxes and legislative harmonization<sup>256</sup>. General social security schemes, for instance, fall outside of the scope of Article 107(1) TFEU<sup>257</sup>.

The recipient must be an undertaking engaged in an economic activity – i.e., offering goods and services on a given market<sup>258</sup> – irrespective to its private or public nature<sup>259</sup>. Therefore, a measure benefitting entities performing only non-economic activities lacks selectivity, which is the case with the funding of research institutions<sup>260</sup> or the building of a road infrastructure that will be freely accessible to all users after its construction<sup>261</sup>.

As far as the aviation sector is concerned, the service offered by an airline is, undoubtedly, an economic activity<sup>262</sup>. The Court also deems airport management as an economic activity<sup>263</sup>, so that public support for building this kind of infrastructure is subject to State aid control<sup>264</sup>.

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<sup>255</sup> Cf. Spaak Report, cit., p. 59: «Toutefois il y a lieu de noter que certains regimes intervention qui formellement sont des aides ou des subventions ne adressent pas specifiquement a des entreprises ou a des secteurs, mais affectent l'economie generale».

<sup>256</sup> Articles 113 and 115-117 TFEU. According to Opinion of AG Wahl of 15 September 2016 in Case C-524/14 P, *Hansestadt Luebeck*, EU:C:2016:693, para. 64 «A distinction must be drawn between general measures of fiscal or economic policy (which now fall within the scope of Articles 113 and 115 to 117 TFEU) and specific measures which lead to the acquisition of advantages by means of State resources (which are, for their part, now covered by Articles 107 to 109 TFEU)». Cf. also Opinion of AG Darmon of 17 March 1992 in Joined Cases C-72/91 and C-73/91, *Sloman Neptun*, EU:C:1992:130, para. 62.

<sup>257</sup> Commission, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Communication 2014/C 249/01, para. 31 ff.

<sup>258</sup> CJEU, 16 June 1987, *Commission v Italy*, C-118/85, EU:C:1987:283, para. 7; EU General Court, *Ryanair v Commission (Charleroi airport)*, T-196/04, cit, para. 87 and *infra*, Part. I, nt. [104].

<sup>259</sup> CJEU, 10 January 2006, *Cassa di Risparmio di Firenze et al.*, C-222/04, EU:C:2006:8, para. 107.

<sup>260</sup> See F. MUNARI, C. CELLERINO, *Artt. 107-109 TFEU*, cit., pp. 1149-1150; G. TESAURO, P. DE PASQUALE, F. FERRARO (eds), *Manuale di Diritto dell'Unione europea*, 3<sup>rd</sup> ed., vol. II, Naples, 2021, p. 208 ff.

<sup>261</sup> Commission (DG Comp), Application of State aid rules to infrastructure investment projects, Note to DG Regio, Doc. COMP/03/2011, esp. p. 4. In detail, please refer to F. MUNARI, M. BARBANO, *L'evoluzione del controllo degli aiuti nel settore delle infrastrutture*, in M. SEBASTIANI ET AL. (eds), *Trasformazioni e sviluppo del sistema della mobilità: scenari prospettici, PNRR e strategia UE per una mobilità sostenibile*, Rapporto SIPOTRA 2023, forthcoming.

<sup>262</sup> Commission, 2014 Aviation Guidelines, cit., para 27.

<sup>263</sup> EU General Court, 12 December 2000, *Aéroports de Paris*, T-128/98, EU:T:2000:290, paras 107 ff., as upheld by CJEU, 24 October 2002, *Aéroports de Paris*, C-82/01, EU:C:2002:617, paras 75-79.

<sup>264</sup> See EU General Court, *Leipzig-Halle*, T-443/08 and T-455/08, cit., paras. 93-94, as upheld by CJEU, 19 December 2012, *Flughafen Leipzig-Halle*, C-288/11 P, EU:C:2012:821, paras 40-43 and 47; cf., more recently, the Gdynia-Kosakowo Airport case, Id., 22 June 2023, *Gmina Miasto Gdynia*, C-163/22, EU:C:2023:515, paras 45 ff. On State aid to airport infrastructure, see: S. VARSAMOS, *Airport Competition Regulation in Europe*, Alphen aan den Rijn, 2016, p. 123 ff.; J. MEHTA, *The Changing Face of State-Owned Infrastructure - Leipzig- Halle and Beyond*, in *European State Aid Law Quarterly*, 2013, p.701-708.

In practice, assessing selectivity requires applying a discrimination test<sup>265</sup>: while individual aid is selective *per se*<sup>266</sup>, it is crucial to distinguish between aid schemes and measures applicable to all economic operators indiscriminately, as the latter do not fall under the prohibition<sup>267</sup>. However, although the geographical or sectoral scope of the measure does not automatically imply selectivity, empirical evidence suggests that the CJEU ruled out selectivity only in a very limited number of cases<sup>268</sup>.

#### 4.2.4 Distortion to competition

The last two factors regarding the notion of aid, i.e., distortion to competition (*sub iv*) and effects on trade between Member States (*sub v*) are usually examined together by the Commission<sup>269</sup>.

Competition is distorted (*sub iv*) when State intervention changes the cost structure of the recipient and strengthens his position *vis-à-vis* his competitors<sup>270</sup>. Potential competition has to be taken into account too, as awarding aid might, for instance, discourage new competitors from entering the market<sup>271</sup>. Therefore, the prohibition is triggered whether there is a serious threat to competition<sup>272</sup>, which according to a ‘plausibility’ criterion, is met when the measure impacts on a competitive market<sup>273</sup>. The burden of proof is on the Commission, which, however, is not required to conduct a thorough analysis of the relevant geographical and product market, as, indeed, would be the case in antitrust proceedings pursuant to Articles 101 and 102 TFEU<sup>274</sup>. Nevertheless, in order to fulfil the duty to state reasons laid down in Article 296 TFEU, the Commission must provide enough information to allow the Court’s judicial review its legality and to enable the undertaking concerned «to ascertain whether or not the decision is well

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<sup>265</sup> T. MAXIAN RUSCHE, *Art. 107*, cit., p. 1130. In detail, see L. CALZOLARI, *La selettività degli aiuti di Stato e il principio di parità di trattamento delle imprese nella recente giurisprudenza della Corte di giustizia*, in *Diritto del Commercio Internazionale*, no. 2, 2015, p. 481-507, esp. 500 ff.

<sup>266</sup> EU General Court, 14 April 2021, *Ryanair v Commission (Finnair I; Covid-19)*, T-388/20, EU:T:2021:196, para. 81. For further remarks on this case, see *infra*, p. [126].

<sup>267</sup> CJEU, 21 December 2016, *World Duty Free*, Joined Cases C-20/15 and C-21/15, EU:C:2016:981, para. 56.

<sup>268</sup> T. MAXIAN RUSCHE, *Art. 107*, cit., p. 1132.

<sup>269</sup> According to the Commission, «the focus of assessment in State aid cases is the aid recipient and the industry/sector concerned rather than identification of competitive constraints faced by the aid recipient» (Commission, Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5, nt. 1).

<sup>270</sup> CJEU, 17 September 1980, *Philip Morris Holland*, C-730/79, EU:C:1980:209, para. 11.

<sup>271</sup> EU General Court, 15 June 2000, *Alzetta*, T-298/97, EU:T:2000:151, para. 76. See also P. NEBBIA, *Il concetto di aiuto di Stato*, in L.F. PACE (ed), *Dizionario Sistematico della Concorrenza*, 2<sup>nd</sup> ed., Milan, 2020, p. 673.

<sup>272</sup> EU General Court, 29 September 2000, *CETM v Commission*, T-55/99, EU:T:2000:223, para. 94.

<sup>273</sup> See P. NEBBIA, *Il concetto di aiuto di Stato*, cit., p. 674.

<sup>274</sup> CJEU, *Philip Morris Holland*, cit., paras 9 ff.; Id., 30 April 2009, *Commission v Italy and Wam*, C-494/06, EU:C:2009:272, para. 58. As known, the *relevant product market* includes the product x of the firm under scrutiny as well as products from other companies that constitute, as substitutes, an alternative to x from the buyer’s perspective, while the *relevant geographic market* is the territorial area where product x and its substitutes are actually offered to the potential buyer. For a comprehensive analysis of the notion of relevant market, see M. SCHMAUCH, *EU Law*, cit., p. 135 ff.; A. PAPPALARDO, *Il diritto della concorrenza dell’Unione Europea*, Milan, 2018, p. 469 ff.

founded»<sup>275</sup>. Therefore, the Commission's decision should, at least, describe *a*) the relevant market, *b*) the position of the recipient in it and *c*) the pattern of trade between the Member States<sup>276</sup>. Moreover, this Institution has to consider the indirect impact of the aid on upstream and downstream markets, as well as product substitutability<sup>277</sup>.

Interpretation issues might arise when the sector under scrutiny is not fully liberalized (e.g., statutory monopolies)<sup>278</sup>; relevant examples can be found in the former regime concerning European rail transport<sup>279</sup>, as well as in cases of services discharged by an in-house provider<sup>280</sup>. Regarding the sector of air transportation, the same reasoning could apply to aids given to carriers prior to the establishment of the single aviation market.

The structure of the industry has to be taken into account too. For instance, airports (including local and regional one) compete for the management of airport infrastructure; therefore, «public funding of an airport may ... distort competition in the markets for airport infrastructure operation»<sup>281</sup>. In the same vein, public support to an airport may distort competition between carriers, as shown by State aid practice on airport charges benefiting LCCs<sup>282</sup>. Moreover, aids to airports and airlines may also impact on intermodal competition<sup>283</sup>.

As a general rule, neither the aid intensity nor the recipient's size affect the above-mentioned assessment<sup>284</sup>. However, in order to achieve legal certainty and to simplify compliance, distortion to competition is ruled out when aid has a very

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<sup>275</sup> CJEU, 13 March 1985, *Netherlands and Leeuwarder Papierwarenfabriek v Commission*, C-296/82 and C-318/82, EU:C:1985:113, para.19.

<sup>276</sup> *Ibidem*, para. 24. In fact, «[e]ven if in certain cases the very circumstances in which the aid is granted are sufficient to show that the aid is capable of affecting trade between Member States and of distorting or threatening to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision» (*ibidem*).

<sup>277</sup> For further references, see F. MUNARI, C. CELLERINO, *Artt. 107-109 TFUE*, cit., p. 1151.

<sup>278</sup> See CJEU, *Alzetta*, para. 142 ff. and EU General Court, 4 April 2001, T-288/97, *Regione autonoma Friuli-Venezia Giulia*, EU:T:2001:115, para. 89.

<sup>279</sup> Commission, 17 July 2002, State aid No. N 356/2002 – United Kingdom, *Network Rail*, Decision C(2002)2622 final.

<sup>280</sup> The provision of in-house services does not exclude *per se* a distortion: EU General Court, 16 July 2014, *Germany v Commission*, T-295/12, EU:T:2014:675, para. 158 and the case-law cited *ivi*. The Commission set out the conditions under which the funding of in-house services does not trigger State aid control: Commission, *Notice on the notion of State aid*, cit., para 188.

<sup>281</sup> Commission, 2014 Aviation Guidelines, cit., para 44.

<sup>282</sup> See *supra*, pp. [25] ff.

<sup>283</sup> *Ibidem*.

<sup>284</sup> EU General Court, 30 April 1998, *Vlaams Gewest v Commission*, T-214/95, EU:T:1998:77, para. 46. This principle has been restated also for the aviation sector: Commission, 2014 Aviation Guidelines, cit., para 45.

limited intensity – the so-called ‘*de minimis* rule’<sup>285</sup>, while small and medium enterprises (SMEs) benefit from more favourable criteria<sup>286</sup>.

#### 4.2.5 Effect on trade

Finally, the aid must affect trade within the Member States (*sub v*), which means strengthening the position of a firm compared with other undertakings competing in intra-EU trade<sup>287</sup>. In fact, aid impacting exclusively on the territory of a State are not relevant for EU law and – if the case may be – are subject only to the Member States national laws<sup>288</sup>. However, in order to avoid circumvention, the Court interpreted the “intra-EU” requirement broadly, considering it met whenever competition with firms established in other Member States is «not inconceivable»<sup>289</sup>. Therefore, the fact that the recipient is not doing in transnational trade or exports almost its entire production out of EU cannot exclude *per se* the effect on EU trade<sup>290</sup>, as it could indirectly affect production and exports from the other Member States<sup>291</sup>.

Nevertheless, the Commission, both in its guidance and in its practice, sets out a ‘purely local impact’ criterion in order to exclude minor cases from the scope of the prohibition<sup>292</sup>. As an example, this interpretation allows public support to small airports or ports serving predominately local users, provided that the impact on cross-border investment is only marginal<sup>293</sup>.

### 4.3. Relevant exemptions in Articles 107, paras. 2-3 TFEU

#### 4.3.1 Introductory remarks

If the conditions described above are met, a State aid measure is prohibited according to Article 107(1) TFEU. The general ban, however, is not complete<sup>294</sup>, because paragraphs 2 and 3 of Article 107 TFEU identify certain categories of aid

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<sup>285</sup> See 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. 1–8, whose consolidated text is available at <http://data.europa.eu/eli/reg/2013/1407/2020-07-27>. This approach has been upheld by the Court in many cases, see e.g., CJEU, 3 March 2005, *Heiser*, C-172/03, EU:C:2005:130.

<sup>286</sup> See Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid OJ L 248, 24.9.2015, p. 1–8. On SMEs aid, see: G. DE STEFANO, W. DUTILLIEUXM, *Risk Finance Aid: Facilitating Access to Finance for SMEs, Start-ups and Small or Innovative Middle-Capitalisation Firms*, in *EStAL*, vol. 21, no. 3, 2022, p. 222 ff.

<sup>287</sup> CJEU, *Philip Morris Holland*, cit., para. 11. For general remarks on the notion see A. PAPPALARDO, *Il diritto della concorrenza*, cit., p. 41 ff.

<sup>288</sup> P. NEBBIA, *Il concetto di aiuto di Stato*, cit., p. 675.

<sup>289</sup> CJEU, *Heiser*, cit., para. 35.

<sup>290</sup> CJEU, 21 March 1990, *Belgium v Commission*, C-142/87, EU:C:1990:125, para. 35.

<sup>291</sup> CJEU, *Lanerossi*, cit., para. 27.

<sup>292</sup> In detail, see T. MAXIAN RUSCHE, *Art. 107*, cit., p. 1137-1138; P. NEBBIA, *Il concetto di aiuto di Stato*, cit., p. 676 ff.

<sup>293</sup> See, e.g., Commission, 7 May 2014, SA.38441 (2014/N) – United Kingdom – Isles of Scilly Air link, C/2014/2626/2. However, cf. *infra*, p. [41] ff. on the block exemption applicable to regional airports according to Article 56-*bis*, reg. (UE) n. 651/2014.

<sup>294</sup> See CJEU, *Steineke*, C-78/76, cit., para. 8 and *Id.*, 8 November 2001, *Adria Wien Pipeline*, C-143/99, EU:C:2001:598, para. 30.

as compatible with the internal market *de jure* or exceptionally allowed after the Commission's discretionary assessment, while other exemptions are provided by Articles 108(2)<sup>295</sup>, 106(2) and 93 TFEU<sup>296</sup>. Unlike the assessment of the aid existence, whose burden of proof is on the Commission<sup>297</sup>, it is up to the Member State to invoke compatibility<sup>298</sup>.

In its assessment, the Commission considers compliance not only with the conditions laid down in the Article 107, paras 2-3 TFEU, but also with other provisions and general principles of EU law<sup>299</sup>. In fact, an aid is unlawful where a breach of EU law is intrinsically linked to the competitive effects of the aid<sup>300</sup>. Examples in that sense are rules on custom duties and taxation<sup>301</sup>, free movement<sup>302</sup>, transport<sup>303</sup> and environmental protection<sup>304</sup>.

The following paragraph will focus on exemptions applicable to air transport in case of market shocks or for sustainability purposes, to be examined in light of the relevant Commission's guidance<sup>305</sup>.

#### 4.3.2 Aid *de jure* compatible with the internal market under Article 107(2) TFEU

According to Article 107(2) TFEU, certain categories of aid 'shall' be compatible with the internal market<sup>306</sup>. Under Article 108(3) TFEU, this aid has to be authorized by the Commission<sup>307</sup>, which is however entitled only to verify that the conditions for admissibility are met, without enjoying any discretionary

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<sup>295</sup> Article 108(2) TFEU: «On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances».

<sup>296</sup> See *supra*, para. [37] ff.

<sup>297</sup> With the exceptions related to applicability of *Altmark* criteria and MEO test, cf. *supra*, pp. [41] ff.

<sup>298</sup> CJEU, 28 April 1993, *Italy v Commission*, C-364/90, EU:C:1993:157, para. 20; Id., 29 April 2004, *Italy v Commission*, C-372/97, EU:C:2004:234, para 81; EU General Court, *Freistaat Sachsen*, cit., para 140.

<sup>299</sup> CJEU, 15 April 2008, *Nuova Agricast Srl*, C-390/06, EU:C:2008:224, para. 50, and, more recently, Id., 22 September 2020, *Austria v Commission (Hinkley Point C)*, C-594/18, EU:C:2020:742, para. 44. In detail, see G. BIAGIONI, *Il rapporto tra l'art. 107 TFEU e le altre norme dei Trattati*, in L. F. PACE (ed), *Dizionario*, cit., p. 711 ff.

<sup>300</sup> CJEU, 19 September 2000, *Germany v Commission*, C-156/98, EU:C:2000:467, paras 78-79; Id., 3 May 2001, *Portugal v Commission*, C-204/97, EU:C:2001:233, paras 41-42; Id., 15 June 1993, *Matra*, C-225/91, EU:C:1993:239, para 41; Id., 21 May 1980, *Commission v Italy (Sugar levy)*, C-73/79, EU:C:1980:129, para 11; Id., 22 March 1977, *Iannelli*, C-74/76, EU:C:1977:51, paras 14-15; EU General Court, 31 January 2001, *Weyl Beef Products*, T-197/97 and T-198/97, EU:T:2001:28, para 75.

<sup>301</sup> Articles 30 and 110 TFEU.

<sup>302</sup> Article 34 TFEU.

<sup>303</sup> See CJEU, 7 May 2009, *Antrop*, C-504/07, EU:C:2009:290, paras 28 and 31–32; Commission, 2 February 2017, France - Aides présumées octroyées aux entreprises de transport en commun par la région Ile-de-France, SA.26763. In detail, T. MAXIAN RUSCHE, *Art. 107 TFEU*, cit., p. 1149.

<sup>304</sup> See *infra*, pp. [50] ff.

<sup>305</sup> Commission, Guidelines on State aid to airports and airlines, Communication 2014/C 99/03, (hereinafter «2014 Aviation guidelines»). See B. BYRNE, E. ADLER, *State aid to airports and airlines*, in L. HANCHER, J. PIERNAS LÓPEZ (eds), *Research handbook on European State aid law*, Cheltenham, 2021, p. 269-296; M. SCHMAUCH, *EU Law*, cit., p. 84 ff.

<sup>306</sup> Hence, these measures are deemed not subject to Article 107(1) TFEU: CJEU, *Steineke*, cit., para. 6.

<sup>307</sup> Once authorization has been obtained, the aid is considered as existing aid and could be ceased or modified under Article 108(1) TFEU.

power<sup>308</sup>. Moreover, as this clause provides for an exception from a general principle, it must be narrowly construed<sup>309</sup>.

For the purposes of this research, the first two categories mentioned in Article 107(2) TFEU are worth noting:

- «a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
- b) aid to make good the damage caused by natural disasters or exceptional occurrences»<sup>310</sup>.

With reference to the first category (letter *a*), the aid must, cumulatively<sup>311</sup>, have a social objective, be provided directly to consumers<sup>312</sup> and comply with the non-discrimination principle<sup>313</sup>. The latter condition requires the aid to be granted «irrespective of the economic operator supplying the product or service» covered by the measure<sup>314</sup>. According to the Commission, non-discrimination is to be referred only to the geographical origin of the product (or service), so distinctions between different types of products may be allowed<sup>315</sup>.

In the aviation sector, the aid is in line with its social objective if it covers only passengers with specific needs (e.g., people with disabilities)<sup>316</sup>; however, regarding routes connecting outermost or underprivileged regions, the aid may cover the entire region's residents<sup>317</sup>. No discrimination as to the origin of the

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<sup>308</sup> See EU General Court, 17 February 2021, *Ryanair v Commission (French scheme)*, T-259/20, para. 23; Id., 25 June 2008, *Olympiaki Aeroporia Ypiresies v Commission*, T-268/06, EU:T:2008:222, para. 51 and in more general terms, CJEU, *Philip Morris Holland*, cit., para. 17. The Commission, nevertheless, might still have some leeway deriving from the complex factual analysis it has to perform: T. MAXIAN RUSCHE, *Art. 107*, cit., p. 1149.

<sup>309</sup> CJEU, 19 September 2000, *Germany v Commission*, C-156/98, EU:C:2000:467, para. 49.

<sup>310</sup> Article 107(2)(c) TFEU, indeed, addresses aid compensating for the economic consequences of Germany's division after the Second World War. Please note that the Council, acting on a proposal from the Commission, is entitled to repeal this letter.

<sup>311</sup> Commission, Aviation guidelines, cit., para. 156.

<sup>312</sup> Therefore, if the aid gives an advantage not only to consumers but also to «investors of all categories», the measure will fall outside the scope of Article 107(2)(a) TFEU: EU General Court, 4 March 2009, *Fineco*, T-445/05, EU:T:2009:50, paras 181-182.

<sup>313</sup> This principle, interestingly, is expressly mentioned only in this provision. For further remarks on the application of the non-discrimination principle to eligibility criteria, see Part II *infra*, pp. [94] ff.

<sup>314</sup> EU General Court, 5 August 2003, *PeçO European Ferries*, T-116/01 and T-118/01, EU:T:2003:217, para. 163.

<sup>315</sup> Otherwise, in fact, a measure applying to all interchangeable types of the product concerned would not fall under the notion of aid in the first place. See: Commission, XXIVth Report on Competition Policy 1994, Luxembourg, 1995, available at <https://op.europa.eu/en/publication-detail/-/publication/cd5535d7-fce4-4021-a6d6-6d76da864cce>, p. 170, at para. 354.

<sup>316</sup> Commission, 2014 Aviation guidelines, cit., para. 156 and even before, Id., Application of articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, OJ C 350, 10.12.1994, p. 5–20, esp. para. 24.

<sup>317</sup> On the the assessment of the social character of the aid, see *ex multis*: Commission, 16 May 2006, N 169/2006 – United Kingdom, Aid of social character air services in the Highlands and Islands of Scotland, OJ C 272, 9.11.2006, p. 10; Id., 11 December 2007, N 471/2007 – Portugal, Social allowances to passengers residing in the Autonomous Region of Madeira, OJ C 46, 19.2.2008, p. 2; Id., 5 January 2011, N 426/2010 – France, Aid of a social character for certain categories of passenger on air services between La Réunion and metropolitan France, OJ C 71, 5.3.2011, p. 5; Id., 29 June 2011, SA.32888 – Germany, Exemption from air transport tax as regards flights of people domiciled on islands and other cases, OJ C 70, 8.3.2012, p. 1.

airline operating the services is allowed<sup>318</sup>. Social aid connecting outermost regions may, under certain conditions, benefit from a block exemption according to Article 108.4 TFEU and Regulation (EC) No. 651/2014 (GBER)<sup>319</sup>.

The second category (letter *b*) specifically addresses external market shocks, as it allows compensation for damages caused by natural disasters or by exceptional occurrences<sup>320</sup>. In order to benefit from this exemption, the Member State shall demonstrate the event's exceptional nature, the direct causal link between this event and the damage that the Member State intends to compensate<sup>321</sup> and that the aid is limited to what is necessary, in order to avoid overcompensation<sup>322</sup>.

The notions of 'natural disaster' and 'exceptional occurrence' are not defined by the Treaties and have to be interpreted narrowly<sup>323</sup>. GBER and secondary legislation in the agriculture sector provide a list of natural disasters for which aid is exempted under Article 108(3) TFEU<sup>324</sup>. The short list includes «earthquakes, avalanches, landslides and floods, tornadoes, hurricanes, volcanic eruptions and wild fires of natural origin»<sup>325</sup>; outside of this list, Commission's authorization is needed under the conditions laid down in its guidelines on State aid in the agricultural sector<sup>326</sup>.

As an exceptional occurrence is characterized by its unforeseeable nature<sup>327</sup>, normal entrepreneurial risks are excluded from compensation<sup>328</sup>. Exceptionality has been found in war, internal disturbances or strikes and, under certain conditions, major nuclear or industrial accidents and large fires<sup>329</sup>. As a

<sup>318</sup> Commission, 2014 Aviation guidelines, cit., para. 156.

<sup>319</sup> See recital no. 70 and Article 51, 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, OJ L 187, 26.6.2014, p. 1–78.

<sup>320</sup> Article 107.2(b) TFEU. For a comment, see F. SAECKER, *Legal exemptions (Art. 107(2) TFEU)*, in F. SAECKER, F. MONTAG (eds), *European State Aid Law*, Munich, 2016, p. 245 ff.; M. SCHMAUCH, *EU Law*, cit., p. 142 ff.; N. LANDI, *Le deroghe al principio generale d'incompatibilità ex art. 107 §§ 2 e 3 TFUE ed i regolamenti di esenzione per categoria*, in L.F. PACE (ed), *Dizionario*, cit., p. 681.

<sup>321</sup> CJEU, 23 February 2006, *Atzeni and Others*, C-346/03 and C-529/03, EU:C:2006:130, para 79.

<sup>322</sup> EU General Court, *Ryanair v Commission (French scheme)*, T-259/20, EU:T:2021:92, paras. 24–25.

<sup>323</sup> CJEU, *Atzeni*, cit., para 79; EU General Court, *Olympiaki Aeroporia Ypiresies*, cit., para 52.

<sup>324</sup> The exemption is subject to conditions additional to those laid down in Article 107(2)(b), such as the formal recognition of the event as a natural disaster by Member State authorities: Art. 50 Regulation (EU) No. 651/14, cit. and Art. 37 Commission Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union, OJ L 193, 1.7.2014, p. 1–75.

<sup>325</sup> Art. 2, no. 38, Reg. (EU) n. 702/2014, cit.

<sup>326</sup> Commission, European Union Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020, OJ C 204, 1.7.2014, p. 1–97, para. 330 (hereinafter «Agriculture Guidelines»).

<sup>327</sup> See Commission, The repercussions of the terrorist attacks in the United States on the air transport industry, Communication COM(2001) 574 final, 10.10.2001, para. 33. The notion encompasses any event that «by its character and by its effects on the affected undertakings» lays «outside of the normal functioning of the market»: Commission, 23 December 2008, Special measures relating to meat products of animal origin from pigs following a dioxin contamination in Ireland, SA.27225, para. 26.

<sup>328</sup> Commission, Aid which Ireland has decided to grant for measures promoting transport of Irish livestock by sea to Continental Europe, Communication 98/C 142/05, para. 30.

<sup>329</sup> Commission, Agriculture Guidelines, cit., para. 330.

consequence, pre-emptive aid should be generally considered as being outside the scope of Article 107(2)(b) TFEU<sup>330</sup>, even if some Scholars envisaged a policy shift by the Commission towards aid that could not only compensate damages but also support the industry recovery as well as resilience in case of future disasters<sup>331</sup>.

The assessment of losses includes loss of property and also refinancing and replacement costs<sup>332</sup>. As a general rule, aid should cover only losses directly caused by the event, thus excluding loss of business chances; income losses, however, may be covered in case of serious hardships<sup>333</sup>. In order to avoid overcompensation, aid should be net of damages already offset by insurance payments and other reimbursement<sup>334</sup>, or damages attributed to the recipient's negligence<sup>335</sup>.

### 4.3.3 In detail: damage compensation schemes in the aviation market

The Commission's practice offers various examples of aid approved in the context of market shocks, such as those addressing the impact of Bovine Spongiform Encephalopathy (BSE, so-called 'mad cow disease')<sup>336</sup> and dioxin contamination on the livestock sector<sup>337</sup>.

With reference to the airline market, aids granted in the aftermath of the 9/11 attacks<sup>338</sup> and those concerning travel disruptions caused by the eruption of the Icelandic volcano Eyjafjallajökull (so-called 'Volcanic ash crisis')<sup>339</sup> offer an interesting case study for examining the more recent initiatives adopted during the pandemic.

In the first case, the exceptional nature of events was upheld by the General Court<sup>340</sup>. Moreover, the Commission drafted an emergency framework, endorsing compensation only for costs directly arising from the closure of US airspace between 11 and 14 September 2001<sup>341</sup> and from the surge in insurance

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<sup>330</sup> Commission, Communication 98/C 142/05, cit., para. 29.

<sup>331</sup> M. SCHMAUCH, *EU Law*, cit., p. 144 and N. LANDI, *Exemptions from the General Incompatibility Principle under Article 87 (2) and (3) of the EC Treaty*, in A. SANTA MARIA AND C. BISCARETTI DI RUFFIA (eds), *Competition and State Aid – An Analysis of the EC Practice*, Alphen aan den Rijn, 2007, p. 49 ff., esp. p.54.

<sup>332</sup> Commission, 17 December 2005, Decision SA.19862, Austria - measures to make good damage caused by the Flood 2005, para. 41.

<sup>333</sup> F. SAECKER, *Legal exemptions*, cit., p. 246.

<sup>334</sup> Commission, Decision SA.19862, cit., para. 40.

<sup>335</sup> F. SAECKER, *Legal exemptions*, cit., p. 247.

<sup>336</sup> Commission, 15 March 1996, United Kingdom – Bovine Spongiform Encephalopathy, Aid No. N 299/96, N 290/96, N 278/96 and N 289/96. See, for further references, Id., 19 May 2004 concerning the aid scheme that Italy plans to implement for poultry farms — AIMA programme for the poultry industry, OJ L 32, 6.2.2007, p. 14–22, para. 17.

<sup>337</sup> See, *ex multis*, Commission, Decision SA.19862, cit.; Id., 20 July 1999, Belgium - Special measures for the poultry, pig meat, eggs and beef sector, as a result of dioxin contamination, 1999/C 253/04; Id., 9 February 2000, Belgium – Indemnités en faveur des entreprises agricoles touchées par la crise de la dioxine, Decision SA.11156.

<sup>338</sup> In detail, see D. DIVERIO, *Gli aiuti di Stato*, cit., p. 77 ff.

<sup>339</sup> On the topic, see M. SCHMAUCH, *EU Law*, cit., p. 147 ff.

<sup>340</sup> EU General Court, *Olympiaki Aeroporia Ypiresies*, cit., para. 49.

<sup>341</sup> Commission, The repercussions of the terrorist attacks in the United States on the air transport industry, Communication COM(2001) 574 final, 10.10.2001 (hereinafter, the '9/11 Communication').

costs<sup>342</sup>. On the contrary, costs related to the implementation of tighter security measures were ruled out<sup>343</sup>.

While introducing its policy on compatibility assessment for 9/11-related aid, the Commission emphasized the need to give priority to measures equally applicable to all EU carriers, in order to minimize distortions within the single aviation market<sup>344</sup>. In practice, however, this non-discrimination criterion was watered down and referred only to all airlines operating with a license issued by a given Member State and not to all carriers holding an EU license in general. In fact, while the 9/11 Communication makes generic reference to applying the aid in a uniform manner «to all airlines in a given Member State»<sup>345</sup>, the subsequent practice clarified that the access to aid could be limited to carriers holding an operating licence issued by the Member State granting the aid<sup>346</sup>.

State aid guidance was provided also during the Volcanic ash crisis, which resulted in even greater traffic disruption compared to the 9/11 crisis<sup>347</sup>. In its Information Note, the Commission recommended a co-ordinated approach and emphasized the non-discrimination principle, but did not provide details on how compatibility assessment should be performed<sup>348</sup>. Once again, the eligibility criteria were based on the possession of a national licence<sup>349</sup>. Nevertheless, the Commission stressed that the exceptional occurrence could not be used as a pretext to bypass the rules on rescue and restructuring aid<sup>350</sup>.

Both eligibility and the definition of undertaking in difficulty have been extensively discussed in the case-law on aid schemes approved during the pandemic, as it will be discussed later<sup>351</sup>.

#### 4.3.4 Discretionary exceptions under Article 107(3) TFEU

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<sup>342</sup> Ibidem, para. 37 ff.; Commission, Insurance in the Air Transport sector following the terrorist attacks of 11 September 2001 in the United States, COM(2002)320 final, esp. para. 57.

<sup>343</sup> These additional costs were deemed of the same nature of those deriving from other political risks – such as the overflying ban over the Balkans – that did not require State intervention: see Commission, 11 December 2002, France - French airlines, Decision 2003/196/EC, paras 37-38.

<sup>344</sup> Commission, The repercussions, cit., para. 28.

<sup>345</sup> Ibidem, paras 35 and 38.

<sup>346</sup> See, Commission, 12 March 2002, United Kingdom – Aid to airlines for closure of airspace, Decision C(2002)894 final, para. 25; Id., 30 April 2003, Austria - Austrian air carriers, Decision 2003/637/EC, para. 42.

<sup>347</sup> According to Eurocontrol, the closure of airspace for the period 15 April to 21 April resulted in the cancellation of more than 100,000 flights overflying the EU airspace and around 10 millions of stranded passengers: Eurocontrol, *Ash-cloud of April and May 2010: Impact on Air Traffic*, STATFOR/Doc394 v1.0, 28.10.2010, available at <https://www.eurocontrol.int/sites/default/files/article/attachments/201004-ash-impact-on-traffic.pdf>, p. 1.

<sup>348</sup> Commission, The impact of the volcanic ash cloud crisis on the air transport industry, Information note SEC(2010)533, 27.04.2010, <https://transport.ec.europa.eu/system/files/2016-09/2010-sec-2010-1580-f.pdf>, para. 39.

<sup>349</sup> See, e.g., Id., SA.32163 – Slovenia – Rectification of consequences of the damage caused to air carriers and airports by earthquake activity in Iceland and the resulting volcano ash in April 2010, 1.8.2011 C (2011) 5495 final, para. 10.

<sup>350</sup> See, respectively, Commission, The repercussions, cit., para. 29; Commission, Information note, cit., para. 39.

<sup>351</sup> See, *infra*, pp. [94] ff.

According to Article 107(3) TFEU, certain measures *may* be compatible with the internal market<sup>352</sup>. In comparison with the derogation in Article 107(2) TFEU, in this case the aid falls under the prohibition, but it is exempted provided that an appropriate justification is given. This instrument proved crucial in the evolution of State aid control from a *static* prohibition mechanism to a *dynamic* tool of EU policy<sup>353</sup>.

It is up to the Member State to demonstrate that one of the exceptions listed in Article 107(3) TFEU applies<sup>354</sup>, while the Commission enjoys a wide margin of discretion in assessing that the aid is in line with Union objectives<sup>355</sup>. The Court cannot replace the Commission's economic and social assessment in its judicial review<sup>356</sup>, which is limited to procedural defects, lack of reasons, failures in factual analysis, manifest error or misuse of power<sup>357</sup>.

The Commission's role is particularly sensitive, because it must reconcile EU principles of free competition and solidarity<sup>358</sup>, ensuring consistency among Member States' economic policies<sup>359</sup> and that the measure is proportionate to its objective<sup>360</sup>. As a consequence, aid supporting an industry with structural flaws or struggling with overcapacity cannot benefit from this exemption<sup>361</sup>.

According to the proportionality principle, the Commission is called upon to verify the *compensatory justification* of the aid, i.e., that the measure is effectively

<sup>352</sup> On this provision, see *ex multis* V. KREUSCHITZ, *Compatible and incompatible aid (Art. 107(3) TFEU)*, in F. SÄCKER, F. MONTAG (ed.), *European State Aid Law*, München, 2016, p. 279 ff.; P. NICOLAIDES, *The Evolving Interpretation of Article 107(3)(b) TFEU*, in *European State Aid Law Quarterly*, vol. 21, no. 1, 2022, p. 31-42; M. SCHMAUCH, *EU law*, cit., p. 149 ff.; T. MAXIAN RUSCHE, *Art. 107*, cit., p. 1151 ff.; M. SERPONE, *La disciplina degli aiuti di Stato*, in C. CATRICALÀ, C. CAZZATO, F. FIMMANÒ (eds), *Diritto antitrust*, Milano, 2021, p. 1111-1155, esp. 1135 ff.; F. MUNARI, C. CELLERINO, *Art. 107*, cit., p. 1154 ff.; N. LANDI, *Le deroghe*, cit., p. 685 ff.; R. ADAM, A. TIZZANO, *Diritto dell'Unione*, cit., p. 648 ff.

<sup>353</sup> See F. MUNARI, *Il diritto comunitario*, cit., p. 83 ff.

<sup>354</sup> EU General Court, 15 June 2005, *Regione autonoma della Sardegna v Commission*, T-171/02, EU:T:2005:219, para.129; Id., 6 April 2006, *Schmitz-Gotha Fabrikwerke v Commission*, T-17/03, EU:T:2006:109, para. 48; Id., *Holland Malt*, C-464/09, cit., para.151.

<sup>355</sup> CJEU, *Italy v Commission*, C-303/88, cit., para. 34; Id., 14 February 1990, *France v Commission*, C-301/87, EU:C:1990:67, para. 49; Id., 14 January 1997, *Spain v Commission*, C-169/95, EU:C:1997:10, para. 18; Id., 15 May 1997, *TWD v Commission*, C-355/95, EU:C:1997:241, para. 26; EU General Court, 27 January 1998, *Ladbrooke*, T-67/94, EU:T:1998:7, para. 52.

<sup>356</sup> On the nature of Commission's assessment, see CJEU, *Philip Morris Holland*, cit., para.24 «[T]he Commission has a discretion the exercise of which involves economic and social assessments which must be made in a Community context» and also EU General Court, 25 June 1998, *British Airways and Others*, T-371/94 and T-394/94, EU:T:1998:140, para 79.

<sup>357</sup> CJEU, 29 February 1996, *Belgium v Commission*, C-56/93, EU:C:1996:64, para. 11; Id., 29 October 1980, *Roquette Frères v Council*, C-138/79, EU:C:1980:249, para. 25; Id., 17 November 1987, *BAT and Reynolds v Commission*, C-142/84 and C-156/84, EU:C:1987:490, para. 62; Id., 10 March 1992, *Ricoh v Council*, C-174/87, EU:C:1992:108, para.68; EU General Court, 11 July 2002, *HAMSA v Commission*, T-152/99, EU:T:2002:188, para. 48; Id., 12 December 1996, *AIUFFASS and AKT v Commission*, T-380/94, EU:T:1996:195, para.56.

<sup>358</sup> See M. SCHMAUCH, *EU law*, cit., p. 149.

<sup>359</sup> On the equality of treatment among Member States, see: CJEU, *Italy v Commission*, C-303/88, cit., para. 34; Id., *Germany v Commission*, C-156/98, cit., para. 67; Id., 7 March 2002, *Italy v Commission*, C-310/99, EU:C:2002:143, paras 57–58.

<sup>360</sup> EU General Court, *AIUFFASS*, T-380/94, cit., para 54.

<sup>361</sup>: Commission, 15 July 1987, France - Aid granted by the French Government to a producer of textiles, clothing and paper products - Boussac Saint Frères, Decision 87/585/EEC, OJ L 352, 15.12.1987, p. 42.

contributing to a goal which the recipient could not achieve under normal market conditions<sup>362</sup>. Moreover, in line with the reforms introduced with the State Aid Action Plan (SAAP)<sup>363</sup> and the State aid modernization policy<sup>364</sup>, the aid must also have an *incentive affect*, thus helping the recipient to expand its activities<sup>365</sup>. In order to achieve equal treatment and effective monitoring, the Member State concerned is required to provide *transparent* information on how the grant is calculated<sup>366</sup>. This also allows the Commission to calibrate the positive and negative effects of the aid<sup>367</sup>; the scope of this balancing test, however, is still debated in the case-law<sup>368</sup>.

Among the five categories of aid listed in Article 107(3) TFEU, this study will focus on aid that remedy to «a serious disturbance of the economy of a Member State» (letter *b*) or as a measure that supports «the development of certain economic activities» (letter *c*)<sup>369</sup>.

#### 4.3.5 Aid remedying to a serious disturbance in the economy of the Member State

As stated in Article 107(3)(b) TFEU, aid may be compatible with the internal market if it remedies to «a serious disturbance in the economy of a Member State».

As confirmed by case-law, the *disturbance* must affect the entire national economy, not only a specific region or sector<sup>370</sup>, while the assessment must be performed by considering the whole EU context<sup>371</sup>. The exceptional nature of the event is not expressly required, as shown by comparison with Article 107(2)(b) TFEU<sup>372</sup>.

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<sup>362</sup> CJEU, *Philip Morris Holland*, cit., paras 17 and 24-26.

<sup>363</sup> Commission, State Aid Action Plan - Less and better targeted state aid: a roadmap for state aid reform 2005–2009, COM(2005) 107 final, 7.6.2005.

<sup>364</sup> Commission, EU State Aid Modernisation (SAM), Communication, COM(2012) 209 final, 8.5.2012.

<sup>365</sup> On the incentive effect see also Recital no. 5 and Article 6 GBER, cit.

<sup>366</sup> Cf. Article 5 GBER.

<sup>367</sup> See Commission, Common principles for an economic assessment of the compatibility of State aid under Article 87.3, Staff Working Paper, 19 May 2009, [https://ec.europa.eu/competition/state\\_aid/reform/economic\\_assessment\\_en.pdf](https://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf); for a comment, see: A. BIONDI, *The Rationale of State Aid Control: A Return to Orthodoxy*, in *Cambridge Yearbook of European Legal Studies*, vol. 12, 2010, p. 35–52, esp. 40.

<sup>368</sup> This point will be further elaborated *infra*, Part. II, pp. [95] ff.

<sup>369</sup> The other measures exempted under Article 107(3) TFEU are those concerning regional development (letter a), the execution of an important project of common European interest (IPCEI, letter b), cultural heritage (letter d) and the other that may be specified by decision of the Council on a proposal from the Commission (letter e). Their analysis, however, is outside the scope of the current research.

<sup>370</sup> CJEU, 30 September 2003, *Germany v Commission*, C-301/96, EU:C:2003:509, para. 106.

<sup>371</sup> EU General Court, 15 December 1999, *Freistaat Sachsen*, T-132/96 and T-143/96, EU:T:1999:326, para. 167; Commission, 27 June 1984, *Belgium - Aid granted by the Belgian Government to a producer of polypropylene fibre and yarn*, Decision 84/508/EEC, OJ L 283, 27.10.1984, p. 42–44.

<sup>372</sup> Article 107(2)(b) TFEU, instead refers to an «exceptional occurrence». However, albeit not having an identical material scope, these two provisions may apply to the same event, as shown by Commission's practice during the pandemic: see *infra*, p. [105].

The first examples of practical application of this provision dates back to the oil crisis in the mid-1970s<sup>373</sup> and to the Greek industrial crisis in late 1980s<sup>374</sup>. Then, in light of the outbreak of the 2008 financial crisis, a larger use of this exception was supported by the Commission, which drafted specific guidance for the banking sector<sup>375</sup> as well as for non-financial industries<sup>376</sup>, whose ancestor can be found in the above-mentioned 9/11 Communication<sup>377</sup>. These soft law instruments were limited in time and were just added to the legal framework applicable to the sectors concerned<sup>378</sup>. Nevertheless, the ‘temporary framework’ approach was endorsed by the Court which upheld recourse to the legal basis of Article 107(3)(b) TFEU<sup>379</sup>.

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<sup>373</sup> See Commission, Fifth Report on Competition Policy 1975, Luxemburg, 1976, available at [https://ec.europa.eu/competition/publications/annual\\_report/ar\\_1975\\_en.pdf](https://ec.europa.eu/competition/publications/annual_report/ar_1975_en.pdf), para. 133.

<sup>374</sup> Commission, 7 October 1987, Greece - Law 1386/1983 by which the Greek Government grants aid to Greek industry, Decision 88/167/EEC, OJ L 76, 22.3.1988, p. 18–22.

<sup>375</sup> See Commission, The application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis, Communication 2013/C 216/01 (‘Banking Communication’) and the other six Crisis Communications adopted during 2008-2012: Id., The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, Communication 2008/C 270/02 (‘2008 Banking Communication’); Id., The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, Communication 2009/C 10/03 (‘Recapitalisation Communication’); The treatment of impaired assets in the Community financial sector, Communication 2009/C 72/01 (‘Impaired Assets Communication’); Id., The return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, Communication 2009/C 195/04 (‘Restructuring Communication’); Id., The application, from 1 January 2011, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis, Communication 2010/C 329/07 (‘2010 Prolongation Communication’); Id., The application, from 1 January 2012, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis, Communication 2011/C 356/07 (‘2011 Prolongation Communication’). On aid to the banking industry, see J. PIERNAS LÓPEZ, *The Concept of State Aid*, cit., p. 221 ff.; D. DIVERIO, *Gli aiuti di Stato*, cit., p. 97 ff.; M. CYNDECKA, *State aid and the financial sector: the crisis and beyond*, in L. HANCHER, J. PIERNAS LÓPEZ (eds), *Research handbook*, cit., p. 134-152.

<sup>376</sup> Commission, Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis, Communication, OJ C 6, 11.1.2011, p. 5–15. See F. MUNARI, C. CELLERINO, *Art. 107*, cit., p. 1163 ff.

<sup>377</sup> See *supra*, p. [50].

<sup>378</sup> See D. DIVERIO, *Gli aiuti di Stato*, cit., p. 191 ff.; M. SCHUTTE, *Rescue and Restructuring Aid*, in F. SAECKER, J. MONTAG, *European State Aid*, cit., p. 911 ff. For an *ex post* evaluation, see Commission, The effects of temporary State aid rules adopted in the context of the financial and economic crisis, Staff Working Paper, SEC(2011) 1126 final, 5.10.2011.

<sup>379</sup> CJEU, 19 July 2016, *Tadej Kotnik and Others*, C-526/14, EU:C:2016:570, para. 51. On the topic, see also Id., 8 March 2016, *Greece v Commission*, C-431/14, EU:C:2016:145; Id., 3 April 2014, *Commission v Netherlands and ING Groep*, C-224/12, EU:C:2014:213.

Consequently, the Commission intervened in a similar fashion in the wake of the economic crisis caused by the pandemic<sup>380</sup> and, more recently, by the war in Ukraine<sup>381</sup>.

Apart for those expressly addressing the banking industry, temporary frameworks are characterized by a horizontal approach and are therefore applicable also to the aviation industry. However, as the most relevant airline aid cases concern the pandemic's Temporary Framework, the features of this policy document will be discussed later<sup>382</sup>.

#### 4.3.6 Aid facilitating the development of certain economic activities. Sector aid to the aviation industry

The material scope of Article 107(3)(c) TFEU is broad as it encompasses «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»<sup>383</sup>. In order to comply with EU law, the aid must be necessary and appropriate to achieve a certain policy objective (*positive* condition) and must not prejudice EU interests (*negative* condition).

In light of the above, it is useful to distinguish between the following types of aid, subject to the Commission's specific guidance:

- i. *sectoral aid*, supporting a specific industry or market;
- ii. *horizontal aid*, aiming to serve cross-sector objectives, such as environmental protection<sup>384</sup> innovation<sup>385</sup>, rescuing and

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<sup>380</sup> Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, Communication 2020/C 91 I/01 ('Temporary Framework' or 'TF'). The TF has been amended seven times (consolidated text available at [https://competition-policy.ec.europa.eu/state-aid/coronavirus/temporary-framework\\_en](https://competition-policy.ec.europa.eu/state-aid/coronavirus/temporary-framework_en)) and phased out after 30 June 2022, while, as an exception, some measures may be put in place until 31 December 2023: Commission, State aid: Commission will phase out State aid COVID Temporary Framework, STATEMENT/22/2980, 12.5.2022. For a comment on the TF, see S. VAN DUREN, A. KNOOK, *State aid in times of crisis*, Deventer, 2021, esp. p. 20 ff. The total yearly expenditure for measures relating to the economic effects of the coronavirus pandemic reached in 2021 EUR 190.65 billion (about 57% of the total State aid yearly spending): Commission, State aid Scoreboard 2022, 24.4.2023, available at [https://competition-policy.ec.europa.eu/state-aid/scoreboard\\_en](https://competition-policy.ec.europa.eu/state-aid/scoreboard_en), p. 11.

<sup>381</sup> See Commission, Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, Communication 2022/C 426/01; Commission, Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, Communication 2023/C 101/03. On aid concerning the energy market see also Id., REPowerEU: Joint European Action for more affordable, secure and sustainable energy, Communication COM(2022) 108 final, 8.3.2022.

<sup>382</sup> See *infra*, p. [80].

<sup>383</sup> Article 107(3)(c) TFEU.

<sup>384</sup> Commission, Guidelines on State aid for climate, environmental protection and energy 2022, Communication 2022/C 80/01.

<sup>385</sup> Commission, Framework for State aid for research and development and innovation, Communication 2022/C 414/01.

restructuring businesses in distress<sup>386</sup> development of small-medium entrepreneurship<sup>387</sup> and *de minimis* aid<sup>388</sup>;

- iii. *regional aid*, fostering economic development in a specific geographical area<sup>389</sup>.

As far as the aviation industry is concerned, reference has to be made, firstly, to the *Guidelines on State aid to airports and airlines* ('2014 Aviation Guidelines')<sup>390</sup>. In these guidelines, the Commission sets out a compatibility test whose cumulative requirements reflect the State Aid Modernization (SAM) reform<sup>391</sup>: *a*) contribution to a well-defined objective of common interest; *b*) need for State intervention; *c*) appropriateness of the aid measure; *d*) incentive effect; *e*) proportionality; *f*) avoidance of undue negative effects on competition and trade between Member States; *g*) transparency.

The above principles have been adjusted to *ad hoc* categories of aid, namely: *i*) *investment aid to airports*, aiming at building new infrastructure<sup>392</sup>; airport size in terms of passenger traffic<sup>393</sup> as well as existing infrastructure in the same catchment area (airports or high-speed train connections)<sup>394</sup>, are important factors to be taken into account; *ii*) *operating aid to airports*, limited to smaller airports with certain connectivity needs<sup>395</sup> and to a transitional period in order to minimize distortions to competition<sup>396</sup>; *iii*) *start-up aid to airlines*, focusing on increasing regional connectivity via the operation of new routes; also in this case overlaps with substitutable means of transport have to be avoided<sup>397</sup>.

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<sup>386</sup> Commission, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Communication 2014/C 249/01.

<sup>387</sup> See Art. 17 ff. and Annex I GBER.

<sup>388</sup> See Commission Reg. (EU) No 1407/2013, cit. and also Commission, Approval of the content of a draft for a Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, Communication 2022/C 435/05.

<sup>389</sup> Further on this classification, see V. KREUSCHITZ, *Compatible and incompatible aid (Art. 107(3) TFEU)*, cit., p. 280.

<sup>390</sup> Commission, Guidelines on State aid to airports and airlines, Communication 2014/C 99/03. These guidelines replaced the previous guidance of 1994 and 2005 (ibid., para. 171): Commission, Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, Communication 1994/C 350/05 («1994 Aviation Guidelines»); Id., Community guidelines on financing of airports and start-up aid to airlines departing from regional airports, Communication 2005/C 312/01 («2005 Aviation Guidelines»).

<sup>391</sup> See *infra*, para. 4.2.2.

<sup>392</sup> Commission, 2014 Aviation Guidelines, cit., paras 83 ff.

<sup>393</sup> Ibidem, paras 89 ff.

<sup>394</sup> Ibidem, paras 85-86.

<sup>395</sup> Up to 3 million passengers: Ibidem, para. 118.

<sup>396</sup> Ibidem, paras 112 ff. The 10-years transitional period was set to expire in 2024, but has been recently extended until 3 April 2027: Commission, Communication extending the transitional period provided for in the Guidelines on State aid to airports and airlines concerning regional airports, 2023/C 244/01; Id., Prolongation of the specific regime for operating aid for airports with up to 700,000 passengers per annum provided for in the Guidelines on State aid to airports and airlines, Communication 2018/C 456/27.

<sup>397</sup> Commission, 2014 Aviation Guidelines, cit., paras 138 ff. For a recent example in the Commission's practice see Commission, 4 August 2017, Netherlands – Start-up aid to airlines operating in the Province of Limburg, SA. 47746, Decision C(2017) 5392 final.

Investment and operating aid to airports may be exempted from notification under the GBER, provided that the airport is open to all potential users and that the airport is not located within 100 kilometres or 60 minutes travelling time by road transport, train or high-speed train<sup>398</sup>. Simplified rules apply to small airports (handling up to 200,000 passengers)<sup>399</sup>.

Aid to airlines in financial distress, on which the Commission developed an extensive practice<sup>400</sup>, is no longer regulated by sector<sup>401</sup>, but subject to the horizontal rules on *rescuing and restructuring aid*<sup>402</sup>.

#### 4.3.7 Rescuing and restructuring aid

As anticipated above<sup>403</sup>, aid impacting on market exit is very likely to distort competition by preventing allocation of resources to more efficient and innovative competitors<sup>404</sup>. Therefore, this aid should be limited in amount and duration in order to avoid moral hazard and risks of setting off subsidy races among Member States wanting to protect their own national industries<sup>405</sup>.

As a pre-requisite, the recipient must be in difficulty, which means that, «without intervention by the State, the undertaking will almost certainly go out of business in the short or medium term»<sup>406</sup>. In fact, a counterfactual analysis should prove that, without State intervention, neither the objective of common interest (i.e., addressing social hardship or market failure and enhancing long term viability of the firm), nor the incentive effect, would be achieved<sup>407</sup>.

Newly created businesses (i.e., in the first three years following the start of operations) are not eligible<sup>408</sup>, while companies belonging to a group may benefit from aid only if the difficulties are *a*) intrinsic to the recipient and «not the result

<sup>398</sup> Article 56a GBER, cit.

<sup>399</sup> Article 56a(5)-(6) GBER, cit.

<sup>400</sup> Among many, see Commission, 24 July 1991, Belgium – Sabena, Decision 91/555/EEC; Id., 21 December 1993, Ireland – Aer Lingus, Decision 94/118/EC; Id., 6 July 1994, Portugal - TAP Air Portugal, Decision 94/698/EC; Id., 27 July 1994, France – Air France, Decision 94/653/EC; Id., 7 October 1994, Greece - Olympic Airways, Decision 94/696/EC; Id., 15 July 1997, Italy – Alitalia, Decision 97/789/EC and, more recently, Id., 8 January 2012, Hungary – Malév Hungarian Airlines, case SA.30584; Id., 15 May 2013, Poland – Rescue aid for LOT Polish Airlines, case SA.35900; Id., 29 July 2014, Poland – Restructuring aid for LOT Polish Airlines SA, case SA.36874; Id., 9 January 2015, Cyprus - Cyprus Airways (Public) Ltd, cases SA.35888, SA.37220 and SA.38225; Id., 6 November 2015, Estonia – Rescue aid to Estonian Air, case SA.35956. For a comprehensive analysis of Commission’s practice on State aid to airlines, see S. TRUXAL, *Competition*, cit., p. 93 ff.

<sup>401</sup> Cf. Commission, 1994 Aviation Guidelines, cit., paras 38 ff.

<sup>402</sup> Commission, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Communication 2014/C 249/01 («Rescuing and Restructuring Aid Guidelines»).

<sup>403</sup> See *supra*, [36] ff.

<sup>404</sup> Commission, Rescuing and Restructuring Aid Guidelines, cit., para. 6. In detail, see M. SCHUTTE, *Rescue and Restructuring Aid*, cit., p. 877 ff.

<sup>405</sup> Commission, Rescuing and Restructuring Aid Guidelines, cit., para. 9-10. From the economic perspective, a subsidy race reflects a ‘prisoner’s dilemma’, see U. SCHWALBE, *Economic principles of State Aid Control*, in F. SAECKER, J. MONTAG (eds), *European State Aid*, cit., p. 8.

<sup>406</sup> The guidelines provide specific economic parameters in this regard: Commission, Rescuing and Restructuring Aid Guidelines, cit., para. 20.

<sup>407</sup> *Ibidem*, paras. 53 and 58.

<sup>408</sup> *Ibidem*, para. 21.

of an arbitrary allocation of costs within the group» and *b*) too serious to be dealt with by the group itself<sup>409</sup>. Special guidance applies where the recipient is a State-owned enterprise<sup>410</sup>.

The two main categories of aid that firms in difficulty are entitled to receive are rescue aid and restructuring aid<sup>411</sup>.

*Rescue aid* means supporting a firm facing a serious decline of its financial situation, for the short time needed to elaborate a restructuring plan<sup>412</sup>. For this reason, rescue aid cannot last more than six months and must consist of loans and guarantees that ensure a certain level of remuneration to the granting State<sup>413</sup>.

Conversely, *restructuring aid* is conditional on the implementation of a restructuring plan aiming at restoring the long-term viability of the firm<sup>414</sup>. In order to achieve that objective, the plan should be «feasible, coherent and far-reaching» and identify the causes of the recipient's financial distress<sup>415</sup>; this implies assessing its business model and corporate structure, an element emphasized by the Court when dealing with aid granted during the pandemic<sup>416</sup>. According to the 'one-time, last-time' principle, this aid may be granted only once over a 10-year time frame<sup>417</sup>. Nevertheless, in case of unforeseeable and exceptional circumstances – for which the beneficiary is not responsible – new aid may be awarded: in this regard, lessons can be learned from the pandemic<sup>418</sup>.

In order to avoid moral hazard, shareholders, creditors or the group holding company must contribute to restructuring costs<sup>419</sup> and sustain an adequate share of the firm's losses<sup>420</sup>. Negative effects of the aid are usually compensated by structural measures, such as divestments (to be performed without deteriorating the market structure)<sup>421</sup> as well as behavioural measures, such as the obligation to refrain from acquiring competitors' shares<sup>422</sup>.

This said, considering the role that de-carbonization plays and will play in the air transport industry, it is worth looking at the case where the objective of

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<sup>409</sup> *Ibidem*, para. 22. The notion of group is non-formalistic and reflects that of economic unity, while the applicability of these conditions to airline groups has been recently assessed by EU Courts, as it will be discussed *infra*, p. [119].

<sup>410</sup> Commission, Guidance Paper on state aid-compliant financing, restructuring and privatisation of State-owned enterprises, SWD(2012)14 final, 10.2.2012, esp. p. 14 ff.

<sup>411</sup> In addition, temporary restructuring support, a liquidity assistance lasting no more than 18 months, is available only to SMEs and smaller State-owned undertakings (*ibidem*, para. 28).

<sup>412</sup> *Ibidem*, para. 26.

<sup>413</sup> *Ibidem*, paras 55 ff. The maximum amount of eligible aid must be calculated according to Annex I of the Guidelines.

<sup>414</sup> *Ibidem*, para. 27. A model of the restructuring plan is provided in Annex II of the Guidelines.

<sup>415</sup> *Ibidem*, paras 45 ff.

<sup>416</sup> *Ibidem*, paras 48-49. For the assessment of the case-law, see, *infra*, pp. [97] ff.

<sup>417</sup> *Ibidem*, paras 70 ff.

<sup>418</sup> See *ibidem*, para. 72(b)(ii) and 72(c). On the link with pandemic events, see, *infra*, pp. [78] ff.

<sup>419</sup> *Ibidem*, para 62.

<sup>420</sup> *Ibidem*, para. 65. It is worth noting that if the aid is given to a company of the group, other entities remain eligible (*ibid.*, para. 74).

<sup>421</sup> *Ibidem*, para. 80.

<sup>422</sup> *Ibidem*, para. 84(a).

common interest under Article 107(3)(c) TFEU is the protection of the environment.

#### 4.3.8 Environmental aid

In order to be approved under Article 107(3) TFEU, State aid must comply with EU law as a whole<sup>423</sup>. Therefore, the Commission has to take environmental law into account too<sup>424</sup>, especially the principle of integration of environmental protection in other EU policies under Article 11 TFEU<sup>425</sup> and the ‘polluter pays’ principle<sup>426</sup>. According to the General Court, environmental assessment should be limited to aid pursuing environmental protection objectives<sup>427</sup>, but this point is debatable in light of the most recent Commission’s guidance.

The Commission’s practice initially defined the implementation of the polluter pays principle in public spending<sup>428</sup>, while specific guidelines on awarding aids with an environmental goal have been adopted since 1994<sup>429</sup>. The main reference is currently the Guidelines on State aid for Climate, Environmental Protection and Energy (CEEAG)<sup>430</sup>, which align State aid rules to the objectives set by the European Green Deal<sup>431</sup> and European Climate Law<sup>432</sup>. In the same vein, also the GBER was amended<sup>433</sup>.

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<sup>423</sup> See *supra*, p. [36].

<sup>424</sup> On the relationship between State aid and environmental rules, see O. PEIFFERT, *L’application du droit des aides d’État aux mesures de protection de l’environnement*, Paris, 2015; J. NOWAG, *Environmental Integration in Competition and Free-Movement Laws*, Oxford, 2016 and also M. BARBANO, *L’inserimento della prospettiva ambientale nella valutazione degli aiuti*, in M. SEBASTIANI ET AL. (eds), *Trasformazioni e sviluppo del sistema della mobilità: scenari prospettici, PNRR e strategia UE per una mobilità sostenibile*, Rapporto SIPOTRA 2023, forthcoming.

<sup>425</sup> CJEU, 22 December 2008, *British Aggregates v Commission*, C-487/06, EU:C:2008:757, paras 90-92, Id., 8 September 2011, *Commission v The Netherlands*, C-279/08, EU:C:2011:551, para. 75.

<sup>426</sup> Article 191.2 TFEU. See EU General Court, 16 July 2014, *Germany v Commission*, T-295/12, EU:T:2014:675, para. 61.

<sup>427</sup> EU General Court, 3 December 2014, *Castelnuovo Energia*, T-57/11, EU:T:2014:1021, paras 187–192.

<sup>428</sup> Commission, Communication regarding cost allocation and action by public authorities on environmental matters, Annex to Council Recommendation 75/436/Euratom, ECSC, EEC of 3 March 1975, OJ L 194, 25.7.1975, p. 1–4. This communication has been updated in 1980 and in 1986, see, respectively, Letter to Member States SG(80) D/8287 of 7 July 1980 and Letter to Member States SG(87) D/3795 of 23 March 1987.

<sup>429</sup> Commission, Community guidelines on State aid for environmental protection, OJ C 72, 10.3.1994, p. 3–9, then updated in 2001, 2008 and 2014: Id., Community guidelines on State aid for environmental protection, OJ C 37, 3.2.2001, p. 3; Id., Community guidelines on State aid for environmental protection, OJ C 82, 1.4.2008 p. 1; Id., Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55 («EEAG 2014-2020»).

<sup>430</sup> Commission, Guidelines on State aid for climate, environmental protection and energy 2022, OJ C 80, 18.2.2022, p. 1–89 («CEEAG»). For a comment, see B. JOURDAN-ANDERSEN, A. SKJONBORG BRUNT, *State Aid (CEEAG) and Taxonomy: Two Novel Pieces of Legislation at the Heart of Europe’s Green Transition*, in *EStAL*, vol. 21, no. 3, 2022, p. 266-277.

<sup>431</sup> Commission, The European Green Deal, COM(2019) 640 final, 11.12.2019. For some general remarks see G. BRUZZONE, S. CAPOZZI, *A Pro-Competitive Strategy for EU Sustainable Growth*, SSRN, 2020, <http://dx.doi.org/10.2139/ssrn.3779819>.

<sup>432</sup> Art. 1 e 4.1, Reg. (EU) 1119/2021, cit. and Commission, ‘Fit for 55’: delivering the EU’s 2030 Climate Target on the way to climate neutrality, Communication COM(2021) 550 final, 14.7.2021.

<sup>433</sup> See Commission Regulation (EU) 2023/1315 of 23 June 2023 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 167, 30.6.2023, p. 1–90 and Commission Regulation (EU) 2022/2473 of

A new approach in the CEEAG is apparent since its definition, as the notion of *environmental protection* has been extended to include climate change mitigation and adaptation as well as the circular economy principle<sup>434</sup>. Therefore, the CEEAG in principle applies to economic activity that improves environmental and climate protection<sup>435</sup>, including the aviation business and any other sector already disciplined by *ad hoc* rules. Accordingly, for instance, large airports can benefit from environmental aid irrespective to the strict limitations set out in the 2014 Aviation Guidelines<sup>436</sup>.

Among the aid measures envisaged by the Commission, those for the acquisition and leasing of clean vehicles and refuelling and recharging infrastructure are applicable to the sector in question<sup>437</sup>.

The first category encompasses *i*) acquisition and leasing of clean aircraft<sup>438</sup>, i.e., those with direct zero emissions or «substantially improved environmental performance» as compared to the alternatives widely available on the market<sup>439</sup>; *ii*) acquisition and leasing of «clean mobile service equipment» such as terminal and ground handling vehicles<sup>440</sup>; *iii*) costs for retrofitting, refitting and adaptation of aircraft and the above-mentioned equipment to the use of alternative fuels<sup>441</sup>. As a general rule, however, aid for the design and manufacture of environmentally-friendly means of transport cannot be allowed under the Commission's guidelines, as it is deemed more distortive than aid granted to users of these means<sup>442</sup>.

Regarding the second category, aid for recharging or refuelling infrastructure compensate the market failure caused by low demand and lack of economies of scale<sup>443</sup>. This problem affects also the use of Sustainable Aviation Fuels (SAFs), for which the ReFuelEU Aviation Regulation sets specific goals<sup>444</sup>. Considering that some SAFs are drop-in fuels fully compatible with the distribution facilities already in use, the Commission requires Member States to

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14 December 2022 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union, OJ L 327, 21.12.2022, p. 82–139. Aid for environmental protection is regulated by Articles 36 ff. GBER, cit.; see for a comment, B. HASLINGER, *Aid for environmental protection*, in F. SAECKER, J. MONTAG, op.cit., p. 826 ff.

<sup>434</sup> Commission, CEEAG, cit., para. 19, no. 39. Cf. Id. EEAG 2014-2020, cit., para. 19, no. 1.

<sup>435</sup> It is worth noting that aid for environmental protection and energy must not be awarded to undertakings in difficulty: *ibidem*, para. 14.

<sup>436</sup> Commission, CEEAG, cit., para. 12. Cf. Id., 2014 Aviation Guidelines, cit., para. 17.b.

<sup>437</sup> *Ibidem*, para. 16.c and 16.d.

<sup>438</sup> Commission, CEEAG, cit., para. 160 ff.

<sup>439</sup> *Ibidem*, para. 19, no. 20.g.

<sup>440</sup> *Ibidem*, para. 19, nos. 17-19

<sup>441</sup> *Ibidem*, para. 163. The retrofitting must allow the aircraft «to use, or increase the share of, biofuels and synthetic fuels, including renewable liquid and gaseous transport fuels of non-biological origin, in addition to, or as an alternative to, fossil-based fuels» (*Ibidem*, para. 163.b). On eligible costs, see *ibid.*, para. 179.

<sup>442</sup> *Ibidem*, para. 13.a.

<sup>443</sup> Cf. *Ibidem*, para. 190 ff.

<sup>444</sup> See Regulation (EU) 2023/2405 of the European Parliament and of the Council of 18 October 2023 on ensuring a level playing field for sustainable air transport. On the impact of the proposal on the regulatory framework, cf. also *infra*, pp. [136] ff.

explicitly justify the need for new infrastructure, in order to avoid its mere duplication<sup>445</sup>.

In terms of compatibility, measures considered under CEEAG must not result in a breach of any relevant provision of Union law<sup>446</sup>. In order to assess the criterion of appropriateness, alternative policy scenarios should be taken into account, such as the implementation of self-regulatory instruments<sup>447</sup>.

At the same time, co-ordination with the ‘polluter-pays’ principle must be ensured to avoid negative externalities<sup>448</sup>. Moreover, the implementation of the EU Emission Trading System (ETS) may trigger State aid compliance as well. In fact, national schemes providing allowances for free or at a more favourable price to certain firms may result in an economic advantage and selectivity, as pointed out by the Commission and upheld by the Court<sup>449</sup>. Nevertheless, aid covering indirect emission costs and the provision of optional transitional free allowances may be compatible under Article 107(3)(c) TFEU, provided that the requirements set out by the Commission’s ETS guidelines are met<sup>450</sup>.

In drawing up the balancing test between positive and negative effects on competition and trade, the Commission stresses the importance of the ‘Do No Significant Harm’ (DNSH) principle<sup>451</sup>, which has already been implemented in other areas of EU law, such as regulation of financial markets (so-called ‘EU Taxonomy’)<sup>452</sup> and EU funding to Member States under the Recovery and Resilience Facility (RRF)<sup>453</sup>.

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<sup>445</sup> Commission, CEEAG, cit., para. 207.

<sup>446</sup> Ibidem, para. 33.

<sup>447</sup> Like, e.g., eco-labelling; ibidem, para. 40, esp. nt. 41.

<sup>448</sup> Ibidem, paras. 41-42.

<sup>449</sup> See the Dutch nitrogen oxide case: CJEU, 8 September 2011, *Commission v The Netherlands*, C-279/08, EU:C:2011:551 and in Commission’s practice: Commission, 12 April 2000, Denmark - CO2 quotas, case SA.12207; Id., 28 November 2001, Great Britain - Emission Trading Scheme, case SA.12525; Id., 24 June 2003, Netherlands - NOx Trading Scheme, case SA.14833. For further references see C. ARHOLD, *Energy and Coal*, in F. SAECKER, J. MONTAG (eds), op. cit., p. 1236 ff., esp. 1279-1282.

<sup>450</sup> Commission, Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading post-2021, 2020/C 317/04. Previously, the topic was addressed by EEAG 2014-2020.

<sup>451</sup> Commission, CEEAG, cit., para. 72.

<sup>452</sup> Article 3 Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198, 22.6.2020, p. 13–43 («EU Taxonomy Regulation»). On the relationship between State aid law and EU taxonomy, see A. BIONDI, *Competition Policy supporting the Green Deal: Some observations on state aid control*, Reply to European Commission Call for Contributions, 2020, at: [https://competition-policy.ec.europa.eu/policy/green-gazette/conference-2021\\_en](https://competition-policy.ec.europa.eu/policy/green-gazette/conference-2021_en).

<sup>453</sup> See Article 5.2, Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, p. 17–75 («RRF Regulation»). As the RRF Regulation does not define the DNSH, reference shall be made to the EU Taxonomy (Article 2, no. 6 RRF Reg., cit.), on which further specifications have been provided by Commission Delegated Regulation (EU) 2022/1288 of 6 April 2022 supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of ‘do no significant harm’, OJ L 196, 25.7.2022, p. 1–72.

According to EU Taxonomy, the DNSH principle is not adhered to when the measure negatively affects the following environmental goals: mitigation and adaptation to climate change, sustainable use of water and marine resources; circular economy and waste prevention; pollution prevention; protection and restoration of biodiversity and ecosystems<sup>454</sup>. As the CEEAG are silent on the exact scope of the DNSH, this principle may have wider application in State aid control, and will be discussed further<sup>455</sup>.

Moreover, the Commission may require an *ex post* evaluation in order to verify whether the assumptions and conditions underlying the compatibility assessment have been achieved<sup>456</sup>.

Because reducing the environmental footprint of the economy requires technological development, aid to Research, Development and Innovation (RDI) it is also worth mentioning<sup>457</sup>. The Commission's guidance on this category of horizontal aid has been recently updated by referring expressly to the link between RDI and the transition to a zero-carbon economy<sup>458</sup>. In this case, the counterfactual analysis is extremely relevant, as public funds should support research in areas for which there is not enough market incentive to invest<sup>459</sup>.

Finally, since only measures adopted by a Member State qualify as State aid<sup>460</sup>, it is worth briefly considering the legislation applicable to subsidies adopted by third countries which, nevertheless, have an impact on the internal aviation market.

#### 4.4. The external dimension of the level playing field: the attempt to counter-act third countries' subsidies

Ensuring a level playing field in the internal aviation market implies addressing the issue of subsidies given by third countries to airlines that, albeit being seated outside the EU, operate connections to and from EU airports, thus competing with European carriers.

As far as ASAs are concerned, the EU-US Open Skies agreement provides an interesting example<sup>461</sup>, as it recognizes the unfair competitive disadvantage

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<sup>454</sup> See Articles 9 and 17.1 Reg. (EU) no. 852/2020, cit.

<sup>455</sup> See *infra*, p. [136].

<sup>456</sup> Commission, CEEAG, cit., paras 454 ff., esp. 458.

<sup>457</sup> On the topic, see B. VON WENDELAND, *State aid for R&D&I*, in F. SAECKER, J. MONTAG (eds), *op. cit.*, p. 759 ff.

<sup>458</sup> Commission, Framework for State aid for research and development and innovation, Communication, 2022/C 414/01, esp. para. 137.

<sup>459</sup> In fact, potential distortions may derive from the closeness to the market, which means that « the more the aid measure is aimed at activities close to the market, the more it is liable to develop significant crowding out effects» (*ibidem*, para. 124).

<sup>460</sup> See, *supra*, pp. [40] ff.

<sup>461</sup> See Air Transport Agreement between the United States of America and the European Community and its Member States, signed on 25 and 30 April 2007, OJ L 134, 25.5.2007, p. 4, as amended by the 2010 Protocol, OJ L 223, 25.8.2010, p. 3–19 ('EU-US Open Skies agreement').

caused by government subsidies, but any disputes arising from this could only be resolved through diplomatic channels<sup>462</sup>.

The above-mentioned solution differs from the ‘comprehensive’ agreements negotiated with EU neighbouring countries as part of the *second pillar* of the EU external aviation strategy. For instance, the EU-Switzerland agreement contains a provision mirroring Articles 107 ff. TFEU<sup>463</sup>, while the European Common Aviation Area (ECAA) agreement with Balkan countries requires the latter to adopt a State aid control regime modelled on the EU one<sup>464</sup>.

Subsidies are also expressly prohibited according to the latest EU ‘comprehensive’ agreement with Qatar<sup>465</sup> and with the Association of Southeast Asian Nations (ASEAN)<sup>466</sup>. Enforcement issues are subject to consultations or arbitration mechanisms<sup>467</sup>, without prejudice within the contracting parties’ jurisdiction<sup>468</sup>; thus, some doubts arise regarding the overall effectiveness of these rules.

Moreover, the European Economic Area Agreement (EEA) as well as Stabilization and Association Agreements, signed with applying countries, establish a comprehensive State aid control regime, which is also applicable to aviation<sup>469</sup>. A similar approach characterizes EU-UK Trade and Cooperation Agreement (TCA) too<sup>470</sup>.

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<sup>462</sup> See, respectively, Article 14 and EU-US Open Skies agreement. Cf. the cooperation mechanism established for antitrust enforcement: *ibidem*, Article 20 and Annex 2.

<sup>463</sup> Article 13, Agreement between the European Community and the Swiss Confederation on Air Transport, OJ L 114, 30.4.2002, p. 73–90, whose consolidated text is available at [http://data.europa.eu/cli/agree\\_internation/2002/309\(2\)/2023-01-01](http://data.europa.eu/cli/agree_internation/2002/309(2)/2023-01-01).

<sup>464</sup> Article 14 and Annex III, Multilateral agreement establishing the European Common Aviation Area, OJ L 285, 16.10.2006, p. 3–46, as amended Decision No 1/2019 of the ECAA Joint Committee of 31 July 2019 replacing Annex I to the ECAA Agreement on the rules applicable to civil aviation, OJ L 211, 12.8.2019, p. 4–19.

<sup>465</sup> Article 8, Agreement on air transport between the European Union and its Member States, of the one part, and the State of Qatar, of the other part, OJ L 391, 5.11.2021, p. 3–40 (‘EU-Qatar Agreement’).

<sup>466</sup> Article 7, Comprehensive Air Transport Agreement between the Member States of the Association of Southeast Asian Nations, and the European Union and its Member States (‘EU-ASEAN Agreement’), signed in 2022 and available at [https://eur-lex.europa.eu/resource.html?uri=cellar:e8fc76ac-cd2b-11ec-a95f-01aa75ed71a1.0009.02/DOC\\_2&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:e8fc76ac-cd2b-11ec-a95f-01aa75ed71a1.0009.02/DOC_2&format=PDF).

<sup>467</sup> See, respectively, Article 7, paras. 7-11 EU-ASEAN Agreement and Article 8, paras. 8-11 EU-Qatar Agreement.

<sup>468</sup> As stated, respectively, in Article 7, para. 13 EU-ASEAN Agreement and Article 8, para. 12 EU-Qatar Agreement.

<sup>469</sup> See Annex XIV Agreement on the European Economic Area, OJ L 1, 3.1.1994, p. 3–522, as well as, e.g., Art. 262 ff. of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (‘EU-Ukraine Association Agreement’), OJ L 161, 29.5.2014, p. 3–2137.

<sup>470</sup> See Article 363 ff., Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30.4.2021, p. 10–2539; the provision of air transport services is addressed by Articles 417 ff. TCA. Moreover, since January 4, 2023 UK enforces its own domestic legislation on the subsidies, the Subsidy Control Act 2022 [2022, ch. 23], available at <https://www.legislation.gov.uk/ukpga/2022/23/enacted>. For a comprehensive analysis of State aid law issues arising from Brexit, see S. TRUXAL, *The EU–UK Competition and State Aid Regulatory Environment for Airlines: Post-Brexit, Post-Transition*, in *Air & Space Law*, vol. 46, Special Issue, 2021, p. 29–44.

To reduce problems associated with extraterritorial enforcement of competition rules, the introduction of bilateral subsidy restrictions seems more effective<sup>471</sup>. Nevertheless, EU legislature awarded the Commission unilateral anti-subsidy trade defense instruments when third countries unfairly grant subsidies to their airlines. This regime was firstly established by Regulation (EC) No. 868/2004<sup>472</sup>, then repealed by Regulation (EU) No. 712/2019<sup>473</sup>; so far, however neither of them has ever been applied<sup>474</sup>. As *lex specialis*, these sectorial rules prevail on the general foreign subsidies regime laid down by Regulation (EU) No. 2560/2022 ('Foreign Subsidies Regulation' or 'FSR')<sup>475</sup>. There are, nevertheless, cases in which the FSR is applicable to the airline industry, such as that of State-backed foreign investments in EU carriers<sup>476</sup>.

## 5. Concluding remarks

Conclusively, some overall remarks on this Part can be made.

The general overview of the relevant legal framework shows the role played by State intervention in the airline market. The lack of a specific international regime on airline subsidies is contrast with the detailed legislative framework provided at EU level. This raises issues as competition between carriers takes place on a global scale. Similar consideration can be made with reference to climate change legislation, on which the EU has been trying for many years to set

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<sup>471</sup> This issue has been addressed by the Court even before the *Nouvelles Frontières* judgement in the *Abmed Saeed* case, when air transport services between EU and third countries were considered outside the scope of the Commission's competition enforcement powers: CJEU, 11 April 1989, *Abmed Saeed Flugreisen c. Silver Line Reisebüro GmbH*, C-66/86, EU:C:1989:140. The exclusion was later removed by Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries, OJ L 68, 6.3.2004, p. 1–2. It is worth noting also that, according to the so-called 'effects doctrine', competition law is applicable outside a country's territory when the actions taken outside its borders have a direct and substantial impact on competition in the domestic market. This principle, developed firstly in the US courts, has been later accepted by EU courts: *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); CJEU, 6 September 2017, *Intel v Commission*, C-413/14, EU:C:2017:632.

<sup>472</sup> Regulation (EC) No 868/2004 of the European Parliament and of the Council of 21 April 2004 concerning protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community, OJ L 162, 30.4.2004, p. 1–7.

<sup>473</sup> 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, OJ L 123, 10.5.2019, p. 4–17.

<sup>474</sup> Cf. [https://eur-lex.europa.eu/search.html?DB\\_MENTIONING=32019R0712&SUBDOM\\_INIT=ALL\\_ALL&DTS\\_SUBDOM=ALL\\_ALL&DTS\\_DOM=ALL&lang=en&type=advanced&qid=1686041210155](https://eur-lex.europa.eu/search.html?DB_MENTIONING=32019R0712&SUBDOM_INIT=ALL_ALL&DTS_SUBDOM=ALL_ALL&DTS_DOM=ALL&lang=en&type=advanced&qid=1686041210155). This is not surprising considering the 'detering' rationale behind the adoption of trade defense instruments and that the use of countervailing measures usually has negative spill over effects in other areas of trade relations with a third country. For a critical assessment, see: A. TRIMARCHI, *EU Regulation 868/2004: report of a unilateral approach on regulating unfair subsidisation and unfair pricing practices and its failure*, in *European Competition Law Review*, vol. 38, 2017, p. 72-79; A. LYKOTRAFITI, *What Does Europe Do About Fair Competition in International Air Transport? A Critique of Recent Actions*, in *Common Market Law Review*, 2020, pp. 831–860.

<sup>475</sup> Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ L 330, 23.12.2022, p. 1–45.

<sup>476</sup> For a first assessment, please refer to: M. BARBANO, *Sovvenzioni estere distorsive: ambito di applicazione ed enforcement settoriale del regolamento (UE) n. 2560/2022*, in *Quaderni AISDUE*, no. 2, 2023, p. 119-132.

the international standard. Therefore, State aid and environmental policy must take into due consideration their repercussions on the external aviation relations.

That said, it is possible to focus specifically on the EU State aid law perspective, by addressing two different types of aid that could be given to the industry: aid in response to a market shock, where the focus is mostly on the short-term perspective, and aid aiming to decarbonization, which is, indeed, long-term oriented.

Nevertheless, the two perspectives both must come together in order to avoid market distortions as well as enhancing fair competition on a global scale.

## Part II – State aid and market shocks: public support to airlines during the pandemic crisis

SUMMARY: 1. COVID-19: a different kind of crisis – 2. Member States’ financial support to the aviation industry during the pandemic – 3. The choice of the legal basis – 3.1 Damage compensation under Article 107(2)(b) TFEU – 3.2 Remedy to a serious disturbance under Article 107(3)(b) TFEU as interpreted under the Temporary Framework – 3.3 Aid approved under Article 107(3)(c) TFEU and Rescue and restructuring guidelines – 4. The Commission’s practice and CJEU’s case-law: selected topics – 4. Aid schemes and eligibility criteria – 4.1.1 The Swedish scheme – 4.1.2 The French scheme – 4.1.3 AG Pitruzzella’s opinion on the Swedish scheme – 4.2 Comparisons and remarks on eligibility criteria – 4.2.1 Difference in treatment and objective justifications – 4.2.2 Weighing the positive and negative effects of the aid – 4.2.3 Comparison with ‘all airlines’ schemes – 4.2.4 Compliance with other EU law provisions: the Italian scheme – 4.3 The relationship between individual aids and their legal basis – The SAS (damage compensation) cases – 4.3.2 Concurrent application of Article 107(2)(b) and Article 107(3)(b) TFEU – 4.3.3 Aid schemes vs individual aid – 4.3.4 The purpose of aid and considerations on allegedly redundant ‘air connectivity’ – 4.4 Airline group structure and multiple awards of State aids – 4.4.1 The KLM I ruling – 4.4.2 The ruling on TAP SGPS rescue – 4.4.3 The new Commission’s decisions after annulment – 4.4.4 Pandemic aid to airlines already in difficulty – 4.4.5 Intra-group dynamics and cumulation of aid – 4.5 Public support and market dominance – 4.5.1 The Deutsche Lufthansa case – 4.5.2 Eligibility for the aid, intensity and State exit – 4.5.3 Assessing significant market power – 4.5.4 The adequacy of structural commitments – 4.5.5 Comparisons with other public capital injections in favour of airlines affected by the pandemic – 5. State aids and environmental commitments: the case of ‘green obligations’ in airline bailouts – 6. Concluding remarks

The pandemic crisis started a new era of public financial support awarded to airlines. This part analyses the European Commission’s practice on COVID-19-related aid to EU airlines and its case-law. After a brief reference to previous crisis, the relevant Commission decisions are examined. A database collecting 94 decisions (56 individual aid measures to airlines, 17 aid schemes to airlines and 21 individual aid and schemes to airports and other operators) and 30 rulings provides some insights on the legal basis and different design of the measures as well as on their economic size.

When this database was completed in February 2024, 37 decisions had been challenged before the EU General Court and 26 rulings had been published so far. Ten GC rulings have been appealed before the Court of Justice, which in four cases upheld the decision. Other six appeals are pending and four opinions been delivered by the Advocate General. This case-law will be examined here to shed light on underlying CJEU’s principles and reasoning. Finally, some remarks will be made as to how this legislation might shape the future Commission’s Government aid policy to the airline sector.

## 1. COVID-19: a different kind of crisis

Historically, operating an airline has been a low-margin business<sup>1</sup>. When the market was highly regulated and many airlines were State-owned, the industry incurred in small but stable losses<sup>2</sup>. Then, deregulation and liberalization brought more dynamism and the market incurred in a series of cyclical fluctuations, as shown by the figures below.

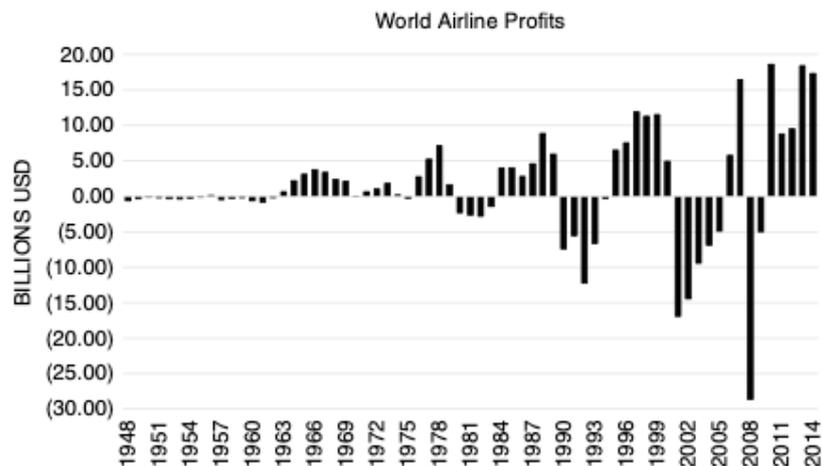


Figure 1: World airline profits (Source: elaboration from Billig, Cook, 2017)

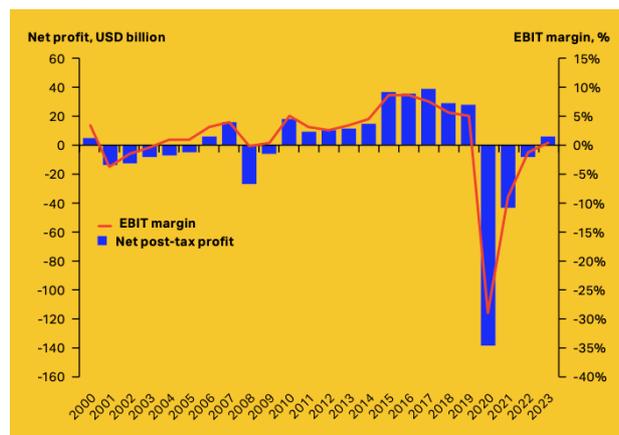


Figure 2: Airline industry net profits and Earnings Before Interest and Taxes (EBIT) margin (Source: IATA, 2023)<sup>3</sup>

Passenger demand is impacted by economic cycles, so any world recession causes airline profit losses due to a general reduction in air traffic<sup>4</sup>. Conversely, growth in demand can lead to overcapacity crisis, since there is a time lag between the airline's decision to expand its business and the actual availability of new aircraft that manufacturers still have to build<sup>5</sup>.

<sup>1</sup> See E. MUSSO, *Trasporti*, cit., p. 354 ff.

<sup>2</sup> On the topic, see G. COOK, B. BILLIG, *Airline Operations and Management*, Abingdon, 2017, p. 164 ff.

<sup>3</sup> IATA, Annual Review, 2023, p. 19.

<sup>4</sup> G. COOK, B. BILLIG, *Airline Operations*, p. 38 ff.

<sup>5</sup> *Ibidem*, p. 165.

Moreover, the airline business is heavily affected by external factors. Surges in fuel prices or shocks to international relations have a direct impact on traffic and profitability, as exemplified by the oil crisis in the mid-1970s, the Gulf war in the 1990s and, more recently, by the Russian aggression to Ukraine<sup>6</sup>.

As a by-product of globalization, air transport also plays a role in the spread of diseases<sup>7</sup>, while the fear of epidemics negatively impacts on passenger demand<sup>8</sup>. This phenomenon became apparent in 2003 when the first coronavirus - the one causing the severe acute respiratory syndrome (SARS) - spread in 26 countries<sup>9</sup>. Similar issues arose with avian flu and H1N1 swine influenza<sup>10</sup>; despite this, the civil aviation market was still severely shocked by the COVID-19 pandemic, whose widespread reach required States to impose travel bans on a global scale<sup>11</sup>. As a consequence, the fall in demand was on an unprecedented scale not comparable to previous market shocks, as shown in the graph below.

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<sup>6</sup> On the topic, please refer to M. BARBANO, *Turbulence in the air and space industry: EU sanctions against Russia*, in *Leiden Law Blog*, 29.4.2022, <https://www.leidenlawblog.nl/articles/turbulence-in-the-air-and-space-industry-eu-sanctions-against-russia>.

<sup>7</sup> See J. BOWEN, C. LAROE, *Airline Networks and the International Diffusion of Severe Acute Respiratory Syndrome (SARS)*, in *The Geographical Journal*, vol. 172, 2006, pp. 130–144. According to Article 14 Chicago Convention, Member States have the obligation to take effective measures to prevent the spread communicable diseases by means of air navigation (see also SARPs of Annex 9, Chapter 8, section E implementing the 2005 International Health Regulations adopted by WHO). Before globalization, movement of people by the sea was one of the main factors in the spread of diseases: in detail, see F. MUNARI, *To What Extent Do the Contemporary International Law of the Sea, International Maritime Law, and International Labor Law Address Public Health Threats such as Pandemics?*, in *Ocean Yearbook*, vol. 35, 2021, p. 388-422.

<sup>8</sup> T. LAMB, ET AL., *A qualitative analysis of social and emotional perspectives of airline passengers during the COVID-19 pandemic*, in *Journal of Air Transport Management*, Vol. 94, 2021, Article 102079.

<sup>9</sup> See B. LITTLE, *SARS Pandemic: How the Virus Spread Around the World in 2003*, in *History.com*, 5.5.2023, <https://www.history.com/news/sars-outbreak-china-lessons>. In June 2003, an international working group met to develop, under the guidance of ICAO, appropriate guidelines for airports. However, WHO declared the last chain of person-to-person transmission broken in July 2003. Further details are available on the ICAO official website: <https://www.icao.int/safety/aviation-medicine/Pages/avmedsars.aspx>.

<sup>10</sup> See, respectively, R. ABEYRATNE, *Implications of an Avian Flu Pandemic for Air Transport*, in *Air & Space Law*, vol. 31, 2006, pp. 159-171, C. CLEGG, *The Aviation Industry and the Transmission of Communicable Disease: The Case of H1N1 Swine Influenza*, in *J. Air L. & Com.*, vol. 75, 2010, pp. 437-467.

<sup>11</sup> See, P. MENDES DE LEON, *National Reflexes Following the COVID-19 Outbreak: Is Sovereignty Back in the Air?*, in *Air & Space Law*, vol. 45, Special issue, 2020, pp. 17-38; B. SCOTT ET AL., *National Aviation Law Responses to COVID-19*, *ibidem*, pp. 195-272.

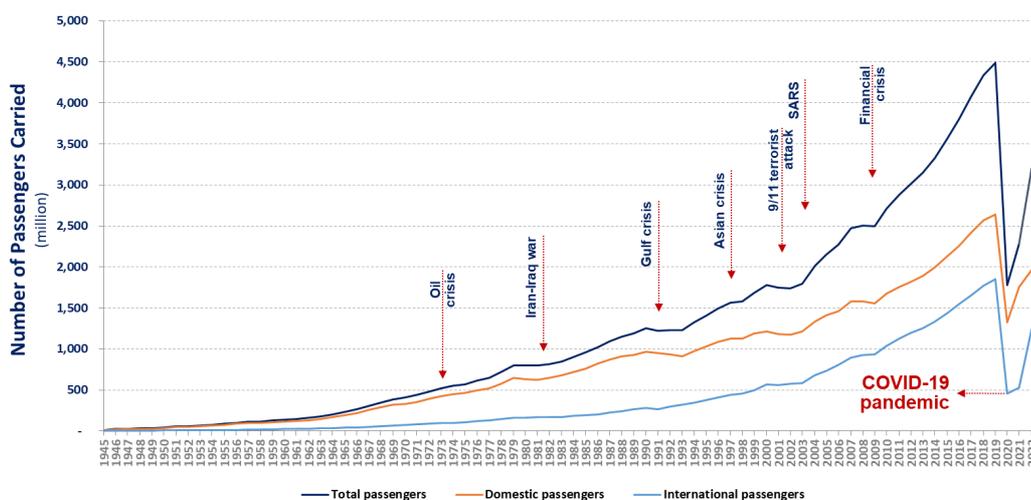


Figure 3: World passenger traffic and exogenous crisis (Source ICAO, 2023)<sup>12</sup>

Compared to 2019 records, the pandemic globally led to a reduction in passenger numbers of – 60% in 2020, – 49% in 2021 and – 29% in 2022, respectively, with an overall USD 871 billion loss of carriers’ gross operating revenues in the 2020-2022 years<sup>13</sup>.

In Europe, the worse drop was reached on 12<sup>th</sup> April 2020, when there were 93% fewer daily flights than those operating on the same day in 2019<sup>14</sup>. At the time, the spread of variants, coupled with uncertainty about vaccine development, posed a serious threat to the air passenger transport business<sup>15</sup>.

These dramatic events compelled airlines to put pressure on governments to pay out liquidity support<sup>16</sup>. Due to national interests, the need for airline services

<sup>12</sup> ICAO, 2021 global air passenger totals show improvement from 2020, but still only half pre-pandemic levels, press release, 17.1.2021, <https://www.icao.int/Newsroom/Pages/2021-global-air-passenger-totals-show-improvement.aspx>.

<sup>13</sup> According to ICAO estimates, airlines lost USD 372 billions in 2020, USD 324 billions in 2021 and USD 175 billions in 2022: ICAO, *Effects of Novel Coronavirus (COVID-19) on Civil Aviation: Economic Impact Analysis*, Air Transport Bureau, 27.4.2023, [https://www.icao.int/sustainability/Documents/Covid-19/ICAO\\_coronavirus\\_Econ\\_Impact.pdf](https://www.icao.int/sustainability/Documents/Covid-19/ICAO_coronavirus_Econ_Impact.pdf), pp. 5 ff. See also Organization for Economic Cooperation and Development (OECD), *State Support to the Air Transport Sector: Monitoring developments related to the Covid-19 crisis*, Paris, 22.4.2021, <https://www.oecd.org/corporate/State-Support-to-the-Air-Transport-Sector-Monitoring-Developments-Related-to-the-COVID-19-Crisis.pdf>.

<sup>14</sup> Eurocontrol, COVID-19 Impact on European Air Traffic – Comprehensive Assessment. Air Traffic situation for Wednesday 1 July 2020 compared with equivalent period in 2019, available at: [www.eurocontrol.int/publication/eurocontrol-comprehensive-assessment-covid-19s-impact-european-air-traffic](http://www.eurocontrol.int/publication/eurocontrol-comprehensive-assessment-covid-19s-impact-european-air-traffic).

<sup>15</sup> B. PEARCE, *COVID-19 Outlook for air travel in the next 5 years*, IATA, 13 May 2020; Eurocontrol, *Charting the European Aviation recovery: 2021 COVID-19 impacts and 2022 outlook*, Aviation Intelligence Unit, Think Paper no. 15, 1 Jan. 2022; ICAO, *Effects of Novel Coronavirus (COVID-19) on Civil Aviation: Economic Impact Analysis*, 2022, [https://www.icao.int/sustainability/Documents/Covid-19/ICAO\\_coronavirus\\_Econ\\_Impact.pdf](https://www.icao.int/sustainability/Documents/Covid-19/ICAO_coronavirus_Econ_Impact.pdf).

<sup>16</sup> On economic implications, see *ex multis*: M. ABATE, P. CHRISTIDIS, A. PURWANTO, *Government support to airlines in the aftermath of the COVID-19 pandemic*, in *Journal of Air Transport Management*, vol. 89, 2020, Article 101931; K. DUBE G. NHAMO, D. CHIKODZI, *COVID-19 pandemic and prospects for recovery of the global aviation industry*, *ivi*, vol. 92, 2021, Article 102022.

and the large number of jobs at stake<sup>17</sup>, EU Member States, along with many other countries such as the US<sup>18</sup>, China<sup>19</sup> and Gulf States<sup>20</sup> all decided to intervene through subsidies.

Right from the earliest stages of the pandemic, the Commission warned about the dire consequences to air transport and the pressing need for State aid intervention<sup>21</sup>. Among the 900 COVID-related measures approved in years 2020-2022, more than one hundred were awarded to the aviation industry<sup>22</sup>. All segments of the industry received financial support, albeit differing sums and quantities with different levels of intensity<sup>23</sup>.

As shown on the graph below, airlines received the largest share, so it seems appropriate to focus on these companies<sup>24</sup>.

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<sup>17</sup> For data on employment directly and indirectly linked to aviation per single Member State, see the most recent IATA country reports: IATA, Value of aviation, 1 June 2019, at <https://www.iata.org/en/iata-repository/publications/economic-reports>.

<sup>18</sup> See, for instance, the measures set out in the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Consolidated Appropriations Act (2021), American Rescue Plan Act (2021), Coronavirus Economic Relief for Transportation Services (CERTS) Program. In detail, see US Department of Treasury, Assistance for American Industry, available at <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-american-industry>, and US House of Representatives, *COVID-19's effects on U.S. aviation and the flightpath to recovery*, Remote hearing before the Subcommittee on aviation of the Committee on transportation and infrastructure, 117<sup>th</sup> Congress, 2.3.2021, <https://www.govinfo.gov/content/pkg/CHRG-117hrg44274/html/CHRG-117hrg44274.htm>. For a comment, see: B. ELIAS, *Addressing COVID-19 Pandemic Impacts on Civil Aviation Operations*, CRS Paper no. R46483, Ago. 2020 and, for a critique, V. DE RUGY, G. LEFF, *The Case against Bailing Out the Airline Industry*, in *Mercatus Center – Policy Brief*, Special Edition, 25 Mar. 2020, <https://dx.doi.org/10.2139/ssrn.3571441>.

<sup>19</sup> H. MENG, W. KUN, Y. HANGJUN, *Hub airport slot Re-allocation and subsidy policy to speed up air traffic recovery amid COVID-19 pandemic - case on the Chinese airline market*, in *Journal of Air Transport Management*, vol. 93, June 2021, Article 102047.

<sup>20</sup> Carriers based in the Gulf States, historically recipients of public support, received substantial aid during the pandemic: A. BATRAWY, *Emirates to start paying back Dubai for its \$4B lifeline*, *ABC News*, 10.5.2022, <https://abcnews.go.com/International/wireStory/emirates-start-paying-back-dubai-4b-lifeline-84617909>; D. DUDLEY, *Qatar Airways Receives \$2 Billion Government Bailout*, *Forbes*, 28.9.2020, <https://www.forbes.com/sites/dominicdudley/2020/09/28/qatar-airways-receives-2-billion-government-bailout/>.

<sup>21</sup> Commission, Coordinated economic response to the COVID-19 Outbreak, Communication COM(2020) 112 final, 13.3.2020, esp. at 4-5, 10-11. Please note that between 2020-2021 the Commission approved a total of about 700 pandemic-related measures (excluding extension decisions), amounting to EUR 3.13 trillion: *ibid.* p. 24.

<sup>22</sup> See *supra*, Part I, nt. [4].

<sup>23</sup> See, for instance, aid given to airports (cf. Commission, SA.56807, Belgium - COVID-19 aéroports wallons, 11.4.2020, C(2020) 2367 final), ground handling and air traffic control service providers (cf. *Id.*, SA.57637, Belgium - COVID-19: Recapitalisation of Aviapartner, 7.7.2020, C(2020) 4733 final; *Id.*, SA.61298, Sweden - COVID-19: Loans to Traffic Control Services, 10.03.2021, C(2021)1719 final), as well as aerospace manufacturers (*Id.*, SA.57767, Hungary - COVID-19: Scheme to provide payroll related exemptions in the aviation industry, 7.7.2020, C(2020) 4737 final).

<sup>24</sup> In legal literature, see: V. CORREIA, *The General Court's Decisions on State Aid Law in Times of COVID-19 Pandemic*, in *Air & Space Law*, vol 47, 2022, p. 1-24; W. DE COCK, *Het Gerecht vernietigt de goedkeuringsbesluiten van de staatssteun aan KLM en TAP: een (pyrrus)overwinning voor Ryanair?*, in *Tijdschrift voor Europees en economisch recht*, n. 3, 2022, p. 177-183; M. GIANNINO, *State Aid to Aviation at the Time of Covid-19: The Developing Case Law of the General Court of the European Union*, in *Transnational Dispute Management*, vol. 18, 2021, Article no. 8; A. HEGER, *State Aid Control with Regard to European Aviation in the COVID-19 Pandemic - European Court Ruling regarding Ryanair DAC/Commission*, in *Zeitschrift für Luftrecht und Weltraumrechtsfragen*, vol. 70, 2021, p. 178-189; R. LUJA, *Ryanair DAC v Commission. French Covid-19 state aid to support airlines is not discriminatory*, *Highlights & Insights on European Taxation*, n. 5, 2021, Article no. 26; F. MARCONI, *Aiuti di Stato nell'emergenza*

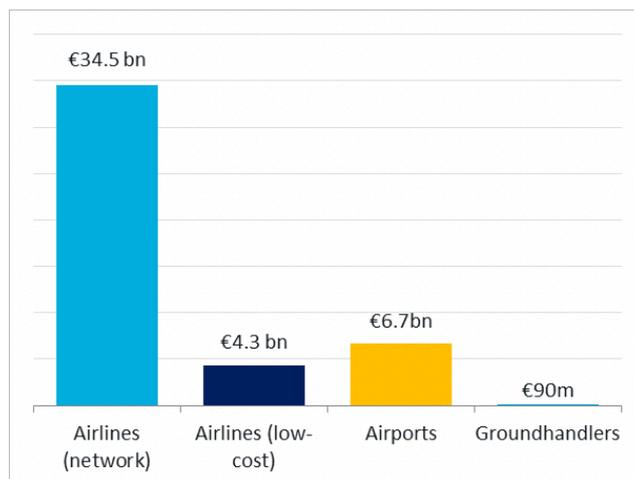


Figure 4: Subsidies per market segment in EU27+EEA3+UK  
(Source: Steer, 2022)<sup>25</sup>

It is worth mentioning that all businesses in the air transport value chain are linked: in other words, aid given to airports may benefit airlines operating from them (and, to a certain extent, *vice versa*)<sup>26</sup>, while aid to carriers may guarantee a stable demand for orders to aircraft manufacturers. Therefore, for the sake of completeness, it is worth taking into account these spill-over effects, as well as the horizontal COVID-19 schemes used by the sector operators, into account<sup>27</sup>.

That said, before going into the legal analysis, it is worth mentioning some background details regarding the financial aid given out.

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*pandemica: il caso delle compagnie aeree tra circostanze eccezionali e grave turbamento dell'economia*, in *Eurojus*, n. 2, 2022, p. 147-165; S. MATHOUX, *Single Economic Unit or Separate Legal Entities? Legal Issues Arising from EU State Aid Measures Granted to Airline Groups of Companies in the Context of the Covid-19 Pandemic*, in *Aviation & Space Journal*, n. 2, 2021, p. 7-14; C. MCMAHON, *State Aid Junkies, Viruses and the Aviation Industry: Ryanair's Litigation against Approved Aid Measures for Airlines during the Pandemic*, in *European State Aid Law Quarterly*, vol. 20, 2021, p. 249-257; J. MILLIGAN, *General Court Rejects Ryanair Challenges to National Covid-19 Aid Schemes in France and Sweden*, in *Air & Space Law*, vol. 46, 2021, p. 469-474; P. NICOLAIDES, *The appropriateness of state aid and the principle of non-discrimination*, in *European Competition Law Review*, vol. 43, 2022, p. 264-269; T. PANTAZI, *State Aid to Airlines in the Context of Covid-19: Damages, Disturbances, and Equal Treatment*, in *Journal of European Competition Law & Practice*, vol. 13(4), 2022, p. 268-277; M. PEPP, *European State Aid Rules in Times of Pandemic: Distorting Competition between European Airlines?*, in *Hungarian Y.B. Int'l L. & Eur. L.*, 2021, p. 51 ff.; P. PETROV, *State Aid and COVID-19: With a Particular Focus on the Air Transport Sector*, in *Eur. St. Aid L.Q.*, vol. 20, 2021, p. 461 ff.; J. PIERNAS LOPEZ, *The COVID-19 State Aid Judgments of the General Court. Every Man for Himself?*, *ivi*, p. 258-269; U. SOLTÉSZ, *Ryanair's Food Envy – Who Allocates Corona Aid?*, in *Kluwer Competition Law Blog*, 19 Feb. 2021; G. STIRLING, *COVID-19 Related State Aid for the Airline Sector: EU Courts Not Hesitant to Remove the Commission's Stamp of Approval*, in *Air & Space Law*, vol. 47, 2022, p. 145-166; A. TRIMARCHI, *State Aid to Airlines in Times of Pandemic in the European Union: Between Regression and Fair Competition?*, in *Transnational Dispute Management*, vol. 18, 2021, Article 9; S. TRUXAL, *State Aid and Air Transport in the Shadow of COVID-19*, in *Air & Space Law*, vol. 45, Special Issue, 2020, p. 61-82.

<sup>25</sup> C. ROUTABOUL, S. WAINWRIGHT, *Study on the impacts of the COVID-19 pandemic on the aviation market*, Steer, presentation at the 18th Florence Air Forum, 13 May 2022, <https://fsr.eui.eu/wp-content/uploads/2022/02/Clemence-Routaboul-Steer.pdf>, at 7.

<sup>26</sup> As exemplified by the case-law on aid awarded by regional airports to LCCs, see *supra*, Part I, pp. [24] ff.

<sup>27</sup> Please note that in this case comparable data on the specific aid given to each beneficiary is not available.

## 2. Member States' financial support to the aviation industry during the pandemic

The database on Commission's decisions reveals a widespread financial support to the aviation industry by EU Member States, as illustrated in the table below.

Table 1: COVID-19 related aid given to the aviation industry by Member States compared to the industry's importance for the nations' economy<sup>28</sup>

Member State	Beneficiaries (case nos.)	Total amount of aid (mln EUR)	Gross value-added contribution to GDP (bln USD) and % of GDP supported by air transport and foreign tourism by air (bln EUR, 2019) <sup>29</sup>
Austria	Austrian Airlines (SA.57539; SA.56981)	450	8.4 (2,1%)
Belgium	Air Belgium SA (SA.61709); aid schemes for Flemish and Walloon airports (SA.58299, SA.56807); Aviapartner (SA.57637); Brussels Airlines (SA.57544); Walloon airports (SA.63455); Charleroi (SA.63245)	343.4	12.3 (2,6%)
Bulgaria	Scheme airlines (SA.100321)	30.68	n.d.
Croatia	Croatia Airlines (SA.55373); Scheme aviation (SA.103028); Scheme transport and tourism (SA. 57711)	177.48	1.4 (2,2%)
Cyprus	Scheme airlines (SA.57691)	6.3	n.d.
Denmark	SAS (SA.56795, SA.57543, SA.59370, SA.58157, SA.63250), Scheme airlines (SA.59370), Scheme airlines and airports (SA.58157)	927.7	8.3 (2,7%)
Estonia	Nordica (SA.57586)	30	n.d.

<sup>28</sup> As mentioned in the previous paragraph, please note that aids given to the industry via horizontal aid schemes have been taken into account only when precise information on the sum awarded to the individual operators were available. Moreover, Czech Republic, Lithuania, Luxemburg and Malta did not notify specific aids related to air transport (NACE code H.51), thus relying only on their horizontal measures.

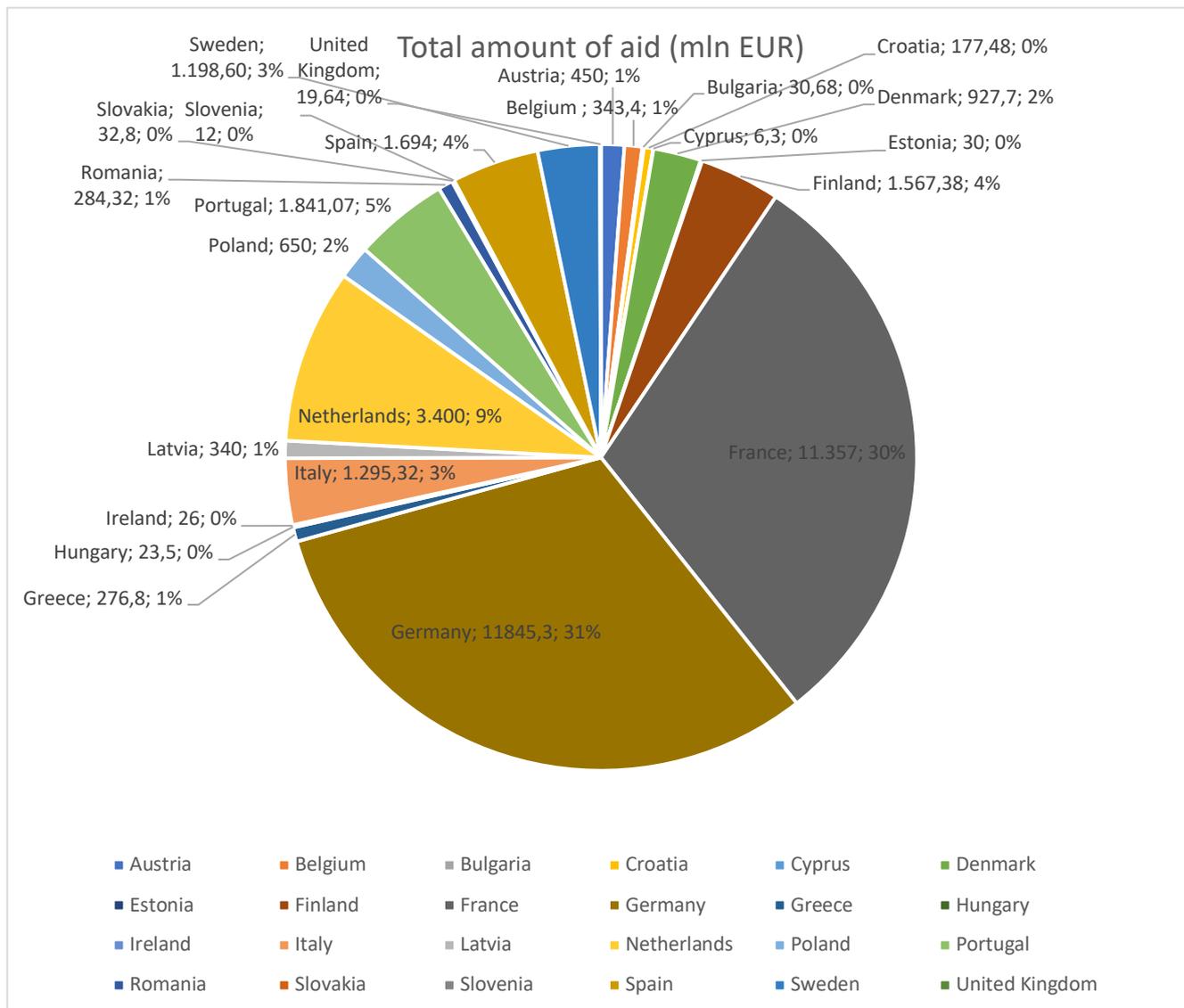
<sup>29</sup> Data collected from the most recent IATA country reports: IATA, Value of aviation, 1 June 2019, at <https://www.iata.org/en/iata-repository/publications/economic-reports>

Member State	Beneficiaries (case nos.)	Total amount of aid (mln EUR)	Gross value-added contribution to GDP (bln USD) and % of GDP supported by air transport and foreign tourism by air (bln EUR, 2019) <sup>29</sup>
Finland	Finnair (SA.60113, SA.56809, SA.57410), Finavia (SA.59132)	1,567.38	6 (2.5%)
France	Corsair (SA.58125, SA.58463), Scheme airlines (SA.56765); Air France (SA.57082, SA.59913); Air Austral (SA.100758)	11,357	105 (4.3%)
Germany	Lufthansa (SA.57153, SA.56714), Condor (SA.56867, SA.56867, SA.63617), TUI (SA.59812), Scheme airports (SA.57644)	11,845.3	86 (2.5%)
Greece	Ellinair (SA.62588); Aegean Airlines (SA.59462 and SA.56857)	276.8	19.7 (10.2%)
Hungary	Scheme aviation industry (SA.57767)	23.5	2.8 (2.2%)
Ireland	Scheme airports (SA.59709)	26	20.6 (6.8%)
Italy	Toscana aeroporti (SA.59518); Alitalia (SA.58114, SA.59188, SA.61676, SA.62542, SA.63234), Scheme airlines (SA.59029); Scheme airports and ground-handling (SA.63074); Calabrian airports (SA.62539)	1,295.32	51 (2.7%)
Latvia	airBaltic (SA.101032, SA.101755, SA.63604, SA.56943)	340	0.85 (3.1%)
Poland	LOT (SA.59158)	650	4.5 (1%)
Portugal	TAP and TAP SGPS (SA.57369, SA.57369, SA.60165, SA.62304, SA.63402, SA.100121)	1,841.07	13.6 (6.6%)
Romania	TAROM (SA.56810, SA.63360, SA.59344), Scheme airports (SA.58676); Blue Air (SA.57026) Scheme airlines (SA.63319, SA.59156, SA.64092); Scheme (airport to airlines, SA.57817, SA.100434); Timisoara Airport (SA.57178)	284,32	2.4 (1.3%)

Member State	Beneficiaries (case nos.)	Total amount of aid (mln EUR)	Gross value-added contribution to GDP (bln USD) and % of GDP supported by air transport and foreign tourism by air (bln EUR, 2019) <sup>29</sup>
Slovakia	Scheme airlines (SA.100438); Scheme airports (SA.59240)	32.8	n.d.
Slovenia	Scheme airlines (SA.101675); Scheme airports (SA.59124)	12	1.5 (2.8%)
Spain	Iberia, Vueling, Air Europa, Volotea (horizontal scheme SA.57659); Air Nostrum (SA.58343)	1,694	113.2 (9.2%)
Sweden	Scheme airlines (SA.56812); SAS (SA.57061, SA.58342, SA.6389); Scheme ATC (SA.61298)	1,198.6	19.2 (3.7%)
The Netherlands	KLM (SA.57116, SA.57116)	3,400	25 (3.2%)
TOT.		37,829.29	-

In financial terms, France and Germany make up 60% of the total amount of aid given out, followed by the Netherlands (9%), Portugal, Finland, Italy, Sweden, Denmark and Spain (ranging from 3-5% respectively). These data generally reflect each country's gross value-added contribution to the GDP, albeit with some remarkable exceptions.

Notably, Member States such as Ireland, Spain and Greece provided much less public money compared to the impact of air transport on their GDP. Conversely, Finland and Latvia proportionally paid out more money considering the aviation's contribution to GDP, a factor that can be explained in light of transportation needs and their geographical locations, as well as the specific economic set up of the recipients. A clearer picture can be seen in the graph below.



Bearing that in mind, it is possible to examine the main features of the Commission's decisions on 'pandemic' aid<sup>30</sup>, by referencing and looking at the legal framework on which these decisions are based.

### 3. The choice of the legal basis

#### 3.1 Damage compensation under Article 107(2)(b) TFEU

Several Member States awarded aid to airlines and airports according to Article 107(2)(b) TFEU, as these businesses were directly hit by travel bans and containment measures. Compensating damages to the transport industry – especially those deriving from flight restrictions – is clearly stipulated by the *Temporary Framework for State aid measures to support the economy in the current COVID-*

<sup>30</sup> Please note that a list with full references to case and notification numbers of each decision can be accessed in the appendix.

19 outbreak (hereinafter «Temporary Framework» or «TF»)<sup>31</sup>. Moreover, the TF specifies that this financial support does not interfere with the ‘one-time, last-time’ principle<sup>32</sup>, so also firms that received rescue and restructuring aid may be eligible for damage compensation too<sup>33</sup>.

According to Article 107(2)(b) TFEU, it is up to the Member State concerned to prove *a*) the pandemic’s exceptional nature, *b*) the direct causal link between the pandemic and the damage suffered by the recipient and *c*) the proportionality of the aid<sup>34</sup>. The key features of the Commission decisions approving damage compensation to airlines and airports can be summarized as follows.

First of all, a usually detailed factual background report describing any travel restrictions put in place by the relevant Member State, as well as financial data on the impact of the pandemic on recipients, is drawn up. Then, the appraisal focuses on eligible costs, usually calculated by using the revenue, or the EBIT, recorded in the same 2019 period as a benchmark. In fact, airlines’ loss of revenue - including fare revenues - is added to additional losses directly caused by the pandemic, for instance fixed costs deriving from contractual obligations, deducted from the costs mitigated by the loss of shrinking operations, as for example fuel consumption.

In terms of factual appraisal, the Commission verifies that the pandemic falls into the category definition of «exceptional occurrence» under Article 107(2)(b) TFEU as three conditions are cumulatively met. The pandemic, in fact, is recognized as *(i)* unforeseeable, *(ii)* on a significant scale and *(iii)* extraordinary, i.e., «differs sharply from the conditions under which the market normally operates»<sup>35</sup>. The causal link is established by comparing the beneficiary’s economic performance in the period when the lock down measures were in place, also known as the ‘compensation period’, to the same data recorded the previous year.

In terms of proportionality, safeguards to avoid overcompensation are prescribed in a similar way to those calculated in the previous crises: the sum is net of any amount received from other sources (e.g., insurance) and cannot be added to other aid to cover the same eligible costs<sup>36</sup>. In some cases, it is explicitly stipulated that aid awarded to a recipient should be deducted by horizontal support schemes<sup>37</sup>.

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<sup>31</sup> Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, Communication 2020/C 91 I/01, as further amended, paras. 15 and 15-*bis*. On TF amendments and consolidated text, see *supra*, Part I, nt. [380].

<sup>32</sup> See Commission, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Communication 2014/C 249/01 (‘RR guidelines’), para. 71. In general terms, cf. *supra*, Part I, p. [58].

<sup>33</sup> TF, cit. para. 15.

<sup>34</sup> On the pre-pandemic practice see *supra*, Part I, p. [48].

<sup>35</sup> See *ex multis* Commission, SA.59462, Greece – Aegean airlines, Decision 23.12.2020, para. 66.

<sup>36</sup> See *supra*, Part I, pp. [48] ff. Moreover, any payment exceeding the actual damage suffered has to be recovered by the Member State.

<sup>37</sup> Cf. Commission, SA.59462, Aegean airlines, cit., para 91.

Concerning the form of the aid given out, half of the damage compensation measures were direct grants (21 out of 42), followed by loans and guarantees (9), capital injections and equity instruments (8) and tax allowances (3)<sup>38</sup>. The aid intensity varies from the EUR 1.36 billion granted by Germany to its airports to a few million euros in cases concerning regional airports or smaller airlines<sup>39</sup>. In some instances, Member States opted to first compensate the damage that happened over a very short period, and then to add other similar funds as the pandemic emergency protracted<sup>40</sup>. Finally, we can see decisions taken based on both Articles 107(2)(b) TFEU and on 107(3)(b) TFEU<sup>41</sup>.

As far as airlines are concerned, most of the Member States required carriers to hold an operating license issued by their own national authorities as a condition for aid eligibility, thus the risk of market fragmentation is high<sup>42</sup>. In case of ‘pan-European’ airline groups (i.e., including former flag carriers of various Member States), the possible build-up of aid granted by different countries to cover the same eligible costs had to be taken into account<sup>43</sup>. Both of these issues will be addressed in the case studies below.

### 3.2 Remedy to a serious disturbance under Article 107(3)(b) TFEU as interpreted under the Temporary Framework

The core objective of the COVID-19 Temporary Framework (TF) is to define the Commission’s discretionary powers when approving financial aid that remedies to «a serious disturbance in the economy of a Member State»<sup>44</sup>. So as to ensure a quick appraisal<sup>45</sup>, the notified measures complying with the conditions laid down in the TF are deemed by the Commission as necessary, appropriate and proportionate under Article 107(3)(b) TFEU<sup>46</sup>.

Section 3 of the TF sets out 14 aid instruments that Member States could use as a model for drawing up their measures. Aid given according to a certain provision of the TF may be added to the one awarded under another TF provision,

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<sup>38</sup> Data elaborated from the Commission’s DG Comp database, see Appendix.

<sup>39</sup> See, Commission, SA.57644, Germany – airports scheme, Decision 23.11.2020 and e.g., aid granted by Romania to Timisoara Airport (EUR 0,98 mln, SA.57178) or Slovenia to airlines operating to and from its airports (EUR 5 mln, SA.59124).

<sup>40</sup> See Commission, Italy - Alitalia damage compensation I-V (SA.58114, SA.59188, SA.61676, SA.62542, SA.63234).

<sup>41</sup> For instance, Finnish aid to airport operator Finavia (SA.59132) and German airport scheme (SA.57644) were based both on Articles 107(2)(b) and 107(3)(b) TFEU, while Romanian State guarantee in favour of Blue Air (SA.57026) was based on Articles 107(2)(b) and 107(3)(c) TFEU.

<sup>42</sup> See e.g., the aid schemes implemented by Sweden (SA.56812), France (SA.56765) Bulgaria (SA.100321), Slovakia (SA.100438), Denmark (SA.59370). As will be further analysed, exceptions can be found in the schemes put forward by Slovenia (SA.59124), Cyprus (SA.57691) and Denmark (SA.58157).

<sup>43</sup> This was the case of aid given to airlines belonging to the Lufthansa group: Commission, SA.57539, Austria - Austrian Airlines, Decision 6.7.2020. In detail, see *infra*, para. [119].

<sup>44</sup> Article 107(3)(b) TFEU. In general terms, see *supra*, Part I, para. [48] ff.

<sup>45</sup> See TF, cit., para. 16.

<sup>46</sup> *Ibidem*, paras 16-17.

as well as any funding under de minimis and GBER regimes, provided that the cumulation requirements in those regulations are met<sup>47</sup>.

In terms of eligibility, the TF does not apply to undertakings that were already in difficulty by 31 December 2019<sup>48</sup>: explicit reference is made to the definition of «undertaking in difficulty» laid down in Article 2(18) GBER, which is based on the company structure<sup>49</sup>. Those firms, nevertheless, can benefit from aid according to Article 107(3)(c) TFEU if the conditions set out in the Rescue and Restructuring guidelines are met<sup>50</sup>.

The first instrument (Section 3.1 TF), allows for temporary liquidity support beyond the basis provided by Article 107(3)(c) TFEU. In this case, the financial aid must be given as a scheme<sup>51</sup>, and the overall aid per undertaking must not exceed EUR 2.3 million<sup>52</sup>. The form of the aid may be that of direct grants, tax advantages, repayable advances, guarantees, loans or equity<sup>53</sup>.

In order to facilitate access to loans, the TF allows for public guarantees (Section 3.2) as well as subsidized interest rates (Section 3.3). Regarding public guarantees, a ceiling to the overall loan amount per beneficiary is set<sup>54</sup> as well as a minimum guarantee premium<sup>55</sup>. As a general rule, the maximum duration of the guarantee is limited to six years<sup>56</sup>. In the case of Section 3.3, a minimum interest rate is defined, as well as other conditions similar to the previous instrument (ceiling, maximum duration, etc.)<sup>57</sup>. The funds awarded under Sections 3.2 and 3.3, however, cannot be cumulated on the same underlying loan principal<sup>58</sup>. If the guarantee or loan is channelled through a credit or financial institution (Section 3.3), additional safeguards are introduced in order to minimize indirect advantages to the credit institution and pass on the advantages to the final beneficiaries<sup>59</sup>.

Supporting the firms' cash flow can also be achieved by using fiscal leverage, especially by deferring the payment of taxes or social security contributions (Section 3.9). As mentioned above, these measures only fulfil the selectivity criteria if they are limited to specific economic sectors<sup>60</sup>. In this case, the TF allows for schemes providing deferrals that apply to undertakings that were

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<sup>47</sup> Ibidem, para. 20.

<sup>48</sup> Under the third amendment to the TF, SMEs were exempted from this limitation. (see e.g. TF, para. 22.c-*bis*). Due to the firms' size, however, this exemption has a very limited impact on the aviation sector.

<sup>49</sup> Article 2(18) GBER, cit. mentioned by e.g., TF, cit., paras. 22.c and 29.c. It is worth noting that a slightly different definition is provided by recital no. 20 of the Commission's Rescuing and Restructuring guidelines, cit.

<sup>50</sup> See *supra*, Part I, pp. [48] ff. For the analysis of the relevant cases, see *infra*, p. [115].

<sup>51</sup> TF, cit., para. 22(b).

<sup>52</sup> TF, cit., para. 22(a). Please that the threshold has been gradually raised by the TF amendments to the current value.

<sup>53</sup> TF, cit., para. 22(a).

<sup>54</sup> TF, cit., para. 25(d).

<sup>55</sup> TF, cit., para. 25(a).

<sup>56</sup> TF, cit., para. 25(f).

<sup>57</sup> TF, cit., para. 27 TF.

<sup>58</sup> TF, cit., para. 26-*bis*.

<sup>59</sup> TF, cit., para. 29-31.

<sup>60</sup> See, *supra*, Part I, pp. [40] ff.

specifically affected by the pandemic<sup>61</sup>, including the aviation industry. Due to its temporary nature, the deferral must expire before 30<sup>th</sup> June 2023<sup>62</sup>.

Lay-offs can be reduced not just by deferring social security contributions (Section 3.9), but also by subsidizing wages (Section 3.10)<sup>63</sup>: eligible sectors are those suffering from a reduction in business revenue due to national lock down measures<sup>64</sup>, and air transport is one of them.

Restrictions to business activities may also result in fixed costs that firms cannot cover by revenues nor by other sources (e.g., insurance, other aid schemes, etc.). Therefore, Section 3.12 allows for up to 70% of financial support to the uncovered fixed costs, with a ceiling of EUR 12 million per undertaking<sup>65</sup>. The compensatory nature of this measure prevents overlaps with any other aid for the same eligible costs<sup>66</sup>.

As a last resort<sup>67</sup>, Section 3.11 allows for recapitalization measures in the form of equity or hybrid capital instruments (i.e., consisting of both debt and equity)<sup>68</sup>. Due to its highly distorting nature, the Commission requires this aid – which can be granted either individually or under schemes – to be subject to clear and stringent conditions applied to State's entry, remuneration and exit from the equity of the firm.

To be eligible for recapitalization aid, *i*) the beneficiary must be at risk of insolvency or be struggling to continue operating and *ii*) be unable to access to finance from markets or via existing horizontal State measures; moreover, *iii*) there must be a common interest to intervene, due to, *inter alia*, the systemic importance of the company or the risk of disruption to an important service<sup>69</sup>.

The recapitalization sum awarded must be limited to «the minimum needed to ensure the viability of the beneficiary» and in any case cannot go beyond restoring the capital structure predating the pandemic<sup>70</sup>. As far as possible, this investment has to be aligned to market conditions, so the State must receive appropriate remuneration, thus incentivizing the firm to «redeem the recapitalization and look for alternative capital» as soon as the economy becomes stable again<sup>71</sup>. If the recapitalization sum amounts to more than 25% of the firm's

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<sup>61</sup> TF, cit., para. 41.

<sup>62</sup> Ibidem.

<sup>63</sup> See conditions set out in TF, cit., para. 43.

<sup>64</sup> TF, cit., para. 42.

<sup>65</sup> TF, cit., para. 87. The eligible period is between 1 March 2020 and 30 June 2022.

<sup>66</sup> Ibidem, para. 87 TF

<sup>67</sup> See Ibidem, para. 45: «if no other appropriate solution can be found».

<sup>68</sup> According to the para. 52(b) TF, cit., examples of hybrid instruments are «profit participation rights, silent participations and convertible secured or unsecured bonds».

<sup>69</sup> TF, cit., para. 49. As recognized *supra* in general terms, the beneficiary must not be an undertaking already in difficulty before the pandemic broke out.

<sup>70</sup> TF, cit., para. 54.

<sup>71</sup> TF, cit., para. 56 and 58.

equity, «a credible exit strategy for the participation of the Member State» should be planned<sup>72</sup>.

State intervention also affects the firm's governance, with specific safeguards addressing moral hazard<sup>73</sup>. If the undertaking has a «significant market power on at least one of the relevant markets in which it operates», additional remedies should be put in place, modelled on structural and behavioural commitments usually implemented in merger control procedures<sup>74</sup>. As the TF stresses the need to design recapitalization measures which are in line with the EU objectives for green and digital transitions<sup>75</sup>, in some cases Member States introduce sustainability commitments to the aid monitoring phase<sup>76</sup>. Even if investment support towards a sustainable recovery was expressly addressed by the TF (Section 3.13)<sup>77</sup>, no examples of application can be found in the aviation sector.

Moreover, Member States were free to impose additional conditions to the ones laid down in the TF, a factor which led to special environmental obligations as seen in the cases regarding Lufthansa, KLM, Air France and Austrian Airlines, as illustrated further on<sup>78</sup>.

In light of the above, the aid granted to the aviation industry under the TF can be grouped by relevant financial instrument as follows.

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<sup>72</sup> TF, cit., para. 79 ff.

<sup>73</sup> TF, cit., para. 71.

<sup>74</sup> TF, cit., para. 72.

<sup>75</sup> TF, cit., para. 45.

<sup>76</sup> The monitoring phase is regulated by Section 4 of the TF. On the regulatory impact of these commitments see, *infra*, p. [124].

<sup>77</sup> TF, cit., paras 90 and 97.

<sup>78</sup> See *infra*, p. [127].

Table 2: Aid instruments in the TF and relevant aviation cases

Section TF	Aid Instrument	Relevant Aviation Cases
3.1	Limited amounts of aid	Belgium – scheme airports (SA.58299); Bulgaria – scheme airlines (SA.100321); Cyprus – scheme airlines (SA.57691, SA.60661); Denmark – scheme airlines (SA.59370); Ireland – scheme airports (SA.59709); Romania – scheme airlines (SA.59156); Romania – aid schemes for airlines operating at various regional airports (Targu Mures, Sibiu, Oradea: SA.57817, SA.63319, SA.59156); Slovakia – scheme airlines (SA.100438); Slovenia – aid schemes to airlines (SA.59124 and SA.101675), Croatia – tourism and transport scheme (SA. 57711, SA.58136, SA.64375)
3.2	Guarantees on loans	Finland – Finnair I (SA.56809); France – Air France (SA.57082); Netherlands – KLM I and II (SA.57116); Croatian – tourism and transport scheme (SA. 57711, SA.58136, SA.64375);
3.3	Subsidised interest rates for loans	Belgium – Brussels airlines (SA.57544); Belgium – aid to Flemish and Walloon airports (SA.58299, SA.56807); Estonia – Nordica (SA.57586); Finland – Finavia (SA.59132); Netherlands – KLM I and II (SA.57116); Poland – LOT (SA.59158); Spain – horizontal scheme (SA.57659); Sweden – ATC operators (SA.61298)
3.4	Guarantees and loans channelled through credit institutions or other financial institutions	Croatian – tourism and transport scheme (SA.57711, SA.64375)

Section TF	Aid Instrument	Relevant Aviation Cases
3.9	Deferrals of tax and/or of social security contributions	Hungary – aviation industry scheme (SA.57767)
3.10	Wage subsidies for employees to avoid lay-offs during the COVID-19 outbreak	Bulgaria – horizontal scheme (SA.56905); Hungary – aviation industry scheme (SA.57767)
3.11	Recapitalisation measures	Belgium – Aviapartner (SA.57637); Belgium – Brussels airlines (SA.57544); Croatia – scheme aviation (SA.103028); Denmark – SAS II (SA.57543); Estonia – Nordica (SA.57586); Finland – Finavia (SA.59132); Finland – Finnair II (SA.57410); France – Air France (SA.59913); Germany – Lufthansa (SA.57153); Germany – TUI (SA.59812); Latvia – Air Baltic I and II (SA.56943, SA.63604); Poland – LOT (SA.59158); Spain – horizontal scheme (SA.57659); Sweden – SAS (SA.58342)
3.12	Support for uncovered fixed costs	Bulgaria – scheme airlines (SA.100321); Ireland – scheme airports (SA.59709); Slovakia – scheme airlines (SA.100438)

Notwithstanding the *extrema ratio* nature, Commission's practice reveals a larger use of the recapitalization instrument (14 measures), followed by aid under Section 3.1 (12 measures) and subsidized interest rates for loans (7 measures). In many cases, more than one instrument has been combined in a single aid.

### 3.3 Aid approved under Article 107(3)(c) TFEU and Rescue and restructuring guidelines

When the funding could not be awarded according to the conditions laid down in the TF, Member States resorted to giving out rescue and restructuring aid under Article 107(3)(c) TFEU as stipulated by the relevant Commission's guidelines («RR guidelines»)<sup>79</sup>. This legal basis, specifically, enabled support to airlines that were already in difficulty before the outbreak of the pandemic. The decisions, however, were sensitive because of the need to comply with the 'one-time, last time' principle and to design viable safeguarding strategies to limit distortions at a time of turmoil and market uncertainty, as shown by the Condor case<sup>80</sup>. Portuguese aid to TAP provides interesting insights on aid given to an airline which is part of a larger group – thus requiring compliance with the requirements laid down in para. 22 of the RR guidelines<sup>81</sup>. Conversely, aid to the SATA group and Air Austral sheds some light on public support to airlines that are subject to public service obligations: in the SATA case, the measure was based on both Articles 107(3)(c) and 106(2) TFEU<sup>82</sup>.

That said, it is possible to examine specific groups of Commission's decisions and their related case-law.

## 4. The Commission's practice and CJEU's case-law: selected topics

This paragraph focuses on the main legal issues deriving from pandemic aid to airlines, i.e., the definition of fair eligibility criteria (para. 4.1); the relevance of EU law as a whole in the Commission's compatibility assessment (para. 4.2.3); individual aid as combined with other aid measures (para. 4.3); multiple aid awards and capital injections granted to major airline groups under the Temporary Framework (para. 4.4); aid to airlines with a significant market power (para. 4.5). The rulings where each of these topics are addressed in detail are examined so as to draw comparisons with other cases and then identify the main legal principles deriving from the 'pandemic' case-law<sup>83</sup>.

### 4.1 The definition of eligibility criteria in aid schemes

Aid scheme beneficiaries are selected «in a general and abstract manner»<sup>84</sup>. However, eligibility criteria do not always appear to be neutral or fair, as choosing a worthy candidate or recipient reflects the policy of the Member State. In this regard, Pandemic-related aid to airlines provides an interesting case study, as we

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<sup>79</sup> See *supra*, Part I, pp. [48] ff.

<sup>80</sup> See RR guidelines, cit., paras. 87-90. On the Condor case (SA.63203), on which an important ruling has been adopted by the EU General Court, see *infra*, Part II, p. [119].

<sup>81</sup> See the Portuguese aid to TAP SGPS (SA.60165), as further discussed *infra*, pp. [112].

<sup>82</sup> See respectively, rescue aid awarded by Portugal to SATA Air Azores (SA.60165) and operated aid granted by France to Air Austral (SA.100758).

<sup>83</sup> The synthesis is provided *infra*, p. [127]. For further data on the decisions examined and the related case law, please refer to the tables in the Appendix, p. [142].

<sup>84</sup> The definition of aid scheme has been recently reaffirmed by EU General Court, 19 May 2021, *Ryanair v Commission (Espagne; Covid-19)*, T-628/20, EU:T:2021:285, para. 50, as will be discussed *infra*, p. [93]. In general terms on the notion of aid scheme, see *supra*, Part I, p. [36].

can observe the differences in application between aid given to carriers holding an EU operating license, issued by the Member State granting the said funding, and cases where no reference to nationality requirements was made.

Regarding the first category, that is, the aid schemes listed in the table below. The Commission's decisions concerning Swedish, French and Italian measures were challenged before the EU General Court, which upheld the first two and annulled the third one<sup>85</sup>.

Table 3: Pandemic-related aid schemes accessible to airlines holding an EU operating licence issued by the Member State concerned

Member State	Case no. (decision date)	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
Sweden	SA.56812 (11.4.2020)	107(2)(b) § 3.2 TF	Guarantee	455	T-238/20 (rejected) C-209/21 (rejected)
France	SA.56765 (31.3.2020)	107(2)(b)	Tax deferment	200.1	T-259/20 (rejected) C-210/21 (rejected)
Italy	SA.59029 (22.12.2020)	107(2)(b)	Grant paid by a compensation fund	130	T-268/21 (annulled) C-490/23 (pending)
Denmark	SA.59370 (27.11.2020)	107(3)(b)	Direct grant	6	n.d.
Bulgaria	SA.100321 (17.3.2022)	107(3)(b) § 3.1, 3.12 TF	Direct grant	30.68	n.d.
Slovakia	SA.100438 (23.3.2022)	107(3)(b) § 3.1, 3.12 TF	Direct grant	3	n.d.

<sup>85</sup> EU General Court, 17 February 2021, *Ryanair v Commission (Sweden; Covid-19)*, T-238/20, EU:T:2021:91; Id., *Ryanair v Commission (France; Covid-19)*, T-259/20, EU:T:2021:92, and Id., 24 May 2023, *Ryanair v Commission (Italie; régime d'aide; Covid-19)*, T-268/21, EU:T:2023:279.

### 4.1.1 The Swedish scheme

The aid in question was a State guarantee on loans to carriers in possession of an EU operating license issued by Swedish civil aviation authorities<sup>86</sup>. Charter operators were expressly excluded from the scope of the measure<sup>87</sup>.

After notification under Article 107(3)(b) TFEU, the aid was approved by the Commission who deemed it coherent with the guarantees drawn up in the TF and «necessary, appropriate and proportionate to remedy a serious disturbance in the Swedish economy»<sup>88</sup>. Low-cost carrier Ryanair challenged the decision, specifically claiming the breach of (i) the principle of non-discrimination on grounds of nationality (Article 18(1) TFEU) and (ii) of the freedom to provide services (Article 56 TFEU), as well as (iii) the obligation to balance the positive and negative effects of the aid on trade within the EU and on competition.

The first argument (*sub i*) relied on the circumstance that an aid, in order to be compatible with the internal market, should comply with the principles enshrined in the Treaties, including also Article 18(1) TFEU<sup>89</sup>. As highlighted by the General Court, however, the principle of non-discrimination on grounds of nationality applies within the scope of the Treaties «without prejudice to any special provisions contained therein»<sup>90</sup>. As Article 107(3)(b) TFEU falls into the latter category, the Commission is only required to verify that the aid *a*) meets the conditions written in this provision and *b*) aid is awarded in a way which is proportionate to the objective<sup>91</sup>.

Concerning Article 107(3)(b) TFEU requirements (*a*), the pandemic is widely seen as an event causing serious disruption to the economy of a Member State and capable of adversely affecting air connectivity<sup>92</sup>.

That said, the General Court assesses the eligibility criteria (*b*), deeming them *appropriate* for the purpose. In fact, national authorities issue an EU operating license only to carriers that have their principal place of business in that same Member State<sup>93</sup>. This «specific, stable link» between the beneficiaries and the Member State in question ensures that the loans granted are honoured thanks to the financial checks done by national authorities<sup>94</sup>. In general terms, the

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<sup>86</sup> Cf. Article 3 Regulation (EC) 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, OJ L 293, 31.10.2008, p. 3–20.

<sup>87</sup> Commission, SA.56812, Sweden – COVID-19: loan guarantees scheme to airlines, Decision 11.4.2020, C(2020) 2366 final, para. 15; EU General Court, T-238/20, cit., para. 25.

<sup>88</sup> EU General Court, T-238/20, cit., para. 3.

<sup>89</sup> Ibidem, para. 29, referring to CJEU, 15.4.2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paras 50–51.

<sup>90</sup> Article 18.1 TFEU. Cf. EU General Court, T-238/20, cit., para. 31.

<sup>91</sup> Ibidem.

<sup>92</sup> EU General Court, T-238/20, cit., para. 33.

<sup>93</sup> See Article 2, no. 26 Regulation (EC) No 1008/2008, cit.

<sup>94</sup> EU General Court, T-238/20, cit., 40–43.

requirement is deemed to reflect the reciprocal obligations between the carrier and the national authorities set out in Regulation (EC) No. 1008/2008<sup>95</sup>.

Moreover, the General Court found the measure *proportionate* to the objective of safeguarding essential air services in Sweden. The appraisal stressed the Member State's need to ensure predictable air services – thus justifying the exclusion of charter operators – and to cover domestic routes<sup>96</sup>. So according to this thinking, each airline's contribution to the overall Member State's traffic does not affect the 'proportionality criterion', and therefore justifies the exclusion of Ryanair which, at the time, was the fourth largest carrier operating in Sweden<sup>97</sup>.

Notably, the Court states that, when notifying an aid like the one under scrutiny, «the Member State is not required to prove, positively, that no other conceivable measure [...] could better achieve the intended objective», as it would be hypothetical by definition<sup>98</sup>. Therefore, the Commission, when assessing the aid eligibility criteria, does not have «to make a decision in the abstract on every alternative measure conceivable»<sup>99</sup>.

Regarding the alleged infringement of the freedom to provide services enshrined in Article 56 TFEU (*sub ii*), the General Court states that air transport does not fall within the purview of said provision. In fact, by virtue of Article 58(1) TFEU, the provision of air services is regulated by the aforementioned Regulation (EC) No 1008/2008<sup>100</sup>, whose infringement was not alleged by Ryanair.

Finally (*sub iii*), the General Court states that, under Article 107(3)(b) TFEU, the Commission is not required to weigh the positive impact of the aid against its negative effects on trade and on competition<sup>101</sup>.

This thinking is based on a comparison with Article 107(3)(c) TFEU, which, in its wording, expressly refers to compatibility with trade and with the common interest; this however is not needed according to Article 107(3)(b) TFEU where these requirements are not stipulated<sup>102</sup>. In fact, according to the General Court, a Member State's intervention to offset a serious disruption to its economy «can only benefit the European Union in general and the internal market in particular»<sup>103</sup>.

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<sup>95</sup> Ibidem, para. 42. Reference is made, in particular, to Articles 5, 7 and 8 of Regulation (EC) No 1008/2008, cit., which regulate, respectively, the financial conditions for the granting of an operating licence, the proof of good repute and the validity of an operating licence.

<sup>96</sup> EU General Court, T-238/20, cit., paras 47 and 49.

<sup>97</sup> With a market share of 5% (ibidem).

<sup>98</sup> EU General Court, T-238/20, cit., para. 53.

<sup>99</sup> Ibidem.

<sup>100</sup> According to Article 58(1) TFEU, «[f]reedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport». The legal basis of Regulation (EC) 1008/2008 is Article 100.2 TFEU pursuant which «[t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport». In detail on this provision, see *supra*, Part I, p. [19].

<sup>101</sup> EU General Court, T-238/20, cit., paras 67-68.

<sup>102</sup> Ibidem, para. 68.

<sup>103</sup> Ibidem.

Consequently, when the conditions for applying Article 107(3)(b) TFEU are met – i.e., when there is a serious disturbance in the economy and the measure is necessary, appropriate and proportionate to its purpose – the then allocated financial aid is automatically *per se* considered to be in the Union’s interest: a balancing test has no reason to exist, because it is presumed to have a positive outcome<sup>104</sup>.

Nor is such a test required by the TF, as it only refers to the need for Member States to coordinate and to support the EU objectives of green and digital transition<sup>105</sup>. The reasoning on the balancing test, however, has been criticized in the AG’s opinion on the appeal brought before the Court of Justice<sup>106</sup>.

#### 4.1.2 The French scheme

The French aid scheme consisted of tax deferral to carriers holding an operating license issued by the French authorities. Unlike the Swedish scheme, the French intended to compensate for the damage caused by the pandemic according to Article 107(2)(b) TFEU<sup>107</sup>. The grounds of the action substantially coincide with those of the claim regarding the Swedish scheme, especially in terms of the alleged breaches of Articles 18(1) and 56 TFEU, to which a specific complaint about the calculation of the compensation is added.

First, the General Court had to verify whether the requirements laid down in Article 107(2)(b) TFEU had been met<sup>108</sup>. So, a causal link between the pandemic and the damage suffered by French airlines was found. In this respect, the pandemic was considered not *per se*, but as the cause of subsequent lock down measures, adopted by France, that restricted freedom of movement of its citizens<sup>109</sup>. In this sense, an analogy emerges with the *Olympiaki Aeroporia Ypiresies* case, concerning damage compensation to carriers following the airspace closures caused by the 11<sup>th</sup> September terrorist attacks<sup>110</sup>.

Regarding the alleged infringement of Articles 18(1) and 56 TFEU, the General Court takes up the already known arguments found in the Swedish Case Scheme. Though, an emphasis on the French lock down could also be found in the assessment of the eligibility criteria. According to the General Court, this lock down had a greater impact on the aid beneficiaries than on competitors – such as

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<sup>104</sup> Ibidem.

<sup>105</sup> See EU General Court, T-238/20, cit., para. 70 and TF, cit., para. 10.

<sup>106</sup> See opinion on the case delivered by AG Pitruzzella on 16 March 2023, EU:C:2023:223 as discussed *infra*, p. [91]. Cf. CJEU, 23 November 2023, *Ryanair v Commission (Sweden; COVID-19)*, C-209/21, EU:C:2023:905.

<sup>107</sup> Commission européenne, *France - COVID-19 - Moratoire sur le paiement de taxes aéronautiques*, cit., paras. 28 ff.

<sup>108</sup> EU General Court, T-259/20, cit., paras 23-25, referring to *Id.*, 25 June 2008, *Olympiaki Aeroporia Ypiresies v Commission*, T-268/06, EU:T:2008:222, para. 51 and, in broader terms, CJEU, 17 September 1980, *Philip Morris Holland v Commission*, C-730/79, EU:C:1980:209, para. 17.

<sup>109</sup> EU General Court, T-259/20, cit., paras 26-27.

<sup>110</sup> EU General Court, *Olympiaki Aeroporia Ypiresies*, cit., para. 49. On Commission’s practice on State aid to airlines in the aftermath of 9/11 terrorist attacks, cf. *supra*, Part I, p. [48] ff.

Ryanair – who served almost exclusively routes to and from France<sup>111</sup>. Moreover, by operating in France, under free provision of services (or freedom of establishment), Ryanair is not subject to the tax charges that the aid defers<sup>112</sup>.

The risk of overcompensation was then ruled out, given that the sum paid out to cover damage initially appeared to be *prima facie* much lower than that of the tax moratorium<sup>113</sup> and that France had drawn up appropriate *ex post* verification measures, undertaking to provide the Commission with detailed information on the methodology adopted to calculate the damage suffered by each carrier<sup>114</sup>.

Therefore, also this action was dismissed by the General Court<sup>115</sup>. This said, it is possible to shed light on some critical aspects of the two rulings in the context of their appeals before the CJEU and of the relevant case-law.

### 4.1.3 AG Pitruzzella’s opinion on the Swedish scheme

In its opinion in the appeal on the Swedish scheme, Advocate General Giovanni Pitruzzella suggests the CJEU to dismiss the case but to refine many elements of the General Court’s reasoning<sup>116</sup>.

Firstly, the AG elaborates on the *International Jet Management* ruling, on which Ryanair based its non-discrimination argument<sup>117</sup>. In that case, national legislation required air carriers holding an operating licence issued by another Member State to obtain an additional authorization for entering airspace from third countries, which was indeed not necessary for air carriers holding a licence issued by that first Member State<sup>118</sup>. The Court of Justice found this requirement discriminatory under Article 18 TFEU, stating that protecting the national economy could not justify any exception on the grounds of nationality<sup>119</sup> - in fact, it is the outcome that the provision is supposed to avoid.

In this respect, the national license required by Sweden, might be seen as «a distinguishing criterion which leads to the same result as a criterion based on nationality»<sup>120</sup>. However, the *International Jet Management* case did not concern State aid law, whose objectives must be taken into account when applying the non-

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<sup>111</sup> Corresponding to 8.3% of overall Ryanair flights: EU General Court, T-259/20, cit., paras 43-44. However, it should be considered that the other Member States had also taken similar measures, in coordination with the Commission, cf. *infra*, p. [119].

<sup>112</sup> EU General Court, T-259/20, cit., para. 67.

<sup>113</sup> The amount of aid was EUR 200.1 million against estimated damages of approximately EUR 680 million: *ibidem*, para. 68.

<sup>114</sup> EU General Court, T-259/20, cit., paras 70-71, cf. Commission européenne, *France - COVID-19 - Moratoire sur le paiement de taxes aéronautiques*, cit., para. 50. On the topic, cf. V. AHLQVIST, A. CLAICI, S. TIZIK, *How to Estimate the COVID-19 Damages?: Economic Considerations for State Aid during a Time of Crisis*, in *Eur. St. Aid L.Q.*, 2020 p. 150-160.

<sup>115</sup> Please note that also this judgement has been upheld by CJEU, 23 November 2023, *Ryanair v Commission (France; COVID-19)*, C-210/21, EU:C:2023:908.

<sup>116</sup> Opinion of AG Pitruzzella of 16 March 2023, *Ryanair v Commission (Sweden; Covid-19)*, C-209/21, EU:C:2023:223.

<sup>117</sup> CJEU, 18 March 2014, *International Jet Management*, C-628/11, ECLI:EU:C:2014:171.

<sup>118</sup> *Ibidem*, paras 63 ff.

<sup>119</sup> *Ibidem*, para. 70.

<sup>120</sup> *Ibidem*, para. 65.

discrimination principle<sup>121</sup>. Therefore, the discriminatory nature of the license requirement in the Swedish scheme was found to be justified as it was deemed to be appropriate and proportionate to the aid's objective under Article 107(3)(b) TFEU<sup>122</sup>.

Moreover, the AG found that the Swedish scheme did not favour all airlines holding a Swedish licence *a priori*, but only those that ensured Swedish air connectivity<sup>123</sup>, thus further distinguishing with the *International Jet Management* ruling, whose requirement was based only on mere nationality<sup>124</sup>.

Secondly, the AG takes a different view on the balancing between positive and negative effects of the aid awarded under Article 107(3)(b) TFEU<sup>125</sup>. Though finding that Ryanair's argument had to be rejected, he nonetheless suggested that the Court of Justice should change the grounds on this point<sup>126</sup>.

As stated by the case-law preceding the *Hinkley Point C* ruling, such a balancing test is part of the aid proportionality assessment<sup>127</sup>. According to the AG, the General Court's literal interpretation cannot lead, on the one hand, to exclude *in toto* the appraisal of the aid's effects and, on the other hand, to automatically introduce a presumption of compliance with the common interest<sup>128</sup>.

Therefore, even in the context of an emergency like the one envisaged by Article 107(3)(b) TFEU, the Commission is obliged to carry out a case-by-case appraisal of the aid's effects, to ensure that the funding is in line with the common interest<sup>129</sup>. However, when a timely response to an exceptional event is needed, the Commission should be allowed to perform an overall balancing via a guidance document, as occurred with the Temporary Framework during the pandemic<sup>130</sup>. Hence, according to the AG, an aid measure modelled on the TF is presumed to offset any possible adverse effects impacting the internal market<sup>131</sup>.

## 4.2 Comparisons and remarks on eligibility criteria

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<sup>121</sup> Opinion of AG Pitruzzella in case C-209/21, cit., para. 23.

<sup>122</sup> *Ibidem*, para 24

<sup>123</sup> *Ibidem*, para 25. As it will be highlighted *infra*, although reference to national air connectivity is made by the General Court in many other cases, it is not possible to find a consistent interpretation of it.

<sup>124</sup> CJEU, *International Jet Management*, cit., para. 68.

<sup>125</sup> Opinion of AG Pitruzzella in case C-209/21, cit., para. 88. Cf. EU General Court, T-238/20, cit., para. 68.

<sup>126</sup> Opinion of AG Pitruzzella in case C-209/21, cit., para. 89.

<sup>127</sup> EU General Court, 19 September 2018, *HH Ferries and Others v Commission*, T-68/15, EU:T:2018:563, para. 211. According to the AG, the General Court's literal interpretation of Article 107(3)(b) TFEU has to be rejected because it would preclude such an assessment even in the case of Article 107(3)(c) TFEU, contrary to the apparent outcome of *Hinkley Point C*: Opinion of AG Pitruzzella in case C-209/21, cit., para. 86.

<sup>128</sup> *Ibidem*, para. 86-87.

<sup>129</sup> *Ibidem*, para 92.

<sup>130</sup> *Ibidem*, para 93-94. The same reasoning was applied to the aid granted according to the State aid framework adopted by the Commission during the financial crisis: CJEU, 19 July 2016, *Tadej Koinik and Others*, C 526/14, EU:C:2016:570, para. 43.

<sup>131</sup> Opinion of AG Pitruzzella in case C-209/21, cit., para. 96.

### 4.2.1 Difference in treatment and objective justifications

So far, the cases examined here discuss the application of the ‘non-discrimination’ principle to State aid control<sup>132</sup>. Since State aid is selective by definition, a difference in treatment between firms operating in the same market is implicit in any measure qualifying as such<sup>133</sup>. As the Court of Justice recently stated in the *SAS* ruling, this conundrum is even more apparent when issuing individual aid<sup>134</sup>. A different interpretation would deprive the exemptions in Article 107(2) and (3) TFEU of practical effectiveness, so

«aid cannot be considered incompatible with the internal market for reasons that are solely linked to whether the aid is selective or distorts or threatens to distort competition»<sup>135</sup>.

However, the real issue is not the difference in treatment *per se*, but whether this difference goes beyond the selectivity which is inherent in State aid<sup>136</sup>. This assessment must be carried out in light of the exemption’s objective.

In light of the above the national licence requirement in question points to two layers of discrimination: one compared to all sectors hit by the pandemic and the other compared to all the firms competing against the beneficiaries in the same sector. As for the latter, the EU Courts found that what, in essence, is indirect discrimination on the grounds of nationality, is nonetheless deemed justifiable under the special provisions according to Article 107(2) and (3) TFEU.

In this respect, the arguments upheld so far do not seem fully convincing. The carrier’s principal place of business may well change over time – albeit as the result of a long-term strategic business choice – thus breaking the alleged connection to the Member States that granted the aid<sup>137</sup>. Similarly, financial checks might also be imposed to companies not holding a national license, although this would require the creation of an *ad hoc* mechanism.

These concerns are confirmed by a number of Court precedents, where aid which was only intended for undertakings based in the granting States’ territory, was not considered compatible with the Treaties, since there was no objective

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<sup>132</sup> In detail on the topic see: L. CALZOLARI, *La selettività degli aiuti di Stato e il principio di parità di trattamento delle imprese nella recente giurisprudenza della Corte di giustizia*, in *Diritto del Commercio Internazionale*, n.2, 2015, p. 481-507, esp. 500 ff.

<sup>133</sup> J. PIERNAS LOPEZ, *The COVID-19 State Aid Judgments*, cit., p. 266.

<sup>134</sup> CJEU, 28 September 2023, *Ryanair v Commission (SAS; Sweden)*, C-320/21, EU:C:2023:712, para. 107; Id., 28 September 2023, *Ryanair v Commission (SAS; Denmark)*, C-321/21, EU:C:2023:713, para. 95. In the same vein, see also the *Finnair I* ruling of the General Court: «individual aid introduces a difference in treatment, or even discrimination, which is nevertheless inherent in the individual character of that measure» (EU General Court, 14 April 2021, *Finnair I*, T-388/20, EU:T:2021:196, para. 81).

<sup>135</sup> CJEU, *Ryanair (SAS; Sweden)*, C-320/21, cit., para. 108; Id., 28 September 2023, *Ryanair (SAS; Denmark)*, C-321/21, cit., para. 96.

<sup>136</sup> See also P. NICOLAIDES, *Compensation for Damage*, in *State Aid Uncovered Blog*, 17.10.2023, p. 6.

<sup>137</sup> In more general terms, it seems that the Member State may justify reserving emergency aid for companies with a close link to its territory if there is a risk that the beneficiary may cease operating there after receiving the aid: C. MCMAHON, *State Aid Junkies*, cit., p. 252.

difference between the beneficiaries and their competitors who were based in other Member States<sup>138</sup>.

However, both the General Court and the Advocate General consider the objective of ensuring domestic air connectivity as the decisive justification, thus indirectly endorsing a difference in treatment based on the beneficiaries' strategies and business model. Conversely, in the case of individual aid to SAS, the Court of Justice ruled out the need of such an assessment<sup>139</sup>, which is a questionable decision as it overlooks the underlying economic context informing the measures under scrutiny<sup>140</sup>.

#### 4.2.2 Weighing the positive and negative effects of the aid

From a procedural point of view, the General Court stands firm on the assessment of potential market distortions, by stating that the Commission is not obliged (*i*) to examine all less distortive alternatives to the measure notified by the Member State and (*ii*) to weigh the positive and negative effects of an aid awarded under 107(3)(b) TFEU.

The first assertion (*sub i*) is based on some precedent concerning the field of Services of General Economic Interest (SGEI) under Art. 106(2) TFEU<sup>141</sup>. The latter case, however, is not entirely comparable to those that are being looked at: SGEI aid only covers companies burdened by additional costs caused by the imposition of a public service obligation by the Member State, and cannot be granted to undertakings not identified *ex ante* - as would be the case of the schemes under Articles 107(2)(b) and 107(3)(b) TFEU<sup>142</sup>. Furthermore, in the guidance on 9/11 attacks damage compensation, the Commission called for priority to be given to measures that were less likely to distort competition between EU carriers<sup>143</sup>.

As to the second profile (*sub ii*), in accordance with the principle *ubi lex voluit dixit, ubi noluit tacuit*, the General Court ruled out the absence of distortion appraisal, because the latter requirement is mentioned as a prerequisite in Article 107(3)(c) TFEU, but not in Article 107(3)(b) TFEU<sup>144</sup>. This reasoning appears to mirror that of the Court of Justice in the *Hinkley Point C* case concerning aid

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<sup>138</sup> In that case, the measure was an indirect tax relief: CJEU, 19 September 2000, *Germany v Commission*, C-156/98, EU:C:2000:467, para. 85. In detail, cf. C. MCMAHON, *State Aid Junkies*, cit., p. 252.

<sup>139</sup> See CJEU, C-320/21, cit., paras 95-96; Id., C-321/21, cit., paras 83-84.

<sup>140</sup> In detail, see *infra*, p. [107].

<sup>141</sup> Reference is made to the recent *Scor* ruling: EU General Court, 6 May 2019, *Scor v Commission*, T-135/17, EU:T:2019:287, para. 94, which was based on established SIEG case-law: Id., 3 December 2014, *Castelnuo Energía v Commission*, T-57/11, EU:T:2014:1021, para. 170; CJEU, 23 October 1997, *Commission v France*, C-159/94, EU:C:1997:501, para. 101.

<sup>142</sup> In detail, see: P. NICOLAIDES, *The appropriateness of state aid*, cit., p. 268-269. In general terms on SIEG, see: M. WOLF, *Exemptions pursuant Article 106(2) TFEU and the SGEI Framework*, in F. SÄCKER, F. MONTAG (ed.), *European State Aid Law*, München, 2016, p. 328 ff.

<sup>143</sup> Commission, The repercussions of the terrorist attacks in the United States on the air transport industry, Communication 10.10.2021, COM 574 final, paras 28 and 38. In detail, see: S. TRUXAL, *State Aid and Air Transport*, cit., p. 74 ff.

<sup>144</sup> EU General Court, T-238/20, cit., paras. 68-69. On interpretation of Article 107(3)(c) TFEU, see the 1998 on the aid to Air France: EU General Court, 25 June 1998, *British Airways et al. v Commission*, T-371/94 and T-394/94, EU:T:1998:140, para. 283.

granted to the energy sector<sup>145</sup>. In that ruling, the CJEU denied that it was necessary to verify whether the aid was of common interest, as it already complied with the requirements laid down in Article 107(3)(c) TFEU (i.e., promotion of the development of certain economic activities or sectors; no adverse effect on trading conditions)<sup>146</sup>.

Albeit being rooted in the 1980s Commission's policy<sup>147</sup>, the literal reading in *Hinkley Point C* reversed a case-law that required the balancing to be applied to every exemption provided for in Article 107(3) TFEU. In the 2018 *HH Ferries* ruling, the General Court specifically pointed out that the proportionality principle and the principle of strict interpretation of Article 107(3) TFEU's exemption required

«a 'weighing' of the expected positive effects in terms of realisation of the objectives set out in Article 107(3)(a) to (e) TFEU against the negative effects of aid in terms of distortion of competition and the effect on trade between Member States»<sup>148</sup>.

According to the General Court, applying the balancing test only to specific sub-paragraphs of Article 107(3) TFEU «would be likely to establish an asymmetry in the assessment of the various exemptions», thus undermining the effectiveness of the State aid rules<sup>149</sup>.

Following on from *HH Ferries* ruling, AG Pitruzzella offered an interpretation that seems to better reconcile the emergency perspective with the need to limit State's discretionary appraisal in drafting an aid measure<sup>150</sup>. In fact, the AG recognizes that a balancing test has already been done 'upfront' while setting out the aid instruments laid down in the Temporary Framework, which is an interpretation that relies on the practice regarding the 2008 financial crisis and that ensures a timely response to a market shock<sup>151</sup>.

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<sup>145</sup> CJEU, 22 September 2020, *Austria v Commission (Hinkley Point C)*, C-594/18, EU:C:2020:742. For a comment, see: L. HANCHER, *Euratom, state aid and environmental protection: Hinkley Point: Case C-594/18 P, Republic of Austria v. Commission*, in *Common Market Law Review*, vol. 58, 2021 p. 1491-1522; P. NICOLAIDES, *Shedding light into the 'black box' of state aid: the impact of Hinkley Point C on the assessment of the compatibility of state aid: C-594/18 P*, in *European State Aid Law Quarterly*, vol. 20, 2021, p. 4-14.

<sup>146</sup> CJEU, *Hinkley Point C*, cit., paras 19-20.

<sup>147</sup> Commission, *XIVth Report on Competition Policy*, 1984, p. 130, para. 202, stating that, in case of sub-paragraphs (a) and (b) of Article 107(3) TFEU, «it is clear from the wording of the clauses that the compatibility or otherwise of such aid with the common market can be determined solely by reference to its objective»; in such circumstances, in fact «an exception is warranted by the pursuit of an objective which can be assumed to be in the common interest».

<sup>148</sup> EU General Court, 19 September 2018, *HH Ferries et al. v Commission*, T 68/15, para. 211. The case concerned IPCEI aid, i.e., the other prong of Article 107(3)(b) TFEU. Further reference can be found in CJEU, 29 April 2004, *Italy v Commission*, C-372/97, EU:C:2004:234, para. 82, as well as in cases concerning Article 107(3)(b) TFEU: Id., 19 September 2002, *Spain v Commission*, C-113/00, EU:C:2002:507, para. 67, and *Spain v Commission*, C-114/00, EU:C:2002:508, para. 81.

<sup>149</sup> EU General Court, *HH Ferries*, T 68/15, cit., para. 211.

<sup>150</sup> Opinion of AG Pitruzzella in case C-209/21, cit., paras 84.

<sup>151</sup> See CJEU, 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, para. 43, referring to from the Commission, Communication on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis, OJ 2013 C 216, p. 1.

This interpretation is also in line with the Commission's evolving practice, as exemplified by the recent guidelines on horizontal aid (environment, regional aid, research and development)<sup>152</sup>, and with the decision on the European Guarantee Fund in support of small and medium-sized enterprises affected by the pandemic, which was approved by the Commission precisely on the basis of Article 107(3)(b) TFEU<sup>153</sup>.

Yet, the Court of Justice upheld the General Court arguments based on *Hinkley Point C* precedent<sup>154</sup>, also reaffirmed by the GC in the *Finnair I*<sup>155</sup> and *Brussels Airlines*<sup>156</sup> rulings.

In any case, the Commission's appraisal under Articles 107(2)(b) and 107(3)(b) TFEU should also take time constraints of an economic emergency into account. As the General Court stresses in an *obiter dictum*, the Swedish and French schemes were approved in no more than eight days<sup>157</sup>. These circumstances, however, cannot water down the obligation under Article 296 TFEU, as exemplified by the annulment of many other decisions<sup>158</sup>.

The duty to state reasons, as well as the balancing test envisaged by the Advocate General, allows EU Courts to review the Commission's exercise of discretionary powers<sup>159</sup>, thus ensuring the overall integrity of the EU State aid control system. In fact, an effective State aid procedure must remain operational

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<sup>152</sup> Commission, Guidelines on State aid for climate, environmental protection and energy 2022, OJ C 80, 18.2.2022, p. 1–89 («CEEAG»), para. 39: «The proposed aid measure must be an appropriate policy instrument to achieve the intended objective of the aid, that is to say there must not be a less distortive policy and aid instrument capable of achieving the same results» Id., Guidelines on regional State aid, OJ C 153, 29.4.2021, p. 1–46, para. 85: «Member States must however, ensure that the aid is awarded in the form likely to have the lowest impact in distorting trade and competition. If the aid is awarded in forms that provide a direct pecuniary advantage [...], Member States must demonstrate why other potentially less distortive forms of aid [...] are not appropriate»; Commission, Framework for State aid for research and development and innovation, OJ C 414, 28.10.2022, p. 1–38, para. 75. On the impact of the CEEAG regime on the transport sector, please refer to: M. BARBANO, *L'inserimento della prospettiva ambientale nella valutazione degli aiuti*, in M. SEBASTIANI (ed), *Trasformazioni e sviluppo del sistema della mobilità: scenari prospettici*, PNRR e strategia UE per una mobilità sostenibile, Rapporto SIPOTRA 2023, forthcoming.

<sup>153</sup> Commission, SA.63422 - SA.63443, *Synthetic securitisation product under the Pan-European Guarantee Fund in response to the COVID-19 crisis*, 16.8.2021, C(2021) 6126 final, para. 106. On the internal contrast in the Commission's practice, see: P. NICOLAIDES, *The appropriateness of state aid*, cit., p. 268.

<sup>154</sup> CJEU, 23 November 2023, *Ryanair v Commission (Sweden; COVID-19)*, C-209/21, EU:C:2023:905, paras 88-89.

<sup>155</sup> EU General Court, *Finnair I*, T-388/20, cit., paras 68-69.

<sup>156</sup> EU General Court, 18 October 2023, *Ryanair v Commission (Brussels Airlines; COVID-19)*, T-14/21, EU:T:2023:643, paras 162 ff.

<sup>157</sup> These circumstances have been emphasized by the General Court EU General Court, T-259/20, cit., para. 79; Id., T-238/20, cit., para. 77. In particular, in the ruling on the French scheme, the General Court underlined that the damage compensation could be adjusted after the exact amount of the costs was calculated during the monitoring phase.

<sup>158</sup> See, as will be discussed *infra*, EU General Court, *Ryanair v Commission (KLM; Covid-19)*, T-643/20, EU:T:2021:286; Id., 9 June 2021, *Ryanair v Commission (Condor; Covid-19)*, T-665/20, EU:T:2021:344; Id., 10 May 2023, *Condor Flugdienst v Commission (Lufthansa; Covid-19)*, T-34/21 and T-87/21, EU:T:2023:248; Id., 10 May 2023, *Ryanair v Commission (SAS II; COVID-19)*, T-238/21, EU:T:2023:247; Id., 24 May 2023, *Ryanair v Commission (Italie; régime d'aide; Covid-19)*, T-268/21, EU:T:2023:279.

<sup>159</sup> Opinion of AG Pitruzzella in case C-209/21, cit., para. 90. On the self-limiting effect of Commission guidance documents, see recently, CJEU, 15 December 2022, *Veejaam and Espo*, C-470/20, EU:C:2022:981, para. 30 and also *supra*, Part I, pp. [40] ff.

even in times of exceptional crises like the pandemic, when economic distress affects multiple – virtually all – Member States and the measures are intended to last for months or even some years. As a consequence, an appropriate balancing test should also take possible market distortions, deriving from the build-up of previous aid, into account<sup>160</sup>.

Before looking at these aspects, however, it is worth noting that the Commission’s practice offers examples of eligibility criteria based on factors that differ from the airline’s principal place of business.

#### 4.2.3 Comparison with ‘all airlines’ schemes

Despite the importance of a stable link between the carrier and their country emphasized by the case-law, not all Member States modelled their aid eligibility on nationality-based criteria. As shown by the table below, there are several examples of aid awarded to all airlines connecting the Member State concerned or one of its airports (‘all airlines’ schemes).

Table 4: Pandemic-related aid schemes to all airlines operating flights to and from a certain MS (or airport)

Member State	Case no. (decision date)	Legal basis [TFEU (§ TF)]	Amount (mln EUR)	Eligibility criteria	Potential beneficiaries	CJEU Case no. (outcome)
Denmark	SA.58157 (3.9.2020)	107(3)(b) § 3.1 TF	24	All airlines serving any of the MS airports (excluding cargo; airports included)	150	n.d.
Cyprus	SA.57691 (1.7.2020)	107(3)(b) § 3.1 TF	6.3	All airlines serving any of the MS airports (proportionally to the load factor reduction)	60	n.d.
Slovenia	SA.59124 (16.11.2020)	107(3)(b) § 3.1 TF	5	All airlines serving any of the MS airports	20	n.d.
Romania	SA.57817 (27.7.2020)	107(3)(b) § 3.1 TF	1	All airlines operating at a certain airport (Oradea)	3	n.d.
Romania	SA.59156 (20.11.2020)	107(3)(b) § 3.1 TF	1.66	All airlines operating at a certain airport (Sibiu)	5	n.d.

<sup>160</sup> Opinion of AG Pitruzzella in case C-209/21, cit., para. 97.

Member State	Case no. (decision date)	Legal basis [TFEU (§ TF)]	Amount (mln EUR)	Eligibility criteria	Potential beneficiaries	CJEU Case no. (outcome)
Romania	SA.63319 (7.7.2021)	107(3)(b) § 3.1 TF	1.15	All airlines operating at a certain airport (Mures)	5	n.d.
Romania	SA.64092	107(3)(b) § 3.1 TF	1.2	All airlines operating at a certain airport (Maramures)	4	n.d.
Romania	SA.100434	107(3)(b) § 3.1 TF	1	All airlines operating at a certain airport (Arad)	4	n.d.

In all of these cases, the aid was given as a direct grant under Article 107(3)(b) TFEU, as interpreted by Section 3.1 of the Temporary Framework. The beneficiaries were the airlines connecting a certain Member State or a specific airport. If we consider the overall intensity of each scheme and the number of potential beneficiaries, it seems unlikely that such aid measures were tailored on needs of one specific operator. However, some differences can be noted: the Danish scheme expressly refers to the passenger connectivity to justify the exclusion of cargo and general aviation operators<sup>161</sup>, while the Romanian and Cypriot schemes are designed as an incentive measures.

In the Cypriot scheme, the given aid is proportional to the reduced load factor, caused by the pandemic, which must be in a range between 41% and 70%<sup>162</sup>. In this respect, a parallel can be made with the SGEI in terms of connectivity needs deriving from Cyprus' insularity and the importance of tourism in the country's economy<sup>163</sup>.

Conversely, the Romanian schemes are not just available to airlines operating to and from the relevant airports before the pandemic broke out, but also to those willing to start new routes from there, an element which is in common with start-up aid<sup>164</sup>.

<sup>161</sup> Commission, SA.58157, Denmark - COVID-19. Aid to Danish airports and to airlines that land in and depart from Denmark, 3.9.2020 C(2020) 5974 final, para. 13(a).

<sup>162</sup> Commission, SA.57691, Cyprus – COVID-19. Incentive scheme towards airlines, 1.7.2020, C(2020) 4551 final, para. 18.

<sup>163</sup> On the adjustments to PSO regime applicable to air services during the pandemic, see Commission, Overview of the State aid rules and public service obligations rules applicable to the air transport sector during the COVID-19 outbreak, 2020, [https://competition-policy.ec.europa.eu/state-aid/coronavirus/adjustments-and-rules-specific-sectors\\_en](https://competition-policy.ec.europa.eu/state-aid/coronavirus/adjustments-and-rules-specific-sectors_en).

<sup>164</sup> Commission, SA.59156, Romania – COVID-19 - Incentive scheme for airlines operating at Sibiu airport, 20.11.2020, C(2020) 8262 final, para. 16, esp. nt. 10; Id., SA.57817, Romania – COVID-19 - Oradea airport support scheme to airlines, 27.7.2020, C(2020) 5221 final, para. 16, nt. 9; Id., SA.63319, Romania -

In any case, the above-mentioned schemes should be seen from a wider perspective and by looking at factual evidence. Regarding Cyprus and Slovenia, it is clear that, following the Cyprus Airways and Adria Airways bankruptcies respectively, those Countries no longer had their major national player to protect<sup>165</sup>.

The scenario is different in Romania and Denmark, where the aid schemes are part of a package of various aid measures addressing the aviation industry. In fact, the Romanian scheme goes hand in hand with financial support to their TAROM flag carrier and to airports such as Timisoara<sup>166</sup>. The Danish case, however, is the most interesting, as we find not only major individual aid to SAS (together with Sweden and Norway)<sup>167</sup>, but also another aid scheme just for airlines holding a Danish Air Operator Certificate (AOC)<sup>168</sup>.

The latter has the same legal basis of the Danish ‘airline connectivity’ scheme<sup>169</sup> and is designed to cover the salary expenses of the airlines’ critical staff<sup>170</sup> – i.e., employees who are responsible for specific safety-critical functions related to the maintaining of the AOC<sup>171</sup>. Therefore, the objective of the measure here is quite different: the aid is aimed at supporting employment conditions rather than air connectivity, as reflected also by its relatively limited intensity (EUR 6 million) *vis-à-vis* the number of potential beneficiaries (26 airlines)<sup>172</sup>.

From the legal standpoint, it is very interesting to note that ‘all airlines’ schemes are based on Article 107(3)(b) TFEU, which allows for more flexibility rather than Article 107(2)(b) TFEU, as also demonstrated by the pre-pandemic practice<sup>173</sup>.

This practice shows that less distortive solutions were in fact available, as confirmed by the circumstance that none of the above-mentioned aid schemes has been challenged before the EU Courts.

Finally, the overview of the practice on eligibility criteria must take into account the case where the beneficiaries, as an additional condition, are subject to complying with legislation beyond the realm of State aid law.

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COVID-19: Incentive scheme for airlines operating at Târgu Mureş Transilvania Airport, 7.7.2021, C(2021) 5171 final, para. 13.

<sup>165</sup> On the history of Cyprus Airways, see H. STAMELOS, *The Legal Regime of Air Transport in Cyprus*, in *Entha*, vol. 9, 2018, p. 5-14, esp. p. 13, while on Adria Airways see M. Novak, *Slovenia's Adria Airways files for bankruptcy*, Reuters, 30.9.2019, <https://www.reuters.com/article/us-slovenia-adria-idUSKBN1WF1OL>.

<sup>166</sup> On Danish support to SAS (cases SA.56795, SA.57543 and SA.63250) see *infra*, p. [103].

<sup>167</sup> Romanian government supported, among others, TAROM (cases SA.56810, SA.63360, SA.59344), Blue air (case SA.57026), Timisoara airport and regional airports (case SA.57178, SA.58676).

<sup>168</sup> Commission, SA.59370, Denmark – COVID-19 - Temporary Framework/3.1 measure to support airlines holding a Danish air operator certificate, 27.11.2020, C(2020) 8561 final.

<sup>169</sup> i.e., Article 107(3)(b) TFEU and Section 3.1 TF. Commission, SA.59370, Denmark, cit., paras 41 ff.

<sup>170</sup> *Ibidem*, paras 18 ff.

<sup>171</sup> *Ibidem*, para, 5.

<sup>172</sup> *Ibidem*, paras 12 and 16 respectively.

<sup>173</sup> See *supra*, Part I, pp. [48] ff.

#### 4.2.4 Compliance with other EU law provisions: the Italian scheme case

This case pertains to a scheme notified by Italian authorities according to Article 107(2)(b) TFEU<sup>174</sup>. An *ad hoc* national fund with a budget of EUR 130 million was created in order to compensate airlines – via direct grants – for losses caused by the pandemic<sup>175</sup>. The measure was specific to airlines (i) being in possession of an air operator certificate and an operating license issued by Italian authorities and (ii) applying to employees having their «home base» in Italy<sup>176</sup> «a remuneration not lower than the minimum established by the national collective agreement» applicable to the aviation sector (hereinafter, the ‘minimum remuneration requirement’)<sup>177</sup>.

Three carriers were identified as potential beneficiaries, and cumulation with other aid covering the same eligible costs was excluded<sup>178</sup>. In fact, one of the potential beneficiaries, Air Dolomiti, was part of the Lufthansa Group that already benefitted from large aid, possible overlaps needed to be looked at<sup>179</sup>.

The Commission approved the scheme despite a complaint submitted by the Italian Low Fares Airline Association (AICALF) claiming that imposing a minimum remuneration obligation to carriers operating in Italy was infringing EU law<sup>180</sup>, especially the freedom to provide services within the EU<sup>181</sup>.

The Commission’s decision was challenged by Ryanair before the General Court, which annulled it for breaching the duty to state reasons<sup>182</sup>. The ruling allowed the GC not only to reaffirm the role of Article 296 TFEU, but also to clarify the scope of the Commission’s compatibility assessment.

Notably, the General Court points to a contradiction in the Commission’s reasoning *re* the minimum remuneration requirement. The Commission deemed

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<sup>174</sup> Commission, SA.59029, Italy – COVID-19 Compensation scheme for airlines with an Italian operating license, 22.12.2020 C(2020) 9625 final.

<sup>175</sup> Commission, SA.59029, Italy, cit., para 29.

<sup>176</sup> Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, OJ L 296, 25.10.2012, p. 1–148. The «home base» is defined as «the location, assigned by the operator to the crew member, from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal circumstances, the operator is not responsible for the accommodation of the crew member concerned» (Annex II, Section I, para. 14, Commission Regulation (EU) No 83/2014 of 29 January 2014 amending Regulation (EU) No 965/2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, OJ L 28, 31.1.2014, p. 17–29).

<sup>177</sup> Commission, SA.59029, Italy, cit., para. 27. The other two requirements were not having received aid from another fund compensating airlines entrusted with Public Service Obligations and operating aircraft with more than 19 seats (*ibidem*).

<sup>178</sup> *Ibidem*, para. 38.

<sup>179</sup> *Ibidem*, para. 39, see *infra*, p. [119].

<sup>180</sup> *Ibidem*, para 94.

<sup>181</sup> See Article 56 TFEU.

<sup>182</sup> EU General Court, 24 May 2023, *Ryanair v Commission (Italie; régime d’aide; Covid-19)*, T-268/21, EU:T:2023:279. For a first comment, see P. NICOLAIDES, *How the Infringement of Non-State aid Rules Can Affect the Compatibility of State aid*, in *State Aid Uncovered Blog*, 11.6.2023.

the requirement «indissolubly linked to the object of the aid», thus impacting on the aid compatibility assessment<sup>183</sup>, but still, considered it «not inherent in the objective of the measure»<sup>184</sup>. The aim, in fact, is to ensure «a minimum salary protection to the beneficiaries’ employees whose home base was in Italy, as required by Italian law»<sup>185</sup>, a point that must be coherent with other relevant EU law provisions<sup>186</sup>.

Consequently, the Commission examined the requirement under the special conflict-of-law rules pertaining to individual contracts of employment (i.e., Article 8(1) Regulation Rome I)<sup>187</sup>, found it *prima facie* compatible with this provision<sup>188</sup> and left to Italian enforcement and judicial authorities the task of ensuring an implementation of the aid in compliance with EU law<sup>189</sup>.

The General Court, however, rejected this view deeming it incompatible with the Commission’s exclusive competence on State aid control, adding that the (ancillary) role of national authorities

«does not relieve the Commission of its obligation to assess the compatibility of aid with the internal market, including, where appropriate, in the light of provisions of EU law other than Articles 107 and 108 TFEU»<sup>190</sup>.

Specifically, the Commission had to examine whether the remuneration requirement based on Italian law, might indirectly present a discriminatory restriction on the freedom to provide services enshrined in Article 56 TFEU<sup>191</sup>. This duty was not put into question by the fact that the beneficiaries’ competitors had previously submitted a complaint to the Commission on this very point, but the latter decided not to start an infringement proceeding<sup>192</sup>.

The ruling, currently under appeal before the Court of Justice<sup>193</sup>, seems to go in the opposite direction compared to the case-law examined so far, which aimed, as we saw with the arguments on the balancing test, at reducing the purview of the Commission’s assessment<sup>194</sup>. On the contrary, the Italian scheme ruling stresses the need for a holistic approach to State aid control, taking other areas of

<sup>183</sup> EU General Court, T-268/21, cit., para. 22 referring to Commission, SA.59029, Italy, cit., para. 92.

<sup>184</sup> EU General Court, T-268/21, cit., para. 23.

<sup>185</sup> Ibidem, para. 23.

<sup>186</sup> Ibidem, para. 23.

<sup>187</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16.

<sup>188</sup> Commission, SA.59029, Italy, cit., paras. 97-99. On the notion of home base under Article 8, Regulation Rome I, cit., see, recently CJEU, 19 May 2022, *INAIL e INPS v Ryanair*, C- 33/21, EU:C:2022:402, as commented by A. TRIMARCHI, *Legge previdenziale applicabile al personale navigante delle compagnie aeree: nuovi spunti dalla giurisprudenza dell’Unione (causa C-33/21)*, in *BlogDUE*, 7.11.2022.

<sup>189</sup> Commission, SA.59029, Italy, cit., para. 99.

<sup>190</sup> EU General Court, T-268/21, cit., para. 36.

<sup>191</sup> Ibidem, para. 32.

<sup>192</sup> Ibidem, para. 35. Notably, in the decision the Commission only refers the existence of the complaint but does not specify its content.

<sup>193</sup> CJEU, *Neos v Ryanair and Commission*, C-490/23, application lodged on 1.8.2023.

<sup>194</sup> See *supra*, p. [94].

EU legislation such as labour law – or, in a future perspective, environmental law – into account<sup>195</sup>.

However, widening the Commission’s appraisal causes serious consequences on the procedural side, especially in a pandemic scenario where a timely response is crucial. To this purpose, the General Court seems to refer to the context of the case and the case-law cited by the complainant as a reasonable limit to the extent of the Commission’s duty<sup>196</sup>. In absence of such a complainant, nevertheless, the obligation remains vague, which shows once again the importance of involving interested parties in State aid control.

The legal issues examined so far stemmed from cases concerning aid schemes. Now it is possible to address the specific features of individual measures, starting from the case of multiple aid awarded to the same carrier and the related defining issues.

### 4.3 The relationship between individual aid and their legal basis

#### 4.3.1 The SAS (damage compensation) cases

In the aftermath of the pandemic, the full-service carrier SAS, providing air connectivity in the Scandinavian region, benefitted from various aids granted by Sweden and Denmark, which are also its major shareholders<sup>197</sup>, as well as from Norway<sup>198</sup>.

Table 5: Pandemic-related aid to the SAS group (from EU Member States only)

Member State	Case no. (decision date)	Beneficiary (subject)	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
Denmark	SA.56795 (15.4.2020)	SAS (damage compensation)	107(2)(b) TFEU	Guarantee	137	T-378/20 (rejected) C-321/21 (rejected)

<sup>195</sup> Cf. *infra*, p. [136].

<sup>196</sup> EU General Court, T-268/21, cit., paras. 28-31. Cf. also CJEU, C-320/21, cit., para. 135.

<sup>197</sup> Holding 21.8% of shares each, see: <https://www.sasgroup.net/investor-relations/the-share/shareholders/>.

<sup>198</sup> The Norwegian aid of EUR 0.93 million was awarded under an horizontal scheme: EFTA Surveillance Authority (ESA), 17.4.2020, case 85047, COVID-19 Grant scheme for undertakings suffering a substantial loss of turnover, Decision No 039/20/COL. Moreover, during the pandemic, SAS concluded also a PSO contract with the Norwegian State for a value amounting to EUR 49 million: Commission, cases SA.58342 and SA.57543, COVID-19 – Recapitalisation of SAS, 14.7.2023, 2023/C 250/08, para. 16.

Member State	Case no. (decision date)	Beneficiary (subject)	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
Sweden	SA.57061 (24.4.2020)	SAS (damage compensation)	107(2)(b) TFEU	Guarantee	137	T-379/20 (rejected) C-320/21 (rejected)
Denmark	SA.57543 (17.8.2020)	SAS (recapitalization)	107(3)(b) TFEU §3.11 TF	Capital injection, hybrid	583	T-238/21 (annulled)
Sweden	SA.58342 (17.8.2020)	SAS (recapitalization)	107(3)(b) TFEU §3.11 TF	Capital injection, hybrid	486	T-238/21 (annulled)
Denmark/ Sweden	SA.57543 and SA.58342 (4.7.2023)	SAS (recapitalization, post annulment)	-	-	-	n.d.
Denmark/ Sweden	SA.63250 and SA.6389 (9.7.2021)	SAS (loan)	107(3)(b) TFEU §3.3 TF	Subsidised loan	252	n.d.
Total amount of aid from MS					1,595	

The SAS damage compensation cases allowed the Court of Justice to deliberate on the legal basis of individual aid<sup>199</sup>. Conversely, the SAS recapitalization decision dealt with the implementation of the conditions laid down in the Temporary Framework<sup>200</sup>; therefore, the latter will be examined *infra*, together with the General Court *Lufthansa* ruling<sup>201</sup>.

In April 2020, the Commission approved two measures notified under Article 107(2)(b) TFEU, respectively, by Denmark and Sweden<sup>202</sup>. Low-cost

<sup>199</sup> CJEU, 28 September 2023, *Ryanair v Commission (SAS; Sweden)*, C-320/21, EU:C:2023:712; Id., 28 September 2023, *Ryanair v Commission (SAS; Denmark)*, C-321/21, EU:C:2023:713.

<sup>200</sup> Commission, Covid-19 Temporary Framework, cit.

<sup>201</sup> EU General Court, 10 May 2023, *Condor Flugdienst v Commission (Lufthansa; Covid-19)*, T-34/21 and T-87/21 EU:T:2023:248. In detail, see *infra*, pp. [119] ff.

<sup>202</sup> Commission, SA.56795, Denmark - Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines, 15.4.2020, C(2020) 2416 final; Id., SA.57061, Sweden - Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines, 24.4.2020, C(2020) 2784 final.

competitor Ryanair challenged both before the General Court, who dismissed them<sup>203</sup>. The outcome was upheld by the Court of Justice in the following appeal judgements<sup>204</sup>.

Among the arguments put forward in its appeal, Ryanair claimed that (i) damage compensation is allowed according to Article 107(2)(b) TFEU only in the form of an aid scheme and not as individual aid; (ii) SAS was not eligible for individual aid because Sweden had already adopted a scheme for airlines hit by the pandemic under Article 107(3)(b) TFEU<sup>205</sup>; (iii) the Commission did not state adequate reasons on the alleged objective of preserving air connectivity; (iv) the Commission erred in quantifying the aid. Albeit rejecting all of the above complaints, the CJEU still leaves several questions open, as it will be now illustrated.

#### 4.3.2 Concurrent application of Article 107(2)(b) and Article 107(3)(b) TFEU

On the relationship between damage compensation and remedies to a serious disturbance, the Court states that

«an event such as the COVID-19 pandemic may be classified both as an ‘exceptional occurrence’ within the meaning of Article 107(2)(b) TFEU and as an event giving rise to a ‘serious disturbance in the economy’ within the meaning of Article 107(3)(b) TFEU»<sup>206</sup>.

Therefore, as the TFEU does not preclude a «concurrent application» of these provisions, a Member State may adopt multiple aid measures addressing the same event, provided that the conditions of each exemption are met<sup>207</sup>.

The individual aid to SAS under Article 107(2)(b) TFEU can be regarded as «subsidiary» to the Swedish scheme according to Article 107(3)(b) TFEU<sup>208</sup>. In fact, the rationale behind the individual damage compensation award was to support an airline which was unable to access to funding under the scheme’s conditions<sup>209</sup>. Hence, the two measures in question are deemed independent, as in practice they do not overlap<sup>210</sup>.

The clarifications on the concurrent application should be examined in the context of other rulings addressing the definition and scope of the aid measures,

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<sup>203</sup> EU General Court, 14 April 2021, *Ryanair v Commission (SAS, Denmark; Covid-19)*, T-378/20, EU:T:2021:194; Id., 14 April 2021, *Ryanair v Commission (SAS, Suède; Covid-19)*, T-379/20, EU:T:2021:195.

<sup>204</sup> CJEU, *Ryanair (SAS; Sweden)*, C-320/21, cit.; Id., *Ryanair (SAS; Denmark)*, C-321/21, cit.

<sup>205</sup> Commission, SA.56812, Swedish scheme for airlines, cit. *supra*, p. [87].

<sup>206</sup> CJEU, *Ryanair (SAS; Sweden)*, C-320/21, cit., para. 51.

<sup>207</sup> CJEU, *Ryanair (SAS; Sweden)*, C-320/21, cit., para. 50 and 52.

<sup>208</sup> CJEU, *Ryanair (SAS; Sweden)*, C-320/21, cit., para. 48.

<sup>209</sup> *Ibidem*, para 48.

<sup>210</sup> See CJEU, *Ryanair (SAS; Sweden)*, C-320/21, cit., para. 49. As far as there is no overlap in the costs covered by the aid, overcompensation is ruled out by the Court (*ibidem*, paras 84 ff.).

much like those on the Spanish scheme for strategic undertakings<sup>211</sup> and on the aid awarded to Brussels airlines<sup>212</sup>.

In the first case, the General Court dismissed the existence of *sui generis* measures other than individual aid and aid schemes under Article 1(d) Regulation 2015/1589, thus upholding the Commission's definition of the measure in question as a scheme<sup>213</sup>.

Regarding *Brussels airlines*, conversely, the aid in question consisted of two components, a subsidized interest rate for loans and a recapitalization measure, approved under Article 107(3)(b) TFEU as interpreted by the Temporary Framework<sup>214</sup>. By rejecting Ryanair's complaint on the application of the TF, the General Court stressed that the Commission's assessment must take the combined impact of each component into account<sup>215</sup>.

### 4.3.3 Aid schemes *vs* individual aid

In the SAS rulings, the Court of Justice reaffirmed that exemptions under paragraphs 2 and 3 of Article 107 TFEU are subject to a strict interpretation<sup>216</sup>. Nevertheless, limiting the scope of damage compensation to aid schemes finds no support in the wording of Article 107(2)(b) TFEU<sup>217</sup> and would also deprive this provision of its *effet utile*<sup>218</sup>. In fact, the compensatory nature of Article 107(2)(b) TFEU does not preclude the choice of a single beneficiary so as to meet «specific objectives» concerning the economic activity it performs or its other «specific characteristics»<sup>219</sup>. Conversely, in the Court's view, requiring damage compensation to be awarded to all firms suffering from the same event might «deter» Member States from using this instrument at all<sup>220</sup>.

The *a contrariis* reasoning seems unconvincing. On the one hand, Member State's ability to support firms hit by exceptional occurrences is undoubtedly affected by their different budgetary capacities; on the other hand, however, the empirical analysis of Commission's practice during the pandemic seems to demonstrate quite the opposite to the Court's argument: the aid schemes open to airlines irrespective to their national licence were generally adopted by Member States with relatively small economies, such as Cyprus and Slovenia<sup>221</sup>. Indeed, in

<sup>211</sup> EU General Court, 19 May 2021, *Ryanair v Commission (Spain; Covid-19)*, T-628/20, EU:T:2021:285.

<sup>212</sup> EU General Court, 18 October 2023, *Ryanair v Commission (Brussels Airlines; COVID-19)*, T-14/21, EU:T:2023:643.

<sup>213</sup> EU General Court, T-628/20, cit., para. 93.

<sup>214</sup> Specifically, subsidised interest rates for loans (Section 3.3 TF) and recapitalisation measures (Section 3.11 TF), see T-14/21, paras 40 ff.

<sup>215</sup> T-14/21, para. 56.

<sup>216</sup> CJEU, *Ryanair (SAS; Denmark)*, C-321/21, cit., para 21.

<sup>217</sup> Ibidem, paras 21 and 24.

<sup>218</sup> 321, para. 24.

<sup>219</sup> See Opinion of AG Pitruzzella of 26 January 2023 in case C-320/21, *Ryanair (SAS; Sweden)*, EU:C:2023:54, para. 17 as referred to by CJEU, *Ryanair (SAS; Denmark)*, C-321/21, cit., para. 23 and CJEU, *Ryanair (SAS; Sweden)*, C-320/21, cit., para. 24.

<sup>220</sup> CJEU, *Ryanair (SAS; Denmark)*, C-321/21, cit., para. 24.

<sup>221</sup> For references, see *supra*, p. [97].

case of Denmark and Romania these ‘all airlines’ schemes were put in place alongside with other measures limited to carriers holding a national license<sup>222</sup>.

The real issue, once again, is to what degree this ‘discrimination’ is justifiable under the relevant derogation to the aid prohibition. Compared to the ‘broader’ objective of Article 107(3)(b) TFEU (i.e., remedying to an economic disturbance), the compensatory nature of Article 107(2)(b) TFEU, as well as the need for strict interpretation of the exemption, might translate as requiring additional ‘fairness’ to the measure’s design. This position is also in line with the proportionality principle that requires to limit the aid’s selectivity to the minimum necessary.

To confirm the compensatory function as the benchmark for assessing the aid’s compatibility pursuant to Article 107(2)(b) TFEU, the Court agrees with the AG’s opinion, that:

«aid measures [...] which, although intended to make good damage suffered as a result of an exceptional occurrence, are, in fact, motivated by considerations that are arbitrary or unrelated to that objective, such as the wish to favour, for reasons not connected with that objective, a particular undertaking compared with its competitors, especially an undertaking which was already in difficulty before the occurrence of the event in question, cannot be held to be compatible with the internal market»<sup>223</sup>.

In any case, the Court affirms that granting compensation to only one firm among the many potentially damaged does not imply per se that the aid «pursues other objectives to the exclusion of the one pursued by that provision or that it is granted arbitrarily»<sup>224</sup>.

That said, we shall now focus on the CJEU’s reasoning on the aid’s objective.

#### **4.3.4 The aid’s objective and the alleged redundancy of considerations on ‘air connectivity’**

In its claims, Ryanair argued that individual aids such as those granted to SAS were not effective to the objective of ensuring air connectivity in Sweden and Denmark, respectively<sup>225</sup>. The Court of Justice rejected this argument and stated that the Commission is obliged to consider the measure only in light of the objective of compensating the firm in question<sup>226</sup>. Therefore, the references to Scandinavian connectivity made in the decision must be intended as better describing the beneficiary’s operations and not to define the aid’s objective<sup>227</sup>.

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<sup>222</sup> Ibidem.

<sup>223</sup> CJEU, *Ryanair (SAS; Sweden)*, C-320/21, cit., para. 28 referring to AG’s opinion on the same case C-320/21, cit., para. 17.

<sup>224</sup> CJEU, *Ryanair (SAS; Sweden)*, C-320/21, cit., para. 31.

<sup>225</sup> Ibidem, para. 94.

<sup>226</sup> Ibidem, para. 95.

<sup>227</sup> Ibidem, para. 96.

The CJEU's reasoning on this point mirrors the *Finnair I* ruling, where the General Court stated that, under Article 107(3)(b) TFEU, the Commission is only required to ascertain whether the aid can remedy to a serious disturbance in the economy of the Member State<sup>228</sup>. As a consequence, albeit taking into account the maintenance of Finnish air connectivity in the decision, it was not for the Commission to verify whether aid might also be given to other recipients<sup>229</sup>. Moreover, this reasoning was not influenced by the circumstance that the Member State in question is also the largest shareholder of the beneficiary<sup>230</sup>.

The formal strict letter-of-the-law approach summarized above, however, does not seem satisfactory. It is apparent from the references to the said decisions, that the protection of national air connectivity played an important role in the Member State's aid intervention. Reducing the assessment to a formally stated objective ignores and diminishes the economic context of the measure and, consequently, the scope of the judicial review on aid compatibility.

As a comparison, a more substantial approach was adopted in the AG's opinion on SAS damage compensation and in the rulings on the Swedish and French schemes, where the objective of ensuring air connectivity was, nevertheless, deemed compatible with the relevant derogations<sup>231</sup>. Moreover, reading between the lines of these judgments, some factual considerations emerged, reflecting the different business models of the aid beneficiaries as compared to the one of the applicant Ryanair.

On the one hand, low-cost carriers (LCCs) abruptly halted operations as soon as the travel restrictions were put in place, without considering the need for essential flight services, functional to the enjoyment of fundamental rights<sup>232</sup>.

On the other hand, full-service carriers (FSCs) seem better suited than low-cost carriers to guarantee domestic connectivity, as recently confirmed by the judgment on the rescue aid granted to the Romanian carrier TAROM right before the pandemic<sup>233</sup>. This consideration becomes apparent if we consider the hub-and-spoke structure, typical of the FSCs business model<sup>234</sup>. The economies of scale achieved at the hub enable the FSC to serve feeder routes that would be *per se* unprofitable because of low demand<sup>235</sup>. By contrast, the point-to-point model

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<sup>228</sup> EU General Court, 14 April 2021, *Ryanair v Commission (Finnair I; Covid-19)*, T-388/20, EU:T:2021:196, paras 83-84.

<sup>229</sup> EU General Court, *Finnair I*, T-388/20, cit., para 89.

<sup>230</sup> *Ibidem*, para. 95.

<sup>231</sup> See *supra*, p. [87].

<sup>232</sup> See e.g., the issues related to the replacement of seafarers, as discussed by F. MUNARI, *To What Extent Do the Contemporary International Law of the Sea, International Maritime Law, and International Labor Law Address Public Health Threats such as Pandemics?*, in *Ocean Yearbook*, vol. 35, 2021, p. 388-422. See also *supra*, Introduction, nt. [2].

<sup>233</sup> EU General Court, 4 May 2022, *Wizz Air Hungary v Commission (TAROM; aide au sauvetage)*, T-718/20, EU:T:2022:276, esp. paras 67-68.

<sup>234</sup> In general terms on the hub and spoke model, see *supra*, Part I, p. [24].

<sup>235</sup> See G. COOK, B. BILLIG, *Airline Operations and Management*, Abingdon, 2017, p. 65 ff.; E. PELS, *Optimality of the hub-spoke system: A review of the literature, and directions for future research*, in *Transport Policy*, vol. 104, 2021, p. A1-A10.

adopted by LCCs is more subject to fluctuations in demand<sup>236</sup>, and therefore less suitable for ensuring domestic air services, all the more so in the event of market shocks such as the pandemic.

The hub-and-spoke structure of a beneficiary may also compound distortion to competition caused by the aid. In fact, the ability to maintain, thanks to aid, domestic (feeder) routes that competitors are forced to discontinue, positively affects traffic to the hub by ensuring a higher load factor in international flight connections departing from that hub<sup>237</sup>. As European FSCs and LCCs compete not only for domestic traffic but also for routes within the EU, this aspect should not be overlooked.

However, a sector-oriented economic appraisal clashes with the position adopted so far by the CJEU, ruling out that the Commission must take into account the competitive advantage that the recipient of the aid might obtain over its competitors<sup>238</sup>.

A proper evaluation of the context in which the aid is awarded is extremely relevant in the case of airlines benefiting from measures adopted by multiple Member States, as pointed out in the rulings *infra*.

#### **4.4 Airline group structure and aid received from more than one Member State**

##### **4.4.1 The KLM I ruling**

Being one of the largest ‘pan-European’ carriers, the Air France-KLM group received aid from both French and Dutch governments, which are the largest shareholders of the group holding<sup>239</sup>. In total, four measures were notified under Article 107(3)(b) TFEU, consisting of guarantees, loans and capital injections modelled on the Temporary Framework, as summarized in the table below.

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<sup>236</sup> In fact, the impossibility of consolidating direct traffic to many destinations severely limits the number of city pairs where it is possible to operate profitably: most small and medium-sized cities have sufficient demand to support direct flights to only a few destinations. In detail: G. COOK, B. BILLIG, *Airline Operations*, cit., p. 63.

<sup>237</sup> Cf. R. TOH, R. HIGGINS, *The Impact of Hub and Spoke Network Centralization and Route Monopoly on Domestic Airline Profitability*, in *Transportation Journal*, vol. 24, 1985, p. 16–27.

<sup>238</sup> CJEU, *Ryanair (SAS; Sweden)*, C-320/21, cit., para. 84.

<sup>239</sup> The two Member States hold, respectively, 14.3% and 14% of the share capital: EU General Court, 19 May 2021, T-643/20, *Ryanair v Commission (KLM; Covid-19)*, EU:T:2021:286, para. 2.

Table 6: Pandemic-related aids to Air France-KLM group

Member State	Case no. (decision date)	Beneficiary	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
France	SA.57082 (4.5.2020)	Air France	107(3)(b) TFEU § 3.2 TF	Guarantee, Loan, Repayable advances	7,000	T-216/21 (annulled)
France	SA.59913 (5.4.2021)	Air France	107(3)(b) TFEU §3.11 TF	Equity Participation, Hybrid Instruments	4,000	T-494/21 (annulled)
The Netherlands	SA.57116 (13.7.2020)	KLM	107(3)(b) TFEU § 3.2 and 3.3 TF	Guarantee, Loan	3,400	T-643/20 (annulled)
The Netherlands	SA.57116 (16.7.2021)	KLM (post annulment)	-	-	-	T-146/22 (annulled)
TOT.					14,400	

The granting of these funds was subject to commitments including environmental obligations and, in the case of Air France, the divestiture of certain assets<sup>240</sup>. As shown above, all four decisions were challenged by Ryanair and annulled by the General Court for breach of the Commission's duty to state reasons<sup>241</sup>.

The case concerns individual aid – a combination of State guarantees and loans amounting to EUR 3.4 billion – granted by the Netherlands to KLM, a subsidiary of the holding company Air France-KLM. The aid to KLM was authorized by the Commission under Article 107(3)(b) TFEU and the TF in July 2020 («KLM I Decision»)<sup>242</sup>; this occurred approximately two months after the approval of the EUR 7 billion measure granted by France to Air France, another subsidiary of the group («Air France Decision»)<sup>243</sup>. According to the applicant Ryanair, the Commission did not adequately justify why the aid awarded to Air

<sup>240</sup> Cf. Commission, SA.59913, France – Air France. Commitments evaluation, 20.09.2021, C(2021) 6930 final; SA.100430, France - prolongation de la mesure d'aide SA.57082, 1.12.2021, C(2021) 8861 final. On additional commitments, see S. VAN DUREN, A. KNOOK, *State aid in times of crisis*, Deventer, 2021, p. 62 ff. and also *infra*, p. [124] and Part III, [127].

<sup>241</sup> EU General Court, T-643/20, cit.; Id., T-216/21, cit.; Id., T-494/21, cit.; Id., T-146/22.

<sup>242</sup> Commission, SA.57116, *The Netherlands - COVID-19: State loan guarantee and State loan for KLM*, 13.7.2020, C(2020) 4871 final, para 9.

<sup>243</sup> Commission, SA.57082, *France - COVID-19 – Encadrement temporaire 107(3)(b) – Garantie et prêt d'actionnaire au bénéfice d'Air France*, 4.5.2020 C(2020) 2983 final, paras 17-19.

France did not affect the compatibility assessment of the measure in favour of KLM<sup>244</sup>.

First of all, the General Court considers the action admissible insofar as the applicant alleges the infringement of procedural rights<sup>245</sup>, thus differing from the rulings on the Swedish and French schemes, where dismissing the claim on the merits justified the GC choice not to rule on admissibility<sup>246</sup>.

In particular, Ryanair is qualified as a competitor of the beneficiary<sup>247</sup> and thus falls in the category of «interested parties» who, pursuant to Article 108(2) TFEU, are entitled to submit comments during the formal aid investigation procedure<sup>248</sup>. Since the Commission's decision not to initiate a formal investigation prevented the applicant from doing so, the General Court deemed the action admissible because of the alleged infringement of procedural rights.

On merit, the Court acknowledges that the Air France decision must also be taken into account when ascertaining the adequacy of the reasoning of the KLM I decision<sup>249</sup>. EU State aid law, in fact, takes a substantive approach to the concept of undertaking: entities with separate legal personality may constitute a single economic unit for the purposes of that discipline<sup>250</sup>; being part of the same corporate group is, of course, a clear indicator in that sense<sup>251</sup>. Hence, the Commission must assess the connections between the companies belonging to the same group in order to avoid cumulation of aid and transfer of resources to other entities of the group<sup>252</sup>.

In the *KLM I* case, the decision does not contain sufficient information to clarify the shareholding structure of the group, nor the functional links between the companies belonging to it, despite the role played by the Air France-KLM holding company in managing and transferring the aid to its subsidiaries<sup>253</sup>. Thus, the failure to examine the risk of cross-financing, in the General Court's view,

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<sup>244</sup> EU General Court, T-643/20, cit., para. 35.

<sup>245</sup> Ibidem, paras 24-29.

<sup>246</sup> EU General Court, T-259/20, cit., para. 20; EU General Court, T-238/20, cit, para. 22. However, on admissibility, cf., *amplius*, Id., 10 May 2023, *Condor Flugdienst v Commission (Luftbansa; Covid-19)*, T-34/21 and T-87/21, EU:T:2023:248, paras 15 ff.; Id., 10 May 2023, *Ryanair v Commission (SAS II ; COVID-19)*, T-238/21, EU:T:2023:247, paras 10 ff.; Id., 24 May 2023, *Ryanair v Commission (Italie; régime d'aide; Covid-19)*, T-268/21, EU:T:2023:279, paras 10 ff.; EU General Court, 18 October 2023, *Ryanair v Commission (Brussels Airlines; COVID-19)*, T-14/21, EU:T:2023:643, paras 9 ff.

<sup>247</sup> In 2019, Ryanair had a 5% share of the Dutch passenger air transport market, making it the third largest air carrier in the Netherlands: EU General Court, T-643/20, cit., paras 27-28.

<sup>248</sup> Ibidem. On State aid control procedure, see *supra*, Part I, p. [36].

<sup>249</sup> EU General Court, T-643/20, cit., paras 38-40. The principle of the adequacy of the statement of reasons to the nature of the measure (based on Article 296 TFEU), obliges the Commission, in a decision not to open a formal investigation such as the one at issue here, to set out only the reasons why it considers that the assessment of aid compatibility does not pose any serious difficulties.

<sup>250</sup> EU General Court, T-643/20, cit., para. 45; Commission, Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, 19.7.2016, 2016/C 262/01, para. 11.

<sup>251</sup> EU General Court, T-643/20, cit., para. 47.

<sup>252</sup> Ibidem, para. 48, referring to EU General Court, 8 September 2009, *AceaElectrabel v Commission*, T-303/05, EU:T:2009:312, para. 116. In detail, see., S. MATHOUX, *Single Economic Unit*, cit., p. 12.

<sup>253</sup> EU General Court, T-643/20, cit., paras 59-61.

impaired the Commission's assessment on appropriateness and proportionality of the aid to KLM under Article 107(3)(b) TFEU, as well as on whether the intensity thresholds laid down in the TF were exceeded<sup>254</sup>.

In upholding Ryanair's appeal, the Court suspended the effects of the annulment<sup>255</sup>, an outcome shared with the TAP judgment<sup>256</sup>, which must now be examined.

#### 4.4.2 The ruling on TAP SGPS rescue

Portuguese legacy carrier TAP was already in difficulty before the pandemic broke out<sup>257</sup>. Therefore, the airline benefited from aid under Article 107(3)(c) TFEU, as interpreted by the Commission's Rescue and Restructuring guidelines (the «RR Guidelines»)<sup>258</sup>, as well as on damage compensations according to Article 107(2)(b) TFEU. A general overview is offered by the table below.

Table 7: Pandemic-related aids to TAP group

Member State	Case no. (decision date)	Beneficiary	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
Portugal	SA.57369 (10.6.2020)	TAP SGPS (rescue)	107(3)(c) TFEU	Rescue Loan	1,200	T-465/20 (annulled)
Portugal	SA.57369 (16.7.2021)	TAP SGPS (rescue, post annulment)	-	-	-	T-743/21 (pending)
Portugal	SA.60165 (21.12.2021)	TAP SGPS (restructuring)	107(3)(c) TFEU	-	-	n.d.
Portugal	SA.62304 (23.4.2021)	TAP (compensation I)	107(2)(b) TFEU	Loan	462	T-499/21 (pending)
Portugal	SA.63402 (21.12.2021)	TAP (compensation II)	107(2)(b) TFEU	Capital Injection, Loan	107.7	T-164/22 (pending)
Portugal	SA.100121 (22.12.2021)	TAP (compensation III)	107(2)(b) TFEU	Capital Injection, Loan	71.37	T-185/22 (pending)

<sup>254</sup> Ibidem, paras. 74-77.

<sup>255</sup> EU General Court, T-643/20, cit., para. 79-84.

<sup>256</sup> EU General Court, *Ryanair v Commission (TAP; Covid-19)*, T-465/20, cit., para. 62.

<sup>257</sup> For a background on the history of TAP, see J. Hardiman, *Connecting Portugal to the World: the History of TAP Air Portugal*, in *Simpleflying*, 14.11.2021, <https://simpleflying.com/tap-history/>.

<sup>258</sup> Commission, Guidelines on State aid for rescuing and restructuring non-financial firms in difficulty, cit.

Member State	Case no. (decision date)	Beneficiary	Legal basis [TFEU (TF)] (§)	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
TOT.					1,841.07	

In the rescue aid case (“TAP Rescue I”), a State loan of EUR 1.2 billion was granted to the company Transportes Aéreos Portugueses SGPS SA, which controlled the airline TAP Air Portugal<sup>259</sup>. Repeating the considerations already examined in the KLM judgment concerning the admissibility of the action<sup>260</sup>, the Court held, in essence, that the Commission did not fulfil its obligation under Article 296 TFEU because it did not take the corporate group structure of the beneficiary airline into account.

According to the RR Guidelines, a company belonging to a group is not eligible for rescue aid unless it can be demonstrated: *i*) that the difficulties are intrinsic to the beneficiary and are not the result of an arbitrary allocation of costs within the group; *ii*) that the difficulties are too serious to be dealt with by the group itself<sup>261</sup>. The purpose of this rule is to avoid unnecessary State intervention when the group is liable for the firm’s financial distress or it has enough resources to cope with the crisis<sup>262</sup>.

The General Court noted that the Commission did not clarify, first of all, that the beneficiary belonged to a group and merely repeated in its reasoning the text of the Guidelines<sup>263</sup>. The brief references to the financial situation of the recipient and to the pandemic crisis, made in other parts of the decision are deemed irrelevant for that purpose<sup>264</sup>, as well as the reasoning added by the Commission in the course of the court proceedings<sup>265</sup>.

The above judgments do not call into question the essential structure of the contested decisions, but make it clear that the Commission’s burden of proof cannot be lightened because of dire circumstances or the subsequent urgency to intervene. This approach seems to be confirmed by the General Court’s decision to suspend the effects of the annulment in both cases<sup>266</sup>. In the *KLM I* ruling,

<sup>259</sup> In the present case, the aid was intended to ensure that TAP would remain in business for six months: Commission, Aid to TAP, para. 13.

<sup>260</sup> EU General Court, T-465/20, cit., paras 20-28.

<sup>261</sup> Commission, RR Guidelines, cit., para. 22.

<sup>262</sup> EU General Court, T-465/20, cit., para. 39, recalling, in turn, the previous 2004 Guidelines: Id., 13 May 2015, *Niki Luftfabrt v Commission*, T-511/09, EU:T:2015:284, para. 159.

<sup>263</sup> EU General Court, T-465/20, cit., paras 42-43.

<sup>264</sup> Ibidem, para. 52.

<sup>265</sup> Ibidem, para. 50.

<sup>266</sup> Cf. *supra*, p. [109]. In the event of a recovery decision, moreover, the question of the applicability of the principle of legitimate expectations of the aid recipient would have arisen: G. STIRLING, *COVID-19 Related State Aid*, cit., p. 164. On the scope of the principles of legal certainty and legitimate expectations in the recovery of aid, see: C. CELLERINO, *La sentenza della Corte di giustizia del 23 gennaio 2019 relativa al caso Traghetti del Mediterraneo (IV): una “mano tesa” alla Corte di Cassazione nella condanna dello Stato italiano*, in *Diritto dell’Unione Europea*, 2019, p. 571-579, esp. 577 ff.

reference is made to the solution endorsed in the *British Airways* judgment, where a contractual clause preventing intra-group transfer of funding was deemed to ensure a legal and financial separation between the companies involved (Air France and Air Inter)<sup>267</sup>.

#### 4.4.3 The outcome of the annulment: the new Commission's decisions

Following the annulment of these decisions by the General Court<sup>268</sup>, the subsequent decisions adopted by the Commission in July 2021 on the same cases dwell on reconstructing the corporate structure of the respective groups<sup>269</sup>, as well as on the identification of the beneficiary<sup>270</sup>. In case of KLM («KLM II decision»), the role of the contractual clauses governing the allocation of aid within the group is emphasised<sup>271</sup>. Therefore, although there are functional, economic and organic links between the holding company Air France-KLM and its subsidiaries KLM and Air France, the Commission decided that the aid could not benefit an entity other than KLM<sup>272</sup> taking also account of the contractual constraints placed on the transfer of funds<sup>273</sup>. The General Court, nevertheless, refuted those arguments after a thorough assessment of the factual position of Air France-KLM as the group holding<sup>274</sup>.

On the other hand, regarding the new TAP decision («TAP rescue decision II»)<sup>275</sup> the Commission states that TAP SGPS and two of its other shareholders constitute a single economic unit<sup>276</sup>, but the cumulative conditions set out in point 22 of the RR Guidelines are nevertheless fulfilled<sup>277</sup>.

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<sup>267</sup> EU General Court, 25 June 1998, *British Airways et al. v Commission*, T-371/94 and T-394/94, EU:T:1998:140, paras 313-315. This case is, moreover, one of the (rare) precedents of decisions authorising aid being declared unlawful by the General Court due to a lack of reasoning.

<sup>268</sup> Commission, SA.57116, The Netherlands - COVID-19: State loan guarantee and State loan for KLM, 16.7.2021, C(2021) 5437 final; Id., SA.57369, Portugal - Rescue aid to TAP SGPS, 16.7.2021, C(2021) 5302 final. TAP's restructuring required the granting of new aid, which was authorised by the Commission following commitments after an initial negative decision: Id., SA.60165, Portugal - Restructuring aid to TAP SGPS, 16.7.2021, C(2021) 5278 final; Id., SA.60165, Aid which Portugal is planning to implement for TAP SGPS, 21.12.2021, C(2021) 9941 final. Following the KLM judgment, the Commission also amended the decision on the EUR 7 billion aid granted to Air France: M. STORM, *European Union Competition Law Developments in the Aviation Sector: July to December 2021*, in *Air & Space Law*, 47, 2022, p. 167-208, esp. 200.

<sup>269</sup> Commission, SA.57116, *KLM II*, cit., paras 24-60; Id., SA.57369, *TAP II*, paras 11-22.

<sup>270</sup> Commission, SA.57116, *KLM II*, cit., paras 104 ss.; Id., SA.57369, *TAP II*, paras 23 ff.

<sup>271</sup> Commission, SA.57116, *KLM II*, cit., para. 110. The wording of such clauses may lead to the conclusion that the beneficiary of the aid is a person other than the borrower, by virtue of the principle of actual enjoyment of the aid: cf. CJEU, 3 July 2003, *Belgium v Commission (Verlipack)*, C-457/00, EU:C:2003:387, paras 55-57.

<sup>272</sup> Commission, SA.57116, *KLM II*, cit., paras 114-116. In the Commission's view, the role of the holding company is limited to what is necessary by virtue of its role as main shareholder and the corporate structure and governance prevent the aid received by KLM from being transferred back to Air France.

<sup>273</sup> Commission, SA.57116, *KLM II*, cit., para. 121.

<sup>274</sup> EU General Court, 7 February 2024, *Ryanair v Commission (KLM II; COVID-19)*, T-146/22, EU:T:2024:68, esp. paras 63 ff. In detail, please refer to: M. BARBANO, *Gruppi societari destinatari di aiuti di Stato da più Stati membri: prime riflessioni sulla sentenza KLM II del Tribunale dell'Unione (T-146/22)*, in *Quaderni AISDUE*, no. 1, 2024, forthcoming.

<sup>275</sup> Commission, SA.57369, *Portugal - Rescue aid to TAP SGPS*, cit.

<sup>276</sup> *Ibidem*, para. 108.

<sup>277</sup> *Ibidem*, paras 114-128.

The 2021 TAP rescue decision II was also challenged by Ryanair and the action is currently pending before the General Court<sup>278</sup>. Some comparisons can be made, respectively with cases concerning recipients who were already in financial distress before the pandemic as well as with those on aid cumulation.

#### 4.4.4 Pandemic aid to airlines already in difficulty

An aspect remaining in the background of the TAP case is the issue of financially struggling airlines even before the pandemic<sup>279</sup>, a scenario where the intensity and timing of the aid is particularly relevant.

In this vein, reference can be made to the *Condor* ruling, where the aid granted by Germany under Article 107(2)(b) TFEU was also annulled by the General Court because of a failure to state reasons<sup>280</sup>. Among other damages, the annulled decision compensated the costs caused by the pandemic in delaying the insolvency procedure, thus going beyond the express purpose of the measure, i.e., compensation for damages directly caused by the travel restrictions<sup>281</sup>.

Table 8: Pandemic-related aid granted by Germany to Condor and TUI

Case no. (decision date)	Beneficiary	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
SA.56867 (26.4.2020)	Condor (I)	107(2)(b) TFEU	State loan guarantee	(550)	T-665/20 (annulled)
SA.56867 (26.7.2021)	Condor (I, post annulment)	107(2)(b) TFEU	State loan guarantee	175.3	T-366/22 (pending)
SA.63617 (26.7.2021)	Condor (II)	107(2)(b) TFEU	State loan	60	n.d.
SA.63203 (26.7.2021)	Condor	107(3)(c) TFEU	Restructuring and write-off of	110.2	T-28/22 (annulled)

<sup>278</sup> EU General Court, *Ryanair v Commission (TAP II)*, T-743/21, application lodged on 22 November 2021.

<sup>279</sup> On the case-law, see *supra*, p. [48] ff. For an analysis of the pre-pandemic decisions, see: R. VAN DRUENEN, *Permission to bail out EU's national flag carriers? Technocratic and political determinants of commission approval of state aid to national airlines in difficulties in the pre-COVID era*, in *Journal of Public Policy*, vol. 42, 2022, p. 553-572.

<sup>280</sup> EU General Court, *Ryanair v Commission (Condor)*, T-665/20, cit.. In detail, cf. G. STIRLING, *COVID-19 Related State Aid*, cit., p. 157 ff.

<sup>281</sup> EU General Court, *Ryanair v Commission (Condor)*, T-665/20, cit., paras 55-56.

Case no. (decision date)	Beneficiary	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
			debt and interest		
SA.59812 (4.1.2021)	TUI	107(3)(b) TFEU §3.11 TF	Recapitalisation, hybrid loan	1,250	n.d.
TOT.				1,595.5	

It is also worth looking at the case-law involving Alitalia and the Romanian carriers Blue Air and TAROM. The former Italian flag carrier received five injections of aid under Article 107(2)(b) TFEU<sup>282</sup>, all of which were challenged by Ryanair before the General Court: the decisions concerning the first two have recently been upheld<sup>283</sup>.

The Alitalia case is similar to that of TAROM, which was awarded rescue aid before the pandemic broke out<sup>284</sup> as well as damage compensation during the health emergency<sup>285</sup>; the decisions on both these aids were both dismissed in first instance.

Table 9: Pandemic-related aids granted by Italy to Alitalia

Case no. (decision date)	Beneficiary	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
SA.58114 (4.9.2020)	Alitalia (I)	107(2)(b) TFEU	Direct grant	199.45	T-225/21 (rejected)
SA.59188 (29.12.2020)	Alitalia (II)	107(2)(b) TFEU	Direct grant	73.02	T-333/21 (rejected)

<sup>282</sup> Commission, cases SA.58114, SA.59188, SA.61676, SA.62542, SA.63234. For a background on the Alitalia see: A. GIACCO, L. STECCHETTI, *La saga Alitalia e il mantello dello Stato salvatore*, in *Mercato Concorrenza Regole*, n. 2, 2020, p. 305-331, esp. 323 ff.

<sup>283</sup> EU General Court, 18 October 2023, *Ryanair v Commission (Alitalia I)*, T-225/21, EU:T:2023:644; Id., 18 October 2023, *Ryanair v Commission (Alitalia I)*, T-333/21, EU:T:2023:646.

<sup>284</sup> EU General Court, *Wizz Air Hungary v Commission (TAROM)*, T-718/20, cit.

<sup>285</sup> Id., 18 October 2023, *Wizz Air Hungary v Commission (COVID-19; TAROM)*, T-332/21, EU:T:2023:645.

Case no. (decision date)	Beneficiary	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
SA.61676 (26.3.2021)	Alitalia (III)	107(2)(b) TFEU	Direct grant	24.7	n.d.
SA.62542 (12.05.2021)	Alitalia (IV)	107(2)(b) TFEU	Direct grant	12.8	n.d.
SA.63234 (2.7.2021)	Alitalia (V)	107(2)(b) TFEU	Direct grant	39.65	n.d.
TOT.				349.62	

The pandemic aid to Blue Air, though, combined a measure pursuant to Article 107(2)(b) TFEU with a rescue aid<sup>286</sup>. In rejecting the action lodged by Wizz Air, the General Court found the aid to be in line with the objective of ensuring Romanian regional air services<sup>287</sup>. As the rescue aid was based on Article 107(3)(c) TFEU as interpreted by the RR Guidelines, this was deemed appropriate for assessing the aid even in the exceptional circumstances of the pandemic crisis<sup>288</sup>.

Table 10: Pandemic-related aid granted by Romania to TAROM and Blue Air

Case no. (decision date)	Beneficiary	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
SA.56244 (24.02.2020)	TAROM (pre-pandemic rescue)	107(3)(c) TFEU	direct grant	(36.66)	T-718/20 (rejected) C-440/22 (pending)
SA.56810 (2.10.2020)	TAROM (I)	107(2)(b) TFEU	guarantee	19.33	T-332/21 (pending)
SA.63360 (29.4.2022)	TAROM (II)	107(2)(b) TFEU	capital injection	1.9	T-827/22 (pending)

<sup>286</sup> Id., 29 March 2023, *Wizz Air Hungary v Commission (COVID-19; Blue air)*, T-142/21, EU:T:2023:164.

<sup>287</sup> Id., 29 March 2023, *Wizz Air (Blue air)*, T-142/21, cit., para. 82.

<sup>288</sup> Ibidem, paras 132-136.

Case no. (decision date)	Beneficiary	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
SA.59344 (5.7.2021)	TAROM (restructuring)	107(3)(c) TFEU	Debt write-off, capital injection, Direct grant	190.7	n.d.
SA.57026 (20.8.2020)	Blue Air	107(2)(b) and 107(3)(c) TFEU  RR guidelines	Guarantee	62	T-142/21 (rejected)
SA.62829 (17.4.2023)	Blue Air (opening formal inv. procedure)	-	-	-	-

#### 4.4.5 Intra-group dynamics and cumulation of aid

The KLM cases reveal the need to take account of integration achieved in the EU aviation market and, in particular, the presence of groups incorporating two or more former flag carriers, who can be capable of receiving aid from several Member States. Restricting intra-group transfer of funds, as happened with Air-France-KLM, seems less preferable than just setting a ceiling on the funds that the group can receive, regardless of the Member State granting the aid. A measure based on this rationale, which requires some coordination between Member States, passed the General Court's scrutiny in the case concerning the damage compensation granted by Austria to Austrian Airlines (AUA), a carrier belonging to the Lufthansa Group<sup>289</sup>.

In upholding the Commission's decision, the General Court emphasized the co-ordination between the Austrian measure and the aid awarded to the Lufthansa Group by the German Federal Government. This last decision expressly stipulated that the amount of public money granted to the group would be reduced by an amount corresponding to the aid granted by other Member States to Lufthansa's subsidiaries, so as to ensure that the overall amount of financial support would remain unchanged<sup>290</sup>.

Multiple aid measures were also awarded to SAS, involving, as stated above, Denmark and Sweden<sup>291</sup>, who put in place an even closer coordination, as revealed by the fact that the aid measures were notified to the Commission at the same time. In some cases, the Commission carried out a joint assessment, an aspect

<sup>289</sup> See EU General Court, *Ryanair e Laudamotion v Commission (Austrian Airlines; Covid-19)*, T-677/20, cit. and Commission, SA.57539, Austria – COVID-19 - Aid to Austrian Airlines, 6.7.2020, C(2020) 4684 final.

<sup>290</sup> In detail, see EU General Court, *Ryanair (Austrian Airlines; Covid-19)*, T-677/20, cit., esp. para. 37.

<sup>291</sup> See the Austrian airlines and Brussels airlines mentioned above and *supra*, p. [104].

that might explain why the ‘intra-EU cumulation’ was not among the arguments put forward by Ryanair<sup>292</sup>.

## 4.5 Public support and market dominance

### 4.5.1 The Deutsche Lufthansa case

Having strong links with more than one Member State because of its ‘Pan-European’ structure, the Lufthansa group received public support not only from Germany via its parent company Deutsche Lufthansa AG (DLH)<sup>293</sup>, but also from Austria and Belgium<sup>294</sup>. The funds were granted either individually to one of the group’s airlines or through a horizontal scheme, as summarized in the table below.

Table 11: Pandemic-related aid to the Lufthansa group

Member State	Case no. (decision date)	Beneficiary	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
Germany	SA.57153 (25.6.2020)	Lufthansa	107(3)(b) TFEU § 3.11 TF	Equity participation, silent participation, loan guarantee	6,000	T-34/21 and T-87/21 (annulled) C-457/23 (pending)
Germany	SA.56714 (22.3.2020)	Lufthansa	107(3)(b) TFEU	German loan scheme, 90% guarantee	3,000	n.d.
Austria	SA.56981 (17.4.2020)	Austrian Airlines	107(3)(b) TFEU	Austrian loan scheme, 90% guarantee	300	n.d.
Austria	SA.57539 (6.7.2020)	Austrian Airlines	107(2)(b) TFEU	Direct grant	150	T-677/20 (rejected) C-591/21 (pending)
Belgium	SA.57544 (21.8.2020)	Brussels Airlines	107(3)(b) TFEU § 3.3, 3.11 TF	loan with subsidised interest rates	290	T-14/21 (rejected)

<sup>292</sup> Cf. CJEU, *Ryanair (SAS; Sweden)*, C-320/21, cit., paras 49-52.

<sup>293</sup> The Lufthansa Group comprises several airlines, including Lufthansa Passenger Airlines, Brussels Airlines SA/NV, Austrian Airlines AG, Swiss International Air Lines Ltd and Edelweiss Air AG.

<sup>294</sup> See *supra*, p. [75].

Member State	Case no. (decision date)	Beneficiary	Legal basis [TFEU § TF]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
TOT.					9,740	

Among the measures listed, the German aid notified on 12 June 2020 is the most significant in intensity (EUR 6 billion)<sup>295</sup>. Approved according to Article 107(3)b TFEU and to the TF, this aid combined (a) an equity participation (EUR 306 million), (b) a silent participation treated as equity but not convertible into equity («Silent Participation I», EUR 4,694 million)<sup>296</sup> and (c) a silent participation with the features of a convertible debt instrument («Silent Participation II», EUR 1 billion). As mentioned above, the Commission had to assess the impact of this decision («the DLH decision»)<sup>297</sup> while simultaneously appraising the compatibility of the aid awarded to Austrian airlines and to Brussels airlines<sup>298</sup>.

By upholding the two actions brought by Ryanair and Condor, the General Court annulled the DLH decision and declared that the Commission (i) erred in concluding that DLH was unable to obtain financing from capital markets; (ii) did not set out a mechanism incentivizing DLH to buy back shares held by Germany, as required by the Temporary Framework; (iii) relied on insufficient evidence to rule out DLH's significant market power in several airports and accepted inadequate commitments<sup>299</sup>. Each of these points has to be examined together with the relevant provisions of the TF<sup>300</sup>.

As a premise, the General Court deliberated on the scope of its judicial review on the Commission's assessment, distinguishing between complex economic and social aspects, where the review is necessarily circumspect, and other factors, such as strictly legal questions, where this review remains, indeed, comprehensive<sup>301</sup>.

#### 4.5.2 Eligibility for the aid, intensity and State exit

On the merits, DLH's eligibility for the aid is examined under Section 3.11 of the Temporary Framework. To be eligible for recapitalization, the TF *inter alia* requires the beneficiary to be unable «to find financing on the markets at affordable

<sup>295</sup> Commission, SA.57153, Germany – COVID-19 – Aid to Lufthansa, 25 June 2020, C(2020) 4372 final, as corrected by Decision C(2021) 9606 final of 14 December 2021.

<sup>296</sup> A silent participation consists in a capital contribution by an investor who becomes a member of a partnership, but does not play an inactive role in the daily operation and management of the business. On the notion of silent partner, see F. WOOLDRIDGE, *The German Limited and Silent Partnerships*, in *Amicus Curiae*, vol. 80, 2009, p. 29-32.

<sup>297</sup> Commission, SA.57153, cit.

<sup>298</sup> See *supra*, p. [120].

<sup>299</sup> EU General Court, 10 May 2023, *Condor Flugdienst v Commission (Lufthansa; Covid-19)*, T-34/21 and T-87/21, EU:T:2023:248.

<sup>300</sup> In general terms on the aid instruments set out in the TF, see *supra*, p. [81].

<sup>301</sup> EU General Court, *Condor (Lufthansa; Covid-19)*, T-34/21 and T-87/21, cit., para. 78.

terms» or to cover its liquidity needs via horizontal schemes<sup>302</sup>. Due to the *extrema ratio* nature of public recapitalization under the TF<sup>303</sup> and the general principle of proportionality<sup>304</sup>, the condition is not met when private financing is at least partially available<sup>305</sup>.

According to the General Court, the Commission failed to assess this availability, while evidence from the same DLH suggest that the group's fleet – largely unencumbered and with a book value of EUR 10 billion – could have been used as a collateral<sup>306</sup>.

Conversely, the GC rejects the complaint concerning the excessive aid intensity. A literal reading of the relevant provision of the Temporary Framework (§ 54 TF) reveals that the amount of recapitalization

«must be restricted to the minimum needed to ensure that the beneficiary remains operational during and after the COVID-19 pandemic, while restoring the capital structure that it had before that crisis»<sup>307</sup>.

The purpose of the Temporary Framework is not to restore the profitability of the beneficiary, but only to maintain the pre-pandemic *status quo*<sup>308</sup>. This approach on aid intensity is more favourable than one adopted by the Commission in the context of 2008 financial crisis and in the RR guidelines, but is justifiable under the different nature of the crisis<sup>309</sup>. In the latter cases, in fact, the beneficiary played a role in the causes of the financial distress, respectively at a sectoral level (as a banking institution) or individually (for its market strategies)<sup>310</sup>.

The second argument upheld by the General Court (*sub ii*) concerned the lack of a step-up mechanism incentivizing DLH to quickly buy back the shares held by German Government after recapitalization. Because of its derogatory nature, the TF is once again strictly interpreted; therefore, the absence of step-up mechanism cannot be compensated by considering the 'overall structure' of the measure as an alleged 'alternative' mechanism<sup>311</sup>.

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<sup>302</sup> TF, cit., para. 49(c).

<sup>303</sup> Cf. TF, cit., paras 44-45.

<sup>304</sup> EU General Court, T-34/21 and T-87/21, cit., para. 130. Interestingly, by referring to para. 44 TF, the General Court recalls the *HH Ferries* judgment: CJEU, *HH Ferries*, cit., para. 144.

<sup>305</sup> EU General Court, T-34/21 and T-87/21, cit., para. 128.

<sup>306</sup> *Ibidem*, paras 132 and 134; the latter paragraph refers to a statement made by DLH's Chief Financial Officer at the beginning of the pandemic emergency (19 March 2020).

<sup>307</sup> EU General Court, T-34/21 and T-87/21, cit., para. 158.

<sup>308</sup> EU General Court, T-34/21 and T-87/21, cit., paras 155-157 recalling the wording of § 54 TF as well as §§ 9 and 11 TF.

<sup>309</sup> EU General Court, T-34/21 and T-87/21, cit., para. 158.

<sup>310</sup> *Ibidem*, paras 160-161.

<sup>311</sup> *Ibidem*, paras 248-251.

### 4.5.3 Assessing Significant Market Power

Regarding the undue distortions of competition (*sub iii*), the General Court criticized the Commission's assessment both on Significant Market Power (SMP) and on the commitments proposed by DLH<sup>312</sup>.

Notably, the notion of SMP is not defined by the Temporary Framework, whose § 72 only refers to 'additional measures' to be put in place where the firm has «significant market power on at least one of the relevant markets in which it operates»<sup>313</sup>. Nevertheless, a legislative definition of SMP is provided for by the European Electronic Communications Code (EECC, Directive (EU) 2018/1972)<sup>314</sup>. According to the EECC, a firm has a SMP when, either individually or jointly with others,

«[it] enjoys a position equivalent to dominance, namely a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers»<sup>315</sup>.

An analogy with the above, the notion of significant market power within § 72 TF was deemed «equivalent to that of a dominant position under competition law»<sup>316</sup>. In any case, the existence of SMP must be referred to the moment when the aid is notified and not to the future market position of the beneficiary after the funding is granted<sup>317</sup>.

The reference to competition law allows the General Court to verify the Commission's assessment under the indicators established by its case-law on market dominance; the most relevant among them are the market shares held by the beneficiary and its competitors and the existence of barriers to entry and to expansion<sup>318</sup>.

Preliminarily, the General Court endorses the definition of the relevant market carried out according to an 'airport-by-airport' approach<sup>319</sup>. On the one hand, the TF does not require a specific method for defining the relevant markets<sup>320</sup>. On the other hand, the measure is unrelated to specific routes, so the

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<sup>312</sup> EU General Court, T-34/21 and T-87/21, cit., paras 365 ff.

<sup>313</sup> TF, cit., para. 72. See EU General Court, T-34/21 and T-87/21, cit., paras 364. The additional measures are modelled on structural and behavioural commitments applied in merger control procedures.

<sup>314</sup> Article 63(2), Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ L 321, 17.12.2018, p. 36–214 («EECC»).

<sup>315</sup> TF, cit., para. 72. See EU General Court, T-34/21 and T-87/21, cit., para. 366. See also recital no. 161 EECC, cit. according to which the notion of SMP is intended to be «equivalent to the concept of dominance as defined in the case-law of the Court of Justice».

<sup>316</sup> EU General Court, T-34/21 and T-87/21, cit., para. 368.

<sup>317</sup> *Ibidem*, para. 371, specifying that «the assessment of the existence of SMP is not by nature forward-looking».

<sup>318</sup> *Ibidem*, paras 370 ff., esp. para. 385.

<sup>319</sup> *Ibidem*, paras 308 ff.

<sup>320</sup> TF, cit., para. 72.

Origin and Destination (O&D) approach, traditionally followed in merger control, is deemed less useful<sup>321</sup>.

That said, the GC found a manifest error in the Commission's assessment of the market power, as it relied on a single factor, i.e., the barrier to entry and to expansion consisting of the slots held in congested airports by DLH and its competitors, while ignoring other relevant indicators such as their respective market shares<sup>322</sup>.

#### 4.5.4 The adequacy of structural commitments

Lastly, pursuant to § 72 TF, the structural commitments imposed to DLH have to be examined in light of the Notice on remedies<sup>323</sup>. Once again, as the latter guidance was designed for merger control, it must be interpreted according to the specific features of State aid law and, particularly, of the TF<sup>324</sup>. In the General Court's words

«Given that the objective of the aid granted under that framework is, in essence, to ensure the operational continuity of viable undertakings during the COVID-19 pandemic, the commitments under [§ 72 TF] must be designed so as to ensure that, after the aid has been granted, the beneficiary will not become more powerful on the market than it was before the COVID-19 outbreak and that effective competition on the markets concerned will be maintained»<sup>325</sup>.

Therefore, some features of the slot divestiture<sup>326</sup>, namely the exclusion of the competitors already based in the relevant airports in the first stages of the procedure<sup>327</sup> and the remuneration required for the slot divested<sup>328</sup> was deemed inadequate by the General Court.

As a result, the GC annulled the decision in question. This ruling offers interesting points of comparison with other measures recently scrutinized by European Union Courts.

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<sup>321</sup> Ibidem, paras 317-319.

<sup>322</sup> Ibidem, para. 386. Moreover, the GC concluded that on the basis of the slot criteria alone, the Commission could not properly rule out that DLH held a SMP at Düsseldorf and Vienna Airport (ibidem, paras 401 ff.).

<sup>323</sup> EU General Court, T-34/21 and T-87/21, cit., paras 115 ff. Cf. Commission, Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1–27.

<sup>324</sup> EU General Court, T-34/21 and T-87/21, cit., para. 421.

<sup>325</sup> Ibidem.

<sup>326</sup> In terms of judicial review, the GC recalls that albeit having the Commission a margin of discretion with regard to economic matters, that does not imply the EU Courts must refrain from reviewing the Commission's interpretation of information of an economic nature (EU General Court, T-34/21 and T-87/21, cit., para. 423).

<sup>327</sup> EU General Court, T-34/21 and T-87/21, cit., paras 467-480.

<sup>328</sup> Ibidem, paras 494-502.

#### 4.5.5 Comparisons with other public capital injections in favour of airlines affected by the pandemic

Contrary to the *KLM I* and *TAP rescue I* cases, no suspension of effects was granted by the General Court<sup>329</sup>. As Lufthansa had already bought back the shares held by the government, recovery of the aid is not an issue<sup>330</sup>; however, if the Court of Justice dismisses the appeal currently pending<sup>331</sup>, competing airlines might bring private enforcement actions against DLH in order to seek damage compensation for the unlawful aid granted<sup>332</sup>.

The interpretation of § 49 TF held by the General Court in *Deutsche Lufthansa* is confirmed by the recent *Brussels airlines* ruling, where the GC examined not only the impossibility of obtaining finance on the market (§ 49, letter *c*), but also the notions of «serious difficulties» suffered by the beneficiary (letter *a*) and «the common interest to intervene» due to its systemic importance (letter *b*)<sup>333</sup>. In this case, however, the GC upholds the Commission's view: unlike DLH, Brussels airlines gave guarantees for a subsidized loan and did not have its own aircraft to use as a collateral for a recapitalization<sup>334</sup>. In more general terms, the GC pointed to the difficulties in investing in the aviation sector during the pandemic<sup>335</sup>. Moreover, since there was no detailed financial comparison, the mere fact that other airlines were able to survive by relying on private capital only cannot put this reasoning into question<sup>336</sup>.

Regarding the notion of a significant market power, the *Deutsche Lufthansa* ruling establishes a straightforward equivalence to that of dominant position. However, the General Court did not investigate the reasons why the Commission decided in the TF not to refer to dominance in the first place. A literal reading suggests that a firm might have a market power that, albeit being 'significant', does not entail a full dominance. Therefore, the threshold for establishing a SMP should be lower than the one to ascertain a dominant position.

While in the words of the European Electronic Communications Code, a firm with significant market power «enjoys a position *equivalent* to dominance»<sup>337</sup>, in the context of the TF, a SMP should be held *at least* by dominant firms. Similarly, it is worth noting the different purposes of the two provisions: the EECC imposes *ad hoc* regulatory framework obligations to telecommunication firms with a SMP in order to prevent any future antitrust infringements, while the TF requires firms

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<sup>329</sup> See *supra*, p. [115].

<sup>330</sup> Cf. A. LEPIÈCE, *State aid: following appeals by Ryanair, the General Court of the EU annuls the Commission's decisions approving aid for SAS, Deutsche Lufthansa and Italian airlines*, in *CMS-Law blog*, 1 June 2023.

<sup>331</sup> CJEU, *Deutsche Lufthansa v Ryanair and Others*, C-457/23, appeal lodged on 20 July 2023.

<sup>332</sup> As it will be discussed *infra*, p. [134], proving such a damage might result a difficult exercise. On the topic, see F. PASTOR-MERCHANTE, *The European Perspective*, in F. WOLLENSCHLÄGER, W. WURMNEST, T. M.J. MÖLLERS (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward*, Alphen aan den Rijn, 2020, p. 197-215.

<sup>333</sup> EU General Court, T-14/21, cit., paras 77 ff.

<sup>334</sup> EU General Court, T-14/21, cit., para. 106.

<sup>335</sup> *Ibidem*, para. 107.

<sup>336</sup> EU General Court, T-14/21, cit., para. 109.

<sup>337</sup> Article 63(2) Directive (EU) 2018/1972, EECC, cit. (emphasis added).

with SMP to undertake commitments to avoid a further consolidation of market power through government subsidies.

In more general terms, referring to SMP instead of dominance reflects a gradual departure from the latter notion due to the evolution of the economic background. This is shown especially in digital markets where judges have to deal with concepts such as those of gatekeeper<sup>338</sup>, firm of paramount significance for competition across markets<sup>339</sup> and super-dominance<sup>340</sup>, all of which, however, set a higher threshold than the mere dominant position<sup>341</sup>.

The proposed distinction between SMP and dominance would not have impacted on the outcome of the *Deutsche Lufthansa* case, where the General Court found, in essence, the dominant position of DLH in several airports. An *obiter dictum* in that sense would have been beneficial for the further elaboration of the Commission's practice. Nevertheless, in the recent *AirBaltic* ruling, the General Court, albeit dismissing Ryanair's action, confirmed its approach on significant market power<sup>342</sup> as well as the market definition according to the 'airport-by-airport' method<sup>343</sup>.

Finally, a sensitive point emerging from the *Deutsche Lufthansa* is how and when the State exits from its participation in the beneficiary's capital. In this regard, comparisons can be made with the *SAS recapitalization* and *Finnair II* cases. In the first case, the General Court annulled the Commission's decision because there was no step-up mechanism as required by the TF<sup>344</sup>; this circumstance invalidated the two tightly interconnected measures adopted by Denmark and Sweden<sup>345</sup>. In *Finnair II*, instead, the recapitalization was notified and approved before the relevant TF amendments<sup>346</sup>. As a result, albeit diverging with many of the

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<sup>338</sup> Article 3(1) of the Digital Markets Act (DMA): Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265, 12.10.2022, p. 1–66.

<sup>339</sup> See Section 19(a) of the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB), as introduced by the GWB-Digitalisierungsgesetz, 18 Jan. 2021, Bundesgesetzblatt 2021:I:1. On the topic see T. WECK, *The New Abuse Rules in the German Competition Act – What's in it for the EU?*, in CPI, Apr. 2020, <https://www.competitionpolicyinternational.com/the-new-abuse-rules-in-the-german-competition-act-whats-in-it-for-the-eu/>; B. FERRI, *The new German Competition Law tackling online platform supremacy – an attempt of balancing authoritative flexibility and legal certainty*, in *Media Laws*, 11 Jan. 2021, <http://www.medialaws.eu/the-new-german-competition-law-tackling-online-platform-supremacy-an-attempt-of-balancing-authoritative-flexibility-and-legal-certainty/>.

<sup>340</sup> See EU General Court, 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763, para. 179.

<sup>341</sup> For further remarks on this topic, please refer to M. BARBANO, *Verso un antitrust italiano 4.0? I GAFAM e i big data all'esame dell'AGCM*, in *Diritto del Commercio Internazionale*, 2021, p. 957-987.

<sup>342</sup> EU General Court, 18 October, *Ryanair v Commission (airBaltic; COVID-19)*, T-737/20, EU:T:2023:641, paras 185 ff.

<sup>343</sup> EU General Court, T-737/20, cit., paras 204 ff.

<sup>344</sup> EU General Court, 10 May 2023, *Ryanair v Commission (SAS II; COVID-19)*, T-238/21, EU:T:2023:247, paras 49 ff.

<sup>345</sup> *Ibidem*, para. 85.

<sup>346</sup> Commission, SA.57410, Finland - COVID-19: Recapitalisation of Finnair, 9.6.2020, C(2020) 3970 final.

safeguards then introduced in the TF, the General Court nevertheless upheld the assessment carried out by the Commission under Article 107(3)(b) TFEU<sup>347</sup>.

To conclude the analysis of the pandemic case-law, it is worth considering its ‘green’ dimension, as it has significant long-term implications.

### 5. State aid and environmental commitments: the case of ‘green obligations’ in airline bailouts

As previously mentioned in Part I, the pandemic was seen as a potential opportunity and catalyst for decarbonizing aviation, because of its disruptive impact on its business model<sup>348</sup>.

In absence of specific indications in the Temporary Framework and other Commission’s guidance documents<sup>349</sup>, while the majority of the decisions did not provide for environmental commitments<sup>350</sup>, several Member States have decided to make their financial support conditional on so-called ‘green obligations’. Some examples can be found in the table below.

Table 12: Examples of ‘green obligations’ in pandemic airline bailouts

Member State	Case no. (decision date)	Beneficiary	‘Green obligations’ (relevant §§ of the decision)
Germany	SA.57153 (25.6.2020)	Lufthansa (DLH)	<u>Reporting</u> : DLH is required to publish information on «how DLH is contributing the Union’s economy-wide objective of climate neutrality by 2050, including through this aid and in its public advocacy activities» (§ 79)
Austria	SA.57539 (6.7.2020)	Austrian Airlines (AUA)	<u>Investments</u> : «AUA is required to invest an amount equivalent to the equity injection by Deutsche Lufthansa AG in climate and noise efficient technologies by 2030» (§ 50)  <u>Short-haul flights</u> : «AUA has committed to move short-haul domestic flights to rail travel if an adequate rail infrastructure exists and Vienna airport can be reached in less

<sup>347</sup> EU General Court, 22 June 2022, *Ryanair v Commission (Finnair II; Covid-19)*, T-657/20, EU:T:2022:390, paras 61 ff.

<sup>348</sup> See *supra*, Part I, pp. [27] ff. and [69] ff. as well as F. MUNARI, *Lifting the veil: COVID-19 and the need to re-consider airline regulation*, in *European Papers*, no. 5, 2020, p. 533-559, J. WATTS, *Is the Covid-19 crisis the catalyst for greening the world's airlines?*, *The Guardian*, 17 May 2020.

<sup>349</sup> See *supra*, Part I, pp. [81] ff.

<sup>350</sup> Cf. Transport & Environment, *Bailout tracker*, 9 Apr. 2021, [www.transportenvironment.org/challenges/planes/subsidies-in-aviation/bailout-tracker/](http://www.transportenvironment.org/challenges/planes/subsidies-in-aviation/bailout-tracker/). For a comparison with US relief measures, see E. HOLDEN, *\$2bn US coronavirus relief comes without climate stipulations*, in *The Guardian*, 26 Mar. 2020, [www.theguardian.com/us-news/2020/mar/26/us-coronavirus-relief-package-airlines-fossil-fuel-companies-climate](http://www.theguardian.com/us-news/2020/mar/26/us-coronavirus-relief-package-airlines-fossil-fuel-companies-climate).

Member State	Case no. (decision date)	Beneficiary	'Green obligations' (relevant §§ of the decision)
			than 3 hours directly by train» (§ 50, nt. 34) <sup>351</sup>
France	SA.57082 (4.5.2020)	Air France (AF)	<p><u>Restructuring</u>: «Les autorités françaises précisent que ce plan devra intégrer [...] des réseaux pour assurer sa soutenabilité économique et opérationnelle dans le nouvel environnement du secteur pour les années à venir» (§ 11)</p> <p><u>Short-haul flights</u>: stop operations on Orly-Bordeaux, Orly-Lyon and Orly-Nantes routes<sup>352</sup></p>
France	SA.59913 (5.4.2021)	Air France (AF)	<p><u>Reporting</u>: AF is required to publish information «on how the Beneficiary's use of the aid received supports its 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» (§107.b)</p>
The Netherlands	SA.57116 (13.7.2020)	Koninklijke Luchtvaart Maatschappij (KLM)	<p><u>Carbon footprint targets</u>: reduce the CO2 emission per passenger kilometre by 50 % in 2030 compared to 2005 (§ 46)</p> <p><u>Sustainable aviation fuel</u>: participate in the first Dutch sustainable aviation fuel factory; use a minimum of 14 % of sustainable aviation fuel in 2030 (§ 46)</p> <p><u>Environmental initiatives</u>: action plan on ultra-fine particles; action program on nitrogen (§ 46)</p> <p><u>Airport congestion</u>: «substantial reduction of the total number of flights at Schiphol airport to a maximum of 25,000» (§ 46)</p> <p><u>Monitoring</u>: «appointment of a State agent at KLM, who will be responsible for</p>

<sup>351</sup> Cf. also the 2020 amendment to the Austrian Air Transport Levy (ATL), setting a minimum air ticket price on flights less than 350 km in order «minimise the social, and environmental impact of the airline industry» (G. MARTIN, *Austria introduces minimum air fare*, in *Ch-Aviation*, 16 June 2020, <https://www.ch-aviation.com/news/91957-austria-introduces-minimum-air-fare>).

<sup>352</sup> Cf. para. 41, nt. 18 of Commission Implementing Decision (EU) 2022/2358 of 1 December 2022 on the French measure establishing a limitation on the exercise of traffic rights due to serious environmental problems, pursuant to Article 20 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council, OJ L 311, 2.12.2022, p. 168–175.

Member State	Case no. (decision date)	Beneficiary	'Green obligations' (relevant §§ of the decision)
			monitoring KLM's compliance with the different commitments» (§ 49).

First of all, despite the large media coverage given to environmental commitments, only the KLM decision provides for clear and measurable targets, addressing not only the overall carbon footprint of the airline, but also setting a minimum target for Sustainable Aviation Fuel usage, thus anticipating the approach of the ReFuelEU Aviation Regulation<sup>353</sup>.

On the contrary, most of the 'green obligations' are just reporting duties concerning the aid monitoring phase. Furthermore, such a monitoring is affected by a general lack of transparency, because none of these reports is published together with the State aid decisions on the Commission's website. In comparison, the approach adopted for slot divestures and other non-environmental commitments seems preferable<sup>354</sup>, whereas the appointment of a State agent as a compliance auditor seems a second-best alternative due to risks of a regulatory capture<sup>355</sup>.

Secondly, both Austria and France imposed a reduction of short-haul flights on aid beneficiaries. Interestingly enough, in case of France, this obligation is not formally mentioned in the decision's text, albeit being negotiated together with the award of the aid<sup>356</sup>.

France has later adopted a general ban on short-haul flights for destinations that can be reached by train in less than two hours and a half (the so-called 'French ban')<sup>357</sup>. In fact, according to Regulation (EC) 1008/2008, in case of «serious environmental problems» a Member State may «limit or refuse the exercise of traffic rights, in particular when other modes of transport provide appropriate levels of service»<sup>358</sup>. However, due to its impact on the internal aviation market, such a measure must fulfil the following conditions, to be assessed by the Commission<sup>359</sup>, namely (i) being non-discriminatory nor distorting airline

<sup>353</sup> Regulation (EU) 2023/2405 of the European Parliament and of the Council of 18 October 2023 on ensuring a level playing field for sustainable air transport.

<sup>354</sup> Cf. *ex multis*, Commission, SA.57153, Lufthansa, cit., paras 65-75, Id., SA.57153, Germany – COVID-19 – Aid to Lufthansa – Evaluation, pursuant to the competition remedies, of the formal bid submitted by MHS Aviation, 5.11.2020, C(2020) 7743 final as well as TAP: Id., SA.60165, Aid which Portugal is planning to implement for TAP SGPS, 21.12.2021, cit.

<sup>355</sup> Cf. the solution adopted by the Lufthansa group to consider emission reduction targets are an element of the long-term variable remuneration of the Executive Board: Lufthansa Group, Annual Report 2022, p. 101.

<sup>356</sup> Cf. *supra*, nt. [352].

<sup>357</sup> Cf. Article 145 Loi Climat: Loi no 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets, in JORF, 24.8.2021.

<sup>358</sup> Article 20(1) Regulation (EC) 1008/2008, cit.

<sup>359</sup> Cf. the stand-still clause in Article 20(2) Regulation (EC) 1008/2008, cit.

competition; (ii) being no more restrictive than necessary; (iii) having a limited period of validity (i.e., not exceeding three years, after which it can be reviewed)<sup>360</sup>.

In its appraisal of the measure, the Commission stressed the need to avoid discrimination between air carriers, and thus rejected the derogations envisaged by France that would have exempted connecting passengers, stating that

«such derogations would, regardless of the proportion of connecting passengers being considered, have constituted *de facto* discrimination and would have led to a distortion of competition to the detriment of existing or potential point-to-point air carriers whose business model is not focused on connecting passengers»<sup>361</sup>.

The reasoning above has implications also for the design of future environmental commitments, as the latter apply only to the beneficiaries of the aid.

It is worth noting, however, that short-haul flights such as those tackled by the measures above have limited impact on overall aviation emissions<sup>362</sup>. Interestingly, the airport capacity limitation imposed by the Dutch government to KLM, though justified by noise pollution reduction, might have a bigger impact on emissions as it also applies to long-haul routes<sup>363</sup>. However, further regulatory interventions in this sense should be calibrated considering many factors, such as the alternatives available to travellers and the efficiency gains achieved in the hub airport<sup>364</sup>.

Once again, a thorough analysis of the market seems to be a necessary prerequisite for any regulatory intervention.

## 6. Concluding remarks

Conclusively, some overall remarks on the case-law examined in this Part can be made.

From a procedural standpoint, two contrasting issues emerge: on the one hand, EU Courts reaffirm the Commission's duty to state reasons, while, on the

<sup>360</sup> Article 20(1) Regulation (EC) 1008/2008, cit.

<sup>361</sup> Commission Implementing Decision (EU) 2022/2358, cit., para. 32.

<sup>362</sup> Short-haul flights (i.e., less than 500 km), albeit being more carbon-intensive (on average 110 g CO<sub>2</sub>/revenue passenger kilometres - RPK, or about 35% higher than the medium-haul average), account for 5.9% of aviation fuel burnt, while flights longer than 4000 km account for 47% of aviation fuel burnt: see ICAO, CO<sub>2</sub> Emissions from Commercial Aviation - 2018, A40-WP/560, 10.9.2019, Appendix A, p. 12; F. DOBRUSZKES, G. MATTIOLI, L. MATHIEU, *Banning super short-haul flights: Environmental evidence or political turbulence?*, in *Journal of Transport Geography*, vol. 104, 2022, Article 103457.

<sup>363</sup> On the Schiphol airport 'saga', see T. ARAS, *Airlines versus the State's Schiphol Agenda*, in *Leiden Law Blog*, 6 April 2023; L. VAN HOUTEN, G. BURGHOUWT, *The fight for airport slots: the case of Amsterdam Airport Schiphol*, in R. MACÁRIO, E. VAN DE VOORDE (eds), *Contemporary Issues in Air Transport*, New York, 2022, pp. 171 ff.; N. BUSSING, *Challenging the 'Balanced Approach to Aircraft Noise Management' Principle: Will the Dutch Approach Stand or Will the Principle Prevail?*, in *Air & Space Law*, vol. 49, 2024, pp. 1-34. In Italy, see also the case of the reduction of night flights at Ciampino airport: Consiglio di Stato, 31 January 2022, no. 3239 and, recently, T.A.R. Lazio Roma, 14 February 2024, no. 3030, both in *Onelegale* online database.

<sup>364</sup> Indirect effects, such as the preventing the creation of air services for point-to-point traffic from the airport hub served by high-speed railway, cannot be overlooked too. Cf. Commission Implementing Decision (EU) 2022/2358, cit., para. 45.

other, they circumscribe the scope of its appraisal (i.e., examining less distortive alternatives to the notified aid and weighing its positive and negative effects). This position reflects a compromise between procedural guarantees and emergency needs, which – at least in a short-term perspective – seems reasonable<sup>365</sup>. This approach seems applicable also to future litigation on the aid granted in the aftermath of the war in Ukraine<sup>366</sup>.

Focusing on the passenger air transport market, the policy underpinning the pandemic aid to airlines leaves room for criticism, also supported by several annulment rulings such as *Deutsche Lufthansa*<sup>367</sup>, and, more recently, *Air France*, *Air France-KLM* and *KLM II* judgements<sup>368</sup>.

First of all, distortion of the internal aviation market seems an inevitable risk, as aid schemes limited to national carriers and, even more, individual aid to former flag carriers increased the market power of the latter, thus going against the cross-border spirit of the liberalization era.

Secondly, there is too little consideration for the decarbonisation challenges currently facing the airline industry. Apart from the aid given to the Air France-KLM and Lufthansa groups, most of the pandemic aid measures ignore any environmental commitments<sup>369</sup>.

Since the air transport market has a global dimension, the effects of pandemic aid on the EU external aviation policy cannot be overlooked. As discussed in Part I, Regulation (EU) No. 712/2019 and the Foreign Subsidies Regulation aim to ensure fairer competition between EU and non-EU carriers<sup>370</sup>. Hence, the more flexible approach – inaugurated with the pandemic – seems to make it harder for the EU to stigmatise third countries' support to their 'national champions', with potentially negative consequences on CORSIA implementation and other multilateral negotiations<sup>371</sup>.

To sum up, this study of the airline case-law shows that achieving an effective level playing field depends on better understanding the relationship between State aid law and industrial policy, as shown in the conclusions below.

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<sup>365</sup> The pandemic, together with those the war in Ukraine and the implementation of the Recovery and Resilience Facility resulted in an increased workload for DG COMP: C. MCMAHON, *State Aid Junkies*, cit., p. 257; G. BRUZZONE, F. BELLO, *La velocizzazione dell'esame delle notifiche: sfide per la Commissione e le autorità nazionali*, in M. SEBASTIANI ET AL. (eds), *Rapporto Sipotra 2023*, forthcoming.

<sup>366</sup> In the case of Finland, the aid scheme drawn up to cope with the effects of the war in Ukraine expressly provides for cumulation with the individual aid granted to Finnair during the pandemic (SA.56809): Commission, SA.103386, Finland TCF: Guarantee and subsidised loan scheme, 15 July 2022, C(2022) 5134 final, para. 23.

<sup>367</sup> See *supra*, Part. II, p. [120] ff.

<sup>368</sup> See *supra*, Part. II, p. [129] ff.

<sup>369</sup> See *supra*, Part. II, p. [128] ff.

<sup>370</sup> See *supra*, Part. I, p. [66] ff.

<sup>371</sup> See *supra*, Part. I, p. [32] ff.

## Conclusions – Future horizons of State aid control: lessons learned from the case study of aviation industry

SUMMARY: 1. The pandemic case-law in a wider frame: possible implications for the evolution of State aid law – 2. Adding the environmental perspective to State aid control – 3. Proposals for a more effective State aid control in times of crisis, in view of a future EU industrial policy

### 1. The pandemic case-law in a wider frame: possible implications for the evolution of State aid law

The appraisal of the pandemic-related practice in previous Part II confirms that we are still far from having a level playing field within the EU internal aviation market. Albeit contributing to an outstanding market growth, the liberalization has not led to airlines' greater financial stability nor has it helped sever the financial and political ties between Member States and their former flag carriers<sup>1</sup>. This relationship came back to the forefront during the pandemic and the allocation of financial aid to Member States points to increased market fragmentation in the aftermath of COVID-19<sup>2</sup>.

The scrutiny of the so-called Ryanair cases before EU Courts allows some general remarks on the evolution of State aid law.

First of all, interested parties, such as competitors, play an important role in State aid procedure. So far, their role had mostly been limited to the phases before and after the Commission's appraisal – namely, by submitting complaints to DG Comp or by seeking damage compensation against the recipient of unlawful aid. Undoubtedly, the Ryanair cases shed light on the competitors' right to challenge decisions approving State aid, that should encourage more effective judicial reviews regarding the public enforcer's actions.

In addition, the pandemic case-law may further stimulate the private enforcement of State aid law. The General Court's Lufthansa, SAS and, more recently Air France, Air-France-KLM and KLM II annulment rulings<sup>3</sup> may encourage their competitors to seek damage compensation in national courts<sup>4</sup>. These actions could be modelled on follow-on litigation in private antitrust enforcement. However, the burden of proof on the harm suffered might be difficult for the competitor to meet. Despite the absence of a common framework

<sup>1</sup> Cf. *supra*, Part I, p. [23] ff. and Part. II, p. [68] ff.

<sup>2</sup> See *supra*, Part II, p. [74] ff. In the same vein, see also S. HOLTAN LAKSÅ, *Proportionality of the Sectoral Application of the Covid-19 Temporary Framework*, in *European State Aid Law Quarterly*, no. 4, 2023, p. 356-370, esp. 362-364.

<sup>3</sup> See *supra*, Part II, pp. [119] ff., and EU General Court, 20 December 2023, *Ryanair and Malta Air v Commission (Air France-KLM; COVID-19)*, T-494/21, EU:T:2023:831; Id., 20 December 2023, *Ryanair and Malta Air v Commission (Air France; COVID-19)*, T-216/21, EU:T:2023:822; Id., 7 February 2024, *Ryanair v Commission (KLM II; COVID-19)*, T-146/22, EU:T:2024:68.

<sup>4</sup> See Commission, Notice on the enforcement of State aid rules by national courts, Communication 2021/C 305/01.

similar to the Damages Directive 2014/104/EU<sup>5</sup>, the abundant CJEU's case-law on private antitrust enforcement seems applicable in analogy to its State aid law counterpart<sup>6</sup>.

From the substantive law perspective, the pandemic case-law stimulates further appraisal of the notion of aid selectivity. The Court of Justice confirms that a difference in treatment among firms operating in the same sector is allowed when supported by an objective justification. Since such margin of discretion enjoyed by Member States eventually translates into supporting 'national champions', a different interpretation is needed. As shown by the cases on pandemic aid schemes, EU Courts should distinguish mere selectivity, which is inherent in every aid, from discrimination, to be deemed going beyond the scope of Article 107(2)-(3) TFEU's exemptions<sup>7</sup>.

In order to be exempted from State aid prohibition, i.e., objectively justified, a measure must be necessary and proportionate to its goal. In carrying out this test, however, the Commission should set a stricter or looser benchmark depending on the market scenario and level of integration.

Therefore, if the market access is harmonized at EU level and firms compete on a trans-national basis, then aid eligibility criteria based on nationality should hardly be necessary and proportionate to the alleged objective. Counter-arguments stating national interest, such as those concerning domestic air connectivity, cannot change this conclusion: preferring State interest over the Union one means altering the foundation of State aid prohibition and its – limited – exemptions.

Nevertheless, the Court of Justice endorsed a policy that ultimately leaves up to Member States to define which firms are eligible for aid within the same relevant market<sup>8</sup>. As far as damage compensation is concerned, even individual aid is allowed, as showed by the outcome of SAS cases<sup>9</sup>.

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<sup>5</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19. For further reference, see M. BERGSTRÖM, M. IACOVIDES, M. STRAND (eds), *Harmonising EU Competition Litigation. The New Directive and Beyond*, London, 2018 as well as F. MUNARI, M. BARBANO, *La Direttiva Damages: dalle origini del sistema europeo di private antitrust enforcement alla Dir. 104/2014*, in L.F. PACE (ed.), *Dizionario Sistematico del Diritto della Concorrenza*, 2<sup>nd</sup> ed., Milan, 2020, p. 357-371.

<sup>6</sup> Cf. C. CELLERINO, *Le azioni nei confronti del beneficiario di aiuti di Stato e i limiti all'effetto diretto "orizzontale" dell'art. 108.3 TFEU: problemi e spunti dalla recente giurisprudenza nazionale*, in *Diritto del Commercio Internazionale*, 2015, p. 1124-1145.

<sup>7</sup> This reasoning has been further elaborated by P. NICOLAIDES, *The Court of Justice Allows Member States to Compensate the Undertaking of their Choice: a Critique*, in *European State Aid Law Quarterly*, no. 4, 2023, p. 371-380.

<sup>8</sup> See CJEU, 23 November 2023, *Ryanair v Commission (Sweden; COVID-19)*, C-209/21, EU:C:2023:905 and Id., 23 November 2023, *Ryanair v Commission (France; COVID-19)*, C-210/21, EU:C:2023:908.

<sup>9</sup> See CJEU, 28 September 2023, *Ryanair v Commission (SAS; Sweden)*, C-320/21, EU:C:2023:712; Id., 28 September 2023, *Ryanair v Commission (SAS; Denmark)*, C-321/21, EU:C:2023:713, as examined *supra*, part. II, pp. [103] ff.

Market integration and nationality are also important when the same corporate group can benefit from aid measures awarded by more than one Member State. In the ruling on individual aid to SAS, the CJEU stated that a single economic unit can benefit from aid granted by more than one Member State, provided that there is no cumulation (namely, compensation for the same damage)<sup>10</sup>. However, only closer coordination between Member States on aid allocation may reduce the risks of distortions within the EU market. This thinking, first emerged in the *Austrian Airlines* case<sup>11</sup>, has been then founded on the duty of sincere cooperation enshrined in Article 4(3) TEU<sup>12</sup>, as shown by the recent judgements on the aid awarded to the Air France-KLM group<sup>13</sup>. In any case, this *modus operandi* has yet to be translated into a best practice<sup>14</sup>.

The distinction between selectivity and discrimination does not change – and is, indeed, crucial – for State aid designed to alleviate market shocks. In a crisis scenario, in fact, the much-needed flexibility does not mean a *de facto* suspension of State aid control, which is a statement that has been repeated over time by the Commission and later confirmed by EU Courts<sup>15</sup>.

However, elaborating on the substantive State aid law is pointless without further advancements on its procedural dimension. In this regard, the scope of the Commission’s duty to state reasons when assessing aid compatibility has been thoroughly examined in the pandemic case-law.

First of all, the General Court acknowledges that the Commission’s duty to state reasons cannot be watered down by the contingencies of a market shock.

As practical solutions are needed in times of crisis, accepting reference to general reasons already provided by temporary frameworks and other guidance documents prevents delays in the Commission’s decision-making. This urgency, however, does not relieve the Commission from verifying that the facts in each notified measure correspond to those broad categories.

In this vein, requiring the Commission to weighing up positive and negative effects of aid notified under Articles 107(2)(b) and 107(3)(b) TFEU, albeit ruled out by the General Court, might help to minimize abuses of State aid flexibility as well as distortions to the internal market. Combining the reasons stated in the Temporary Framework with a thorough factual analysis of the case,

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<sup>10</sup> See CJEU, *Ryanair (SAS; Sweden)*, C-320/21, cit.; Id., *Ryanair (SAS; Denmark)*, C-321/21, cit.

<sup>11</sup> See EU General Court, 14 July 2021, *Ryanair and Laudamotion v Commission (Austrian Airlines; Covid-19)*, T-677/20, EU:T:2021:465.

<sup>12</sup> See EU General Court, T-494/21, cit., para. 152; Id., T-216/21, cit., para. 168; Id., 7 February 2024, T-146/22, cit., para. 164, all stating that «[the] duty of sincere cooperation and of coordination is all the more necessary where different Member States intend to grant aid simultaneously to entities belonging to the same group of companies which operates in a coordinated manner in the internal market in order to derive full benefit therefrom».

<sup>13</sup> See EU General Court, *Ryanair (Air France-KLM; COVID-19)*, T-494/21, cit.; Id., *Ryanair (Air France; COVID-19)*, T-216/21, cit.; Id., 7 February 2024, *Ryanair (KLM II ; COVID-19)*, T-146/22, cit.

<sup>14</sup> Cf. the proposals *infra*, para. 3, p. [134].

<sup>15</sup> Cf. e.g., EVP Vestager’s remarks at the State aid and tax conference *EU State aid: strong principles, in crisis and in change*, Copenhagen, 20 March 2023, SPEECH/23/1792.

as suggested by AG Pitruzzella, seems well in line with the reasoning underlying Article 296 TFEU<sup>16</sup>.

Moreover, while the State aid assessment envisaged by the Temporary Framework relies heavily on principles embedded in antitrust law, the case-law suggests that more clarity is needed. In fact, the TF requires the Commission (i) to define the relevant market<sup>17</sup>, which is generally overlooked in the compatibility assessment – as confirmed also by the pandemic practice; (ii) to assess the existence of significant market power, which is a notion that, contrary to the recent GC's case-law<sup>18</sup>, seems broader than that of dominant position; (iii) to verify the adequacy of commitments, which, however, have a different scope and purpose to those applied in merger control.

Conversely, when assessing the aid necessity and proportionality and several conditions laid down in the TF, a precise definition of the beneficiary is needed, so the GC advocated for a stricter application of the 'single economic unit' principle<sup>19</sup>.

Finally, the ruling on the Italian scheme highlights the importance for a holistic approach to State aid control that takes compliance into account, not only to State aid rules but also with other areas of EU law. While the EU legislation at stake in this case concerned labour conditions<sup>20</sup>, major implications might ensue in the realm of environmental law.

## 2. Adding the environmental perspective to State aid control

State aid could play a major role in the shift towards a climate neutral economy. As huge investments are required, State intervention might overcome market failures such as the positive externalities concerning the development and roll-out of new technologies<sup>21</sup>.

This issue is addressed in the 'environmental aid' category under the Article 107(3)(c) TFEU, as implemented by EU secondary legislation such as GBER and interpreted by the Commission's CEEAG. However, as mentioned in Part I, due to their cross-subject nature, environmental goals can only be achieved by adopting a holistic approach that, according to the principle of integration, encompasses all EU policy areas, including State aid law.

Therefore, being a 'hard-to-abate' sector where the pursuit of climate targets is extremely complex, the aviation industry offers an interesting perspective for studying the future of State aid law. In fact, when designing public investment

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<sup>16</sup> See *supra*, part II, p. [91].

<sup>17</sup> Cf., recently, Commission, Notice on the definition of the relevant market for the purposes of Union competition law, Communication C/2024/1645, 22.2.2024.

<sup>18</sup> See *supra*, part II, p. [122].

<sup>19</sup> See e.g., EU General Court, T-494/21, cit., paras 149-150.

<sup>20</sup> See *supra*, part II, p. [100] ff.

<sup>21</sup> As discussed *supra*, Part I, p. [31].

measures required by ReFuelEU Aviation<sup>22</sup>, the Net-Zero Industrial Act<sup>23</sup> and the digitalization of ATM<sup>24</sup>, Member States should, first of all, take stock of the principle that aid measures must comply not only with State aid rules but with EU law as a whole, thus including also environmental law. Conversely, a business-as-usual approach to subsidies might reinforce a carbon lock-in effect.

So far, the Commission's practice on pandemic-related aid only makes vague reference to EU green and digital transition objectives. In most cases, the Commission asked Member States to consider these objectives during the monitoring phase, but did not specify how this appraisal should be carried out<sup>25</sup>.

Only a few aid measures provided for more detailed 'green obligations'<sup>26</sup>; these commitments should be designed so as to minimize market distortions. However, the practice reveals quite the opposite: in case of France, the restrictions on short-haul flights were criticized for being designed in a way that favours the beneficiary of the aid, while in the case of Austria, the measure was combined with a minimum price requirement on certain routes, an aspect that raised competition law concerns as well<sup>27</sup>.

Moreover, the recent amendments to the EU ETS regime brought the issue of free allowances back to the policy-maker<sup>28</sup>. In fact, allocating free allowances only to certain airlines or using a different timeline for their phase out is also relevant under State aid law, as it has a direct impact on the operator's cost structure. At the same time, imposing taxes on passengers can help to internalize the environmental costs of aviation, but – in absence of co-ordination – it might further depart from a level playing field<sup>29</sup>.

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<sup>22</sup> See recital no. 46 of Regulation (EU) 2023/2405 of the European Parliament and of the Council of 18 October 2023 on ensuring a level playing field for sustainable air transport.

<sup>23</sup> Commission, Proposal for a regulation of the European Parliament and of the Council on establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem (Net Zero Industry Act), COM(2023) 161, esp. recital no. 41 and 73.

<sup>24</sup> Cf. recital no. 10, Commission Implementing Regulation (EU) 2021/116 of 1 February 2021 on the establishment of the Common Project One supporting the implementation of the European Air Traffic Management Master Plan provided for in Regulation (EC) No 550/2004 of the European Parliament and of the Council, amending Commission Implementing Regulation (EU) No 409/2013 and repealing Commission Implementing Regulation (EU) No 716/2014, OJ L 36, 2.2.2021, p. 10–38.

<sup>25</sup> See e.g., Commission, TF, cit., para. 45.

<sup>26</sup> See e.g., aid given to Lufthansa and Air France, *supra*, part II, p. [80] ff.

<sup>27</sup> See *supra*, part II, p. [128] ff.

<sup>28</sup> Directive (EU) 2023/958 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC as regards aviation's contribution to the Union's economy-wide emission reduction target and the appropriate implementation of a global market-based measure, OJ L 130, 16.5.2023, p. 115–133. On this issue, cf. CJEU, 20 January 2022, *ET, acting as liquidator of Air Berlin PLC & Co. Luftverkehrs KG (AB KG) v Bundesrepublik Deutschland*, C-165/20, EU:C:2022:42. In his Opinion of 23 September 2021, AG Hogan stated that free allowances cannot constitute property rights under Article 17 of the Charter (C-165/20, EU:C:2021:764, para. 78).

<sup>29</sup> Cf. Commission, SA.29064, Ireland — non-application of the Air Travel Tax to transit and transfer passengers, C(2017) 4932. In this policy area, see also the current revision of the Energy Taxation Directive that would reduce taxation exemptions to aviation fuel used in flights within the EU: Commission, Proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity, COM(2021)563 final, 14.7.2021, esp. Articles 14-15 and pp. 15-16.

Therefore, after the ‘pandemic wave’ of State aid litigation, a possible ‘next wave’ of claims might stem from the aid’s environmental implications. For instance, competitors might put into question the fact that certain measures favour one means of transport (e.g., aviation) over less-emitting ones (e.g., high-speed rail), or other aspects related to the technological neutrality of the policy decision.

Hence, in order to avoid that public spending goes in the opposite direction of decarbonization goals and reinforce a carbon lock-in effect, more care needs to be placed both on the *ex ante* and *ex post* perspective of State aid control.

From the *ex ante* perspective, each aid measure should be allowed only after assessing its compatibility with ‘Do Not Significant Harm’ criteria. This appraisal, is already required for Member States’ investments under the Recovery and Resilience Facility and for qualifying private investments under the EU Taxonomy, would ensure a State aid policy coherent with the principle of integration. In fact, this prevents the environmental perspective from remaining confined, as it so far, to measures expressly ‘labelled’ as ‘environmental aid’.

Carrying out a DNSH assessment in State aid proceedings might require additional resources for DG Comp as well as co-ordination with other DGs<sup>30</sup>, such as DG Envi, DG Clima and other operating in the relevant sector (e.g., DG Move for aviation). Nevertheless, these issues could be dealt with by setting an intensity threshold for triggering the DNSH appraisal.

Then, from an *ex post* viewpoint, more detailed procedural obligations are needed in terms of aid transparency, especially during the monitoring phase.

In fact, aid transparency should be improved to reduce any opaque allocation of State aid during market shocks. To this end, the Commission should upgrade the State aid database, by adding information on the aid that go beyond the legal basis and the overall financial intensity aid and by adopting uniform and comparable standards on aid classification.

Another solution that might be implemented without changing much of the existing legal framework would be to add the assessment of detailed efficiency and sustainability goals in the monitoring phase. The workload and need for technical expertise might be solved by availing of independent auditors, as already occurs when monitoring the compliance with other commitments.

As a general rule, the outcome of this checks should be publicly available and effective sanctions should be implemented in case of non-compliance. Some parallels could be drawn with the principles laid down in the proposal for a

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<sup>30</sup> R. SENNINGER, D. FINKE, J. BLOM-HANSEN, *Coordination inside government administrations: Lessons from the EU Commission*, in *Governance*, vol. 34, 2021, pp. 707–726.

corporate sustainability due diligence directive<sup>31</sup>. Transparency might also be an incentive for private enforcement initiatives<sup>32</sup>.

Finally, environmental aid should be also carefully designed as to avoid the risk of market fragmentation. For instance, aid for fleet renewals and retrofitting under CEEAG<sup>33</sup> might pave the way to discrimination allegations if the financial incentives are directed only to the supply chain of a Member State. This scenario has already surfaced during the pandemic, when some governments expected part of the aid given to airlines to be passed-on to domestic aerospace manufacturers via new fleet orders<sup>34</sup>. Therefore, even well-meaning commitments such as ‘green obligations’ require careful scrutiny to prevent any potential distortion.

The above-mentioned motivations, however, are linked to the need to reshape a broader concept of ‘fairness’ in competition law, which was recently discussed in many areas of antitrust enforcement, such as sustainability agreements under 101(3) TFEU<sup>35</sup> and digital platforms regulation<sup>36</sup>.

That said, a summary of outcomes of this research and recommendations will follow.

### 3. Proposals for a more effective State aid control in times of crisis in view of a future EU industrial policy

Pandemic-related case practice show that the Commission needs to adjust its approach to State aid enforcement in times of crisis. State aid and EU funding policies are even more crucial because of the geopolitical – and, thus, financial – turmoil that the EU is currently facing. The fact that some Member States may, by virtue of their economic situation, provide larger financial support (*deep pockets*) clashes with the EU internal market’s rationale and to the objectives of economic,

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<sup>31</sup> Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23.2.2022, COM (2022) 71.

<sup>32</sup> Cf. J. DELARUE, S. BECTHEL, *Access to justice in State aid: how recent legal developments are opening ways to challenge Commission State aid decisions that may breach EU environmental law*, in *ERA Forum*, vol. 22, 2021, p. 253–268.

<sup>33</sup> For a parallel in the maritime sector, see the investment aid for fleet renewal recently approved by EFTA Surveillance Authority, Norway - Aid for the Topeka Natruten project, 268/21/COL, C 131, p.11, 24.3.2022.

<sup>34</sup> See, e.g., a press statement by Finance Minister Bruno Le Maire on the Air France-Airbus relationship: Reuters, *Air France must be good Airbus customer - finance minister*, 29 April 2020.

<sup>35</sup> Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Communication C/2023/4752, OJ C 259, 21.7.2023, p. 1–125. On the issue, cf. M. CAMPO COMBA, *EU Competition Law and Sustainability. The Need for an Approach Focused on the Objectives of Sustainability Agreements*, in *Erasmus Law Review*, no. 3, 2022, Article No. 217.

<sup>36</sup> The notion of fairness has been called into question by the Platform to Business Regulation (P2B) and, more recently, by many provisions of the Digital Markets Act (DMA). See respectively, Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57–79; Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265, 12.10.2022, p. 1–66. For further details, see L. HOFFMANN, *Fairness in the Digital Markets Act*, in *European Papers*, Vol. 8, 2023, pp. 17-23.

social and territorial cohesion and solidarity between Member States enshrined in Article 3 TEU<sup>37</sup>.

So, the Commission, could define *ex ante* the scope of the exemptions applicable during a crisis, on a sectorial basis. These ‘on demand’ temporary frameworks should provide for non-discriminatory eligibility criteria and facilitate Member States’ coordination in case of trans-European recipient groups. Thanks to their sectorial scope, these frameworks could be adjusted to the specific features of each market avoiding a one-size-fits-all approach. The risks of overly stringent regulation might be mitigated by calibrating the Commission’s assessment standards on certain intensity thresholds. Cases that require specific consideration could still be notified and examined outside these frameworks, on a case-by-case basis.

Alternatively, the Commission could establish a series of general principles applied ‘horizontally’ in the face of market shocks, modelled on the Temporary Crisis and Transition Framework adopted in the wake of the Ukraine war and later extended to support digital and green transitions’ objectives<sup>38</sup>.

This general framework should set out a strict hierarchy of different forms of aid, limiting resort to direct grants and capital injections only as *extrema ratio* and encouraging a combination of public and private investment. Such a policy document might also introduce a sort of ‘State aid Taxonomy’ by classifying the compatibility of each aid template with the DNSH principle.

In more general terms, adding an environmental component in the compatibility assessment might ensure better coordination between State aid policy and other policy areas, so transforming State aid prohibition into ‘positive’ action, similarly to other Commission’s initiatives such as the Green Deal Industrial Plan<sup>39</sup>. *De jure condendo*, the Commission should be entitled to design and set up uniform aid schemes for the whole internal market and allocate resources accordingly. Hence, such progress would require a shift in public financial intervention within the EU, progressively replacing State aid with EU funding. Such a trend finds a seminal example in the NGEU package, as the RRF builds a bridge between EU funding and State aid regimes. This experience might provide important lessons for establishing the future EU industrial policy, in which the airline sector will definitely play a key role.

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<sup>37</sup> In this vein, see also J. PIERNAS LOPEZ, *The COVID-19 State Aid Judgments*, cit. p. 269; I. AGNOLUCCI, *Will COVID-19 Make or Break EU State Aid Control? An Analysis of Commission Decisions Authorising Pandemic State Aid Measures*, in *Journal of European Competition Law & Practice*, vol. 13, 2022, p. 3-16, esp. 6 ff.

<sup>38</sup> Cf. Commission, Amendment to the Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, OJ C, Communication C/2023/1188, 21.11.2023.

<sup>39</sup> Commission, A Green Deal Industrial Plan for the Net-Zero Age, Communication COM(2023) 62 final, 1.2.2023. This strategy represents the EU reaction to the US Inflation Reduction Act of 2022, 136 Stat. 1818, Public Law 117–169, 16.8.2022, cf.: U.S. White House, Building a clean energy economy: a guidebook to the inflation reduction act’s investments in clean energy and climate action, version 2, Jan. 2023, <https://www.whitehouse.gov/wp-content/uploads/2022/12/Inflation-Reduction-Act-Guidebook.pdf>.

## Appendix

### A. International Acts

#### i. Treaties and ICJ Judgements

Agreement between the European Community and the Swiss Confederation on Air Transport, OJ L 114, 30.4.2002, p. 73–90

Agreement on air transport between the European Union and its Member States, of the one part, and the State of Qatar, of the other part, OJ L 391, 5.11.2021, p. 3–40 (‘EU-Qatar Agreement’)

Agreement on the European Economic Area, OJ L 1, 3.1.1994, p. 3–522

Air Services Agreement Between the United States and the United Kingdom, signed in Bermuda, 11 February 1946, 45 ISL 395

Air Transport Agreement between the United States of America and the European Community and its Member States, signed on 25 and 30 April 2007, OJ L 134, 25.5.2007, p. 4, as amended by the 2010 Protocol, OJ L 223, 25.8.2010, p. 3–19 (‘EU-US Open Skies agreement’)

Annex on Air Transport Services of the General Agreement on Trade in Services, [https://www.wto.org/english/tratop\\_e/serv\\_e/9-anats\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/9-anats_e.htm)

Carbon Offsetting and Reduction Scheme for International Aviation (CORSA), ICAO, Annex 16 – Volume IV, 2<sup>nd</sup> ed., 2023, at <https://elibrary.icao.int/>

Comprehensive Air Transport Agreement between the Member States of the Association of Southeast Asian Nations, and the European Union and its Member States (‘EU-ASEAN Agreement’), signed in 2022 and available at [https://eur-lex.europa.eu/resource.html?uri=cellar:e8fc76ac-cd2b-11ec-a95f-01aa75ed71a1.0009.02/DOC\\_2&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:e8fc76ac-cd2b-11ec-a95f-01aa75ed71a1.0009.02/DOC_2&format=PDF)

Consolidated Air Services Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, signed in Bermuda, 23 July 1977, available at <https://2009-2017.state.gov/e/eb/rls/othr/ata/u/uk/176322.htm>

Convention on International Civil Aviation concluded in Chicago on 7 December 1944, ICAO Doc. 7300

Convention Relating to the Regulation of Aerial Navigation, signed in Paris, 13 Oct. 1919, in *American Journal of International Law*, vol. 17, no. 4, 1923, p. 195–212

General Agreement on Trade in Services (GATS), Annex 1B of the Agreement Establishing the World Trade Organization, signed in Marrakesh on 15 April 1994, 1867 UNTS 3

International Air Services Transit Agreement (IASTA), signed in Chicago on 7 December 1944, 84 UNTS 389

International Air Transport Agreement, signed in Chicago on 7 December 1944, 45 ILS 388

- International Court of Justice (ICJ), 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, at 14
- Kyoto Protocol to the United Nations Framework Convention on Climate Change, signed in Kyoto, 11 December 1997, 2303 UNTS 162
- Montreal Protocol on Substances that Deplete the Ozone Layer, signed in Montreal on 16 September 1987, 1522 UNTS 2
- Multilateral agreement establishing the European Common Aviation Area, OJ L 285, 16.10.2006, p. 3–46, as amended Decision No 1/2019 of the ECAA Joint Committee of 31 July 2019 replacing Annex I to the ECAA Agreement on the rules applicable to civil aviation, OJ L 211, 12.8.2019, p. 4–19
- Paris Climate Agreement, signed in Paris, 12 December 2015, 3156 UNTS, at [www.unfccc.int/files/essential\\_background/convention/application/pdf/english\\_paris\\_agreement.pdf](http://www.unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf)
- Protocol (No 26) on services of general interest, OJ C 115, 9.5.2008, p. 308–308
- Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30.4.2021, p. 10–2539
- Treaty establishing the European Economic Community, signed in Rome on 25 March 1957, available at <https://eur-lex.europa.eu/eli/treaty/teec/sign>
- Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 27 Jan. 1967, 610 UNTS 205
- UN Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, 1760 UNTS 79
- United Nations Convention on the Law of the Sea (UNCLOS), signed in Montego Bay, 10 December 1982, 1833 UNTS 397
- United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Paris, 14 October 1994, 1954 UNTS 3
- United Nations Framework Convention on Climate Change, signed in New York, 9 May 1992, 1771 UNTS 107
- Vienna Convention for the Protection of the Ozone Layer, signed in Vienna on 22 March 1985, 1513 UNTS 293

## ii. ICAO Assembly Resolutions

- ICAO, Assembly Resolution A16-3 of 1968
- ICAO, Assembly Resolution A18-11 of 1971
- ICAO, Assembly Resolution A37-19 of 2010

ICAO, Assembly Resolution A38-18 of 2013

ICAO, Assembly Resolution A39-2 of 2016

ICAO, Assembly Resolution A40-18 of 2019

ICAO, Assembly Resolution A41-21 of 2022

## **B. Legislation of the European Union**

- Regulation (EEC) No 141/62 of the Council exempting transport from the application of Council Regulation No 17/62, OJ 124, 28.11.1962, p. 2751–2751
- Council Directive 83/416/EEC of 25 July 1983 concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States, OJ L 237, 26.8.1983, p. 19–24
- Council Directive 87/601/EEC of 14 December 1987 on fares for scheduled air services between Member States, OJ L 374, 31.12.1987, p. 12–18
- Council Decision 87/602/EEC of 14 December 1987 on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States, OJ L 374, 31.12.1987, p. 19–26
- Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, OJ L 374, 31.12.1987, p. 1–8
- Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, OJ L 374, 31.12.1987, p. 9–11
- Commission Regulation (EEC) No 2671/88 of 26 July 1988 on the application of Article 85 (3) of the Treaty to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices concerning joint planning and coordination of capacity, sharing of revenue and consultations on tariffs on scheduled air services and slot allocation at airports, OJ L 239, 30.8.1988, p. 9–12
- Commission Regulation (EEC) No 2672/88 of 26 July 1988 on the application of Article 85(3) of the Treaty to certain categories of agreements between undertakings relating to computer reservation systems for air transport services, OJ L 239, 30.8.1988, p. 13
- Commission Regulation (EEC) No 2673/88 of 26 July 1988 on the application of Article 85 (3) of the Treaty to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices concerning ground handling services, OJ L 239, 30.8.1988, p. 17
- Council Regulation (EEC) No 2342/90 of 24 July 1990 on fares for scheduled air services, OJ L 217, 11.8.1990, p. 1–7
- Council Regulation (EEC) No 2343/90 of 24 July 1990 on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States, OJ L 217, 11.8.1990, p. 8–14
- Council Regulation (EEC) No 2344/90 of 24 July 1990 amending Regulation (EEC) No 3976/87 on the application of article 85 (3) of the treaty to certain categories of agreements and concerted practices in the air transport sector, OJ L 217, 11.8.1990, p. 15–16

- Commission Regulation (EEC) No 82/91 of 5 December 1990 on the application of Article 85 (3) of the Treaty to certain categories of Agreements, Decisions and concerted practices concerning ground handling services, OJ L 10, 15.1.1991, p. 7–8
- Commission Regulation (EEC) No 83/91 of 5 December 1990 on the application of Article 85 (3) of the Treaty to certain categories of Agreements between undertakings relating to computer reservation systems for air transport services, OJ L 10, 15.1.1991, p. 9–13
- Commission Regulation (EEC) No 84/91 of 5 December 1990 on the application of Article 85 (3) of the Treaty to certain categories of Agreements, Decisions and concerted practices concerning joint planning and coordination of capacity, consultations on passenger and cargo tariffs rates on scheduled air services and slot allocation at airports, OJ L 10, 15.1.1991, p. 14–18
- Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers, OJ L 240, 24.8.1992, p. 1–7
- Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ L 240, 24.8.1992, p. 8–14
- Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services, OJ L 240, 24.8.1992, p. 15–17
- Council Regulation (EEC) No 2410/92 of 23 July 1992 amending Regulation (EEC) No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, OJ L 240, 24.8.1992, p. 18
- Council Regulation (EEC) No 2411/92 of 23 July 1992 amending Regulation (EEC) No 3976/87 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, OJ L 240, 24.8.1992, p. 19–20
- Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, p. 32–46
- Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries, OJ L 68, 6.3.2004, p. 1–2
- Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.4.2004, p. 1–134
- Regulation (EC) No. 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries OJ L 157/2004, p. 7–17

- Regulation (EC) No 868/2004 of the European Parliament and of the Council of 21 April 2004 concerning protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community, OJ L 162, 30.4.2004, p. 1–7
- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16
- 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, OJ L 293, 31.10.2008, p. 3–20
- Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ L 8, 13.1.2009, p. 3–21
- Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 140, 5.6.2009, p. 136–148
- Commission Decision 2009/450/EC of 8 June 2009 on the detailed interpretation of the aviation activities listed in Annex I to Directive 2003/87/EC of the European Parliament and of the Council, OJ L 149, 12.6.2009, p. 69–72
- Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community, OJ L 302, 18.11.2010, p. 1–41
- Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.1.2012, p. 3–10
- Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, OJ L 296, 25.10.2012, p. 1–148
- 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. 1–8
- Commission Regulation (EU) No 83/2014 of 29 January 2014 amending Regulation (EU) No 965/2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC)

No 216/2008 of the European Parliament and of the Council, OJ L 28, 31.1.2014, p. 17–29

Regulation (EU) No 421/2014 of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions, OJ L 129, 30.4.2014, p. 1–4

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, OJ L 187, 26.6.2014, p. 1–78

Commission Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union, OJ L 193, 1.7.2014, p. 1–75

Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid OJ L 248, 24.9.2015, p. 1–8

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, OJ L 248, 24.9.2015, p. 9–29

Regulation (EU) 2017/2392 of the European Parliament and of the Council of 13 December 2017 amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021, OJ L 350, 29.12.2017, p. 7–14

Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, OJ L 321, 17.12.2018, p. 36–214 («EECC»)

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, OJ L 123, 10.5.2019, p. 4–17

Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57–79

Commission Delegated Regulation (EU) 2019/1603 of 18 July 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council as regards measures adopted by the International Civil Aviation Organisation for the monitoring, reporting and verification of aviation emissions for the purpose of implementing a global market-based measure, OJ L 250, 30.9.2019, p. 10–13

Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable

investment, and amending Regulation (EU) 2019/2088, OJ L 198, 22.6.2020, p. 13–43 («EU Taxonomy Regulation»)

Commission Implementing Regulation (EU) 2021/116 of 1 February 2021 on the establishment of the Common Project One supporting the implementation of the European Air Traffic Management Master Plan provided for in Regulation (EC) No 550/2004 of the European Parliament and of the Council, amending Commission Implementing Regulation (EU) No 409/2013 and repealing Commission Implementing Regulation (EU) No 716/2014, OJ L 36, 2.2.2021, p. 10–38

Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, p. 17–75 («RRF Regulation»)

Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999, OJ L 243, 9.7.2021, p. 1–17

Commission Delegated Regulation (EU) 2022/1288 of 6 April 2022 supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of ‘do no significant harm’, OJ L 196, 25.7.2022, p. 1–72

Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265, 12.10.2022, p. 1–66

Commission Implementing Decision (EU) 2022/2358 of 1 December 2022 on the French measure establishing a limitation on the exercise of traffic rights due to serious environmental problems, pursuant to Article 20 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council, OJ L 311, 2.12.2022, p. 168–175

Commission Regulation (EU) 2022/2473 of 14 December 2022 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union, OJ L 327, 21.12.2022, p. 82–139

Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ L 330, 23.12.2022, p. 1–45

Council Regulation (EU) 2022/2586 of 19 December 2022 on the application of Articles 93, 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of State aid in the rail, inland waterway and multimodal transport sector, OJ L 338, 30.12.2022, p. 35–39

Commission Regulation (EU) 2023/1315 of 23 June 2023 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 167, 30.6.2023, p. 1–90

Directive (EU) 2023/958 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC as regards aviation's contribution to the Union's economy-wide emission reduction target and the appropriate implementation of a global market-based measure, OJ L 130, 16.5.2023, p. 115–133

Regulation (EU) 2023/2405 of the European Parliament and of the Council of 18 October 2023 on ensuring a level playing field for sustainable air transport, OJ L, 2023/2405, 31.10.2023

## C. Jurisprudence of the Court of Justice of the European Union

### i. Court of Justice

- CJEU, 23 February 1961, *Steenkolenmijnen Limburg v High Authority*, C-30/59, EU:C:1961:2
- CJEU, 15 July 1964, *Costa v ENEL*, 6/64, EU:C:1964:66
- CJEU, 31 March 1971, *Commission v Council (European Agreement on Road Transport – AETR)*, Case 22-70, EU:C:1971:32
- CJEU, 4 April 1974, *Commission v France (French Merchant Seamen)*, C-167/73, EU:C:1974:35
- CJEU, 2 July 1974, *Italy v Commission (Italian Textiles)*, Case C-173/73, EU:C:1974:71
- CJEU, 22 March 1977, *Iannelli*, C-74/76, EU:C:1977:51
- CJEU, 22 March 1977, *Steinike und Weinlig*, C-78/76, EU:C:1977:52
- CJEU, 12 October 1978, *Commission v Belgium (Belgian railway case)*, C-156/77, EU:C:1978:180
- CJEU, 21 May 1980, *Commission v Italy (Sugar levy)*, C-73/79, EU:C:1980:129
- CJEU, 17 September 1980, *Philip Morris Holland v Commission*, C-730/79, EU:C:1980:209
- CJEU, 29 October 1980, *Roquette Frères v Council*, C-138/79, EU:C:1980:249
- CJEU, 10 June 1982, *Lord Bethell v Commission*, C-246/81, EU:C:1982:224
- CJEU, 7 February 1985, *Procureur de la République v ADBHU*, C-240/83, EU:C:1985:59
- CJEU, 13 March 1985, *Netherlands and Leeuwarder Papierwarenfabriek v Commission*, C-296/82 and C-318/82, EU:C:1985:113
- CJEU, 22 May 1985, *Parliament v Council*, C-13/83, EU:C:1985:220
- CJEU, 30 April 1986, *Ministère public v Asjes (Nouvelles Frontières)*, C-209/84, EU:C:1986:188
- CJEU, 16 June 1987, *Commission v Italy*, C-118/85, EU:C:1987:283
- CJEU, 14 October 1987, *Germany v Commission*, C-248/84, EU:C:1987:437
- CJEU, 17 November 1987, *BAT and Reynolds v Commission*, C-142/84 and C-156/84, EU:C:1987:490
- CJEU, 11 April 1989, *Abmed Saeed Flugreisen c. Silver Line Reisebüro GmbH*, C-66/86, EU:C:1989:140
- CJEU, 14 February 1990, *France v Commission*, C-301/87, EU:C:1990:67
- CJEU, 21 March 1990, *Belgium v Commission*, C-142/87, EU:C:1990:125
- CJEU, 21 March 1991, *Italy v Commission (Lanerossi)*, C-303/88, EU:C:1991:136
- CJEU, 21 March 1991, *Italy v Commission (Alfa Romeo)*, C-305/89, EU:C:1991:142

- CJEU, 10 March 1992, *Ricob v Council*, C-174/87, EU:C:1992:108
- CJEU, 17 March 1993, *Sloman Neptun*, C-72/91, EU:C:1993:97
- CJEU, 28 April 1993, *Italy v Commission*, C-364/90, EU:C:1993:157
- CJEU, 15 June 1993, *Matra*, C-225/91, EU:C:1993:239, para 41
- CJEU, 9 March 1994, *Textilwerke Deggendorf (TWD) v Germany*, C-188/92, EU:C:1994:90
- CJEU, 14 September 1994, *Spain v Commission*, Joined Cases C-278/92, C-279/92 and C-280/92, EU:C:1994:325
- CJEU, 29 February 1996, *Belgium v Commission*, C-56/93, EU:C:1996:64
- CJEU, 11 July 1996, *Syndicat français de l'Express international (SFEI)*, Case C-39/94, EU:C:1996:285
- CJEU, 14 January 1997, *Spain v Commission*, C-169/95, EU:C:1997:10
- CJEU, 15 May 1997, *TWD v Commission*, C-355/95, EU:C:1997:241
- CJEU, 23 October 1997, *Commission v France*, C-159/94, EU:C:1997:501
- CJEU, 17 June 1999, *Belgium v Commission (Maribel)*, C-75/97, EU:C:1999:311
- CJEU, 5 October 1999, *France v Commission*, C-251/97, EU:C:1999:480
- CJEU, 19 September 2000, *Germany v Commission*, C-156/98, EU:C:2000:467
- CJEU, 3 May 2001, *Portugal v Commission*, C-204/97, EU:C:2001:233
- CJEU, 8 November 2001, *Adria Wien Pipeline*, C-143/99, EU:C:2001:598
- CJEU, 7 March 2002, *Italy v Commission*, C-310/99, EU:C:2002:143
- CJEU, 16 May 2002, *France v Commission*, C-482/99, EU:C:2002:294
- CJEU, 13 June 2002, *The Netherlands v Commission*, C-382/99, para. 24
- CJEU, 19 September 2002, *Spain v Commission*, C-113/00, EU:C:2002:507
- CJEU, 19 September 2002, *Spain v Commission*, C-114/00, EU:C:2002:508
- CJEU, 24 October 2002, *Aéroports de Paris*, C-82/01, EU:C:2002:617
- CJEU, 5 November 2002, *Commission v the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany (Open Skies)*, Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98
- CJEU, 12 December 2002, *Belgium v Commission (Cockerill)*, C-5/01, EU:C:2002:754
- CJEU, 3 July 2003, *Belgium v Commission (Verlipack)*, C-457/00, EU:C:2003:387
- CJEU, 24 July 2003, *Altmark*, C-280/00, EU:C:2003:415
- CJEU, 30 September 2003, *Germany v Commission*, C-301/96, EU:C:2003:509
- CJEU, 29 April 2004, *Italy v Commission*, C-372/97, EU:C:2004:234
- CJEU, 10 January 2006, *Cassa di Risparmio di Firenze et al.*, C-222/04, EU:C:2006:8

- CJEU, 23 February 2006, *Atzeni and Others*, C-346/03 and C-529/03, EU:C:2006:130
- CJEU, 12 February 2008, *CELF I*, C-199/06, EU:C:2008:79
- CJEU, 15 April 2008, *Nuova Agricast Srl*, C-390/06, EU:C:2008:224
- CJEU, 22 December 2008, *British Aggregates v Commission*, C-487/06, EU:C:2008:757
- CJEU, 30 April 2009, *Commission v Italy and Wam*, C-494/06, EU:C:2009:272
- CJEU, 7 May 2009, *Antrop*, C-504/07, EU:C:2009:290
- CJEU, 2 December 2010, *Holland Malt v Commission*, C-464/09, EU:C:2010:733
- CJEU, 8 September 2011, *Commission v The Netherlands*, C-279/08, EU:C:2011:551
- CJEU, 21 December 2011, *Air Transport Association of America v. Secretary of State for Energy and Climate Change*, C-366/10, EU:C:2011:864
- CJEU, 5 June 2012, *Commission v EDF*, C-124/10, EU:C:2012:318
- CJEU, 19 December 2012, *Flughafen Leipzig-Halle*, C-288/11 P, EU:C:2012:821
- CJEU, 15 January 2013, *Križan and Others*, C-416/10, EU:C:2013:8
- CJEU, 19 March 2013, *Bouygues*, Joined Cases C-399/10 and C-401/10, EU:C:2013:175
- CJEU, 21 March 2013, *Buczek Automotive*, C-405/11 P, EU:C:2013:186
- CJEU, 18 March 2014, *International Jet Management*, C-628/11, ECLI:EU:C:2014:171
- CJEU, 3 April 2014, *Commission v Netherlands and ING Groep*, C-224/12, EU:C:2014:213
- CJEU, 11 September 2014, *Commission v Germany (Biria)*, C-527/12, EU:C:2014:2193
- CJEU, 8 March 2016, *Greece v Commission*, C-431/14, EU:C:2016:145
- CJEU, 19 July 2016, *Tadej Kotnik and Others*, C-526/14, EU:C:2016:570
- CJEU, 21 December 2016, *World Duty Free*, Joined Cases C-20/15 and C-21/15, EU:C:2016:981
- CJEU, 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172
- CJEU, 22 September 2020, *Austria v Commission (Hinkley Point C)*, C-594/18, EU:C:2020:742
- CJEU, 20 January 2022, *ET, acting as liquidator of Air Berlin PLC & Co. Luftverkehrs KG (AB KG) v Bundesrepublik Deutschland*, C-165/20, EU:C:2022:42
- CJEU, 19 May 2022, *INAIL e INPS v Ryanair*, C- 33/21, EU:C:2022:402
- CJEU, 8 September 2022, *Lux Express Estonia*, C-614/20, EU:C:2022:641
- CJEU, 17 November 2022, *Volotea and Easyjet v Commission*, C-331/20 and C-343/20, EU:C:2022:886

- CJEU, 15 December 2022, *Veejaam and Espo*, C-470/20, EU:C:2022:981
- CJEU, 22 June 2023, *Gmina Miasto Gdynia*, C-163/22, EU:C:2023:515
- CJEU, 28 September 2023, *Ryanair v Commission (SAS; Sweden)*, C-320/21, EU:C:2023:712
- CJEU, 28 September 2023, *Ryanair v Commission (SAS; Denmark)*, C-321/21, EU:C:2023:713
- CJEU, 23 November 2023, *Ryanair v Commission (Sweden; COVID-19)*, C-209/21, EU:C:2023:905
- CJEU, 23 November 2023, *Ryanair v Commission (France; COVID-19)*, C-210/21, EU:C:2023:908

## ii. Advocate General Opinions before the CJEU

- Opinion of AG Darmon of 17 March 1992 in Joined cases C-72/91 and C-73/91, *Sloman Neptun*, EU:C:1992:130
- Opinion of AG Jacobs of 26 October 2000 in case C-379/98, *PreussenElektra*, EU:C:2001:160
- Opinion of AG Tizzano of 8 May 2001 in case C-53/00, *Ferring*, EU:C:2001:253
- Opinion of AG Wahl of 15 September 2016 in case C-524/14 P, *Hansestadt Luebeck*, EU:C:2016:693
- Opinion of AG Hogan of 23 September 2021 in case C-165/20, *ET, acting as liquidator of Air Berlin PLC & Co. Luftverkehrs KG (AB KG) v Bundesrepublik Deutschland*, EU:C:2021:764
- Opinion of AG Pitruzzella of 26 January 2023 in case C-320/21, *Ryanair (SAS; Sweden)*, EU:C:2023:54
- Opinion of AG Pitruzzella of 16 March 2023 in case C-209/21, *Ryanair v Commission (Sweden; Covid-19)*, EU:C:2023:223

## iii. General Court

- EU General Court, 12 December 1996, *AIUFFASS and AKT v Commission*, T-380/94, EU:T:1996:195
- EU General Court, 27 January 1998, *Ladbroke*, T-67/94, EU:T:1998:7
- EU General Court, 30 April 1998, *Vlaams Gewest v Commission*, T-214/95, EU:T:1998:77
- EU General Court, 25 June 1998, *British Airways et al. v Commission*, T-371/94 and T-394/94, EU:T:1998:140
- EU General Court, 15 December 1999, *Freistaat Sachsen*, T-132/96 and T-143/96, EU:T:1999:326

- EU General Court, 15 June 2000, *Alzetta*, T-298/97, EU:T:2000:151
- EU General Court, 29 September 2000, *CETM v Commission*, T-55/99, EU:T:2000:223
- EU General Court, 12 December 2000, *Alitalia v Commission*, T-296/97, EU:T:2000:289
- EU General Court, 12 December 2000, *Aéroports de Paris*, T-128/98, EU:T:2000:290
- EU General Court, 31 January 2001, *Weyl Beef Products*, T-197/97 and T-198/97, EU:T:2001:28
- EU General Court, 4 April 2001, T-288/97, *Regione autonoma Friuli-Venezia Giulia*, EU:T:2001:115
- EU General Court, 11 July 2002, *HAMSA v Commission*, T-152/99, EU:T:2002:188
- EU General Court, 6 March 2003, *Westdeutsche Landesbank v Commission*, Joined Cases T-228/99 and T-233/99
- EU General Court, 5 August 2003, *P&O European Ferries*, T-116/01 and T-118/01, EU:T:2003:217
- EU General Court, 15 June 2005, *Regione autonoma della Sardegna v Commission*, T-171/02, EU:T:2005:219
- EU General Court, 6 April 2006, *Schmitz-Gotba Fahrzeugwerke v Commission*, T-17/03, EU:T:2006:109
- EU General Court, 25 June 2008, *Olympiaki Aeroporia Ypiresies v Commission*, T-268/06, EU:T:2008:222
- EU General Court, 17 December 2008, *Ryanair v Commission (Charleroi airport)*, T-196/04, EU:T:2008:585
- EU General Court, 4 March 2009, *Italy v Commission*, T-424/05, EU:T:2009:49
- EU General Court, 4 March 2009, *Fineco v Commission*, T-445/05, EU:T:2009:50
- EU General Court, 8 September 2009, *AceaElectrabel v Commission*, T-303/05, EU:T:2009:312
- EU General Court, 15 June 2010, *Mediaset SpA v Commission*, T-177/07, EU:T:2010:233
- EU General Court, 24 March 2011, *Flughafen Leipzig-Halle*, T-443/08, EU:T:2011:117
- EU General Court, 12 September 2013, *Germany v Commission*, T-347/09, EU:T:2013:418
- EU General Court, 16 July 2014, *Germany v Commission*, T-295/12, EU:T:2014:675
- EU General Court, 3 December 2014, *Castelnuovo Energia v Commission*, T-57/11, EU:T:2014:1021
- EU General Court, 19 September 2018, *HH Ferries and Others v Commission*, T-68/15, EU:T:2018:563

- EU General Court, 6 May 2019, *Scor v Commission*, T-135/17, EU:T:2019:287
- EU General Court, 17 February 2021, *Ryanair v Commission (French scheme)*, T-259/20,
- EU General Court, 17 February 2021, *Ryanair v Commission (Sweden; Covid-19)*, T-238/20, EU:T:2021:91
- EU General Court, 17 February 2021, *Ryanair v Commission (France; Covid-19)*, T-259/20, EU:T:2021:92
- EU General Court, 14 April 2021, *Ryanair v Commission (SAS, Denmark; Covid-19)*, T-378/20, EU:T:2021:194
- EU General Court, 14 April 2021, *Ryanair v Commission (SAS, Suède; Covid-19)*, T-379/20, EU:T:2021:195
- EU General Court, 14 April 2021, *Ryanair v Commission (Finnair I; Covid-19)*, T-388/20, EU:T:2021:196
- EU General Court, 19 May 2021, *Ryanair v Commission (Espagne; Covid-19)*, T-628/20, EU:T:2021:285
- EU General Court, 19 May 2021, *Ryanair v Commission (KLM; Covid-19)*, T-643/20, EU:T:2021:286
- EU General Court, 9 June 2021, *Ryanair v Commission (Condor; Covid-19)*, T-665/20, EU:T:2021:344
- EU General Court, 14 July 2021, *Ryanair and Laudamotion v Commission (Austrian Airlines; Covid-19)*, T-677/20, EU:T:2021:465
- EU General Court, 10 November 2021, *Google and Alphabet v Commission (Google Shopping)*, T-612/17, EU:T:2021:763
- EU General Court, 4 May 2022, *Wizz Air Hungary c. Commissione (TAROM; aide au sauvetage)*, T-718/20, EU:T:2022:276
- EU General Court, 22 June 2022, *Ryanair v Commission (Finnair II; Covid-19)*, T-657/20, EU:T:2022:390
- EU General Court, 8 February 2023, *Carpatair v. Commission*, T-522/20, EU:T:2023:51
- EU General Court, 29 March 2023, *Wizz Air Hungary v Commission (COVID-19; Blue air)*, T-142/21, EU:T:2023:164
- EU General Court, 10 May 2023, *Condor Flugdienst v Commission (Lufthansa; Covid-19)*, T-34/21 and T-87/21, EU:T:2023:248
- EU General Court, 10 May 2023, *Ryanair v Commission (SAS II; COVID-19)*, T-238/21, EU:T:2023:247
- EU General Court, 24 May 2023, *Ryanair v Commission (Italie; régime d'aide; Covid-19)*, T-268/21, EU:T:2023:279
- EU General Court, 18 October 2023, *Ryanair v Commission (Brussels Airlines; COVID-19)*, T-14/21, EU:T:2023:643

EU General Court, 18 October 2023, *Ryanair v Commission (Alitalia I)*, T-225/21, EU:T:2023:644

EU General Court, 18 October 2023, *Wizz Air Hungary v Commission (COVID-19; TAROM)*, T-332/21, EU:T:2023:645

EU General Court, 18 October 2023, *Ryanair v Commission (airBaltic ; COVID-19)*, T-737/20, EU:T:2023:641

EU General Court, 20 December 2023, *Ryanair and Malta Air v Commission (Air France-KLM; COVID-19)*, T-494/21, EU:T:2023:831

EU General Court, 20 December 2023, *Ryanair and Malta Air v Commission (Air France; COVID-19)*, T-216/21, EU:T:2023:822;

EU General Court, 7 February 2024, *Ryanair v Commission (KLM II ; COVID-19)*, T-146/22, EU:T:2024:68

## D. European Commission

### i. Communications, guidance documents, reports

- Commission, Memorandum of the general lines of the Common transport policy, COM (61) 50 final, 10 April 1961, at <http://aei.pitt.edu/33840/>
- Commission, Draft Council Regulation suspending the application of Articles 85 to 94 of the Treaty establishing the European Economic Community to sea and air transport, EEC Bulletin, suppl. No. 11/62
- Commission, Communication Regarding Cost Allocation and Action by Public Authorities on Environmental Matters, Annex to Council Recommendation 75/436/Euratom, ECSC, EEC of 3 March 1975, OJ L 194, 25.7.1975, p. 1–4
- Commission, Fifth Report on Competition Policy 1975, Luxemburg 1976, at [https://ec.europa.eu/competition/publications/annual\\_report/ar\\_1975\\_en.pdf](https://ec.europa.eu/competition/publications/annual_report/ar_1975_en.pdf)
- Commission, Contributions of the European Communities to the Development of Air Transport Service, Memorandum COM (79) 311, 6 July 1979, at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51979DC0311&rid=9>
- Commission, Letter to Member States SG(80) D/8287 of 7 July 1980, in Competition Law in the European Communities, Vol. II: Rules applicable to State aids, Brussels-Luxembourg, 1990, at 130, <https://op.europa.eu/en/publication-detail/-/publication/23875606-bead-4b1c-85f3-91d1435beaf1>
- Commission, Civil Aviation Memorandum No. 2. Progress towards the development of a Community Air Transport Policy, Communication COM(84) 72 final, 15 March 1984, at <http://aei.pitt.edu/5374/>
- Commission, XIVth Report on Competition Policy, Brussels-Luxembourg, 1984
- Commission, Civil Aviation, Communication COM(86) 338 final/2, 1 July 1986, at <http://aei.pitt.edu/4025/>
- Commission, Market Access in Civil Aviation, Proposal for a Council Directive amending for the second time Council Directive 83/416/EEC, COM(86) 424 final/2, 8 Sep. 1987, available at <http://aei.pitt.edu/4021/>
- Commission, Letter to Member States SG(87) D/3795 of 23 March 1987, in Competition Law in the European Communities, Vol. IIA: Rules applicable to State aid, Brussels-Luxembourg, 1999, at 199
- Commission, Report on the evaluation of aid schemes established in favour of Community air carriers, SEC(92) 431 final, 19 March 1992, available at <http://aei.pitt.edu/4822/1/4822.pdf>
- Commission, Application of articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, OJ C 350, 10.12.1994, p. 5–20

- Commission, Community guidelines on State aid for environmental protection, OJ C 72, 10.3.1994, p. 3-9
- Commission, XXIVth Report on Competition Policy 1994, Luxembourg, 1995, at <https://op.europa.eu/en/publication-detail/-/publication/cd5535d7-fce4-4021-a6d6-6d76da864cce>
- Commission, Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5–13
- Commission, Community guidelines on State aid for environmental protection, OJ C 37, 3.2.2001, p. 3
- Commission, The repercussions of the terrorist attacks in the United States on the air transport industry, Communication COM(2001) 574 final, 10.10.2001
- Commission, Insurance in the Air Transport sector following the terrorist attacks of 11 September 2001 in the United States, COM(2002)320 final, 2.7.2002
- Commission, The consequences of the Court judgments of 5 November 2002 for European air transport policy, Communication COM(2002)649 final, 19.11.2002
- Commission, Relations between the Community and third countries in the field of air transport, Communication COM(2003) 94 final, 26.2.2003
- Commission, Developing the agenda for the Community's external aviation policy, Communication COM(2005) 79 final, 11.3.2005
- Commission decision of 29 March 2005 on approving the standard clauses for inclusion in bilateral air service agreements between Member States and third countries jointly laid down by the Commission and the Member States, C(2005)943
- Commission, State Aid Action Plan - Less and better targeted state aid: a roadmap for state aid reform 2005–2009, COM(2005) 107 final, 7.6.2005
- Commission, Information Note, EU external aviation policy: why does the EU want to modify air service agreements between its member States and partner countries?, 12.10.2005, [https://transport.ec.europa.eu/system/files/2016-09/2005\\_10\\_12\\_info\\_note\\_faq\\_en.pdf](https://transport.ec.europa.eu/system/files/2016-09/2005_10_12_info_note_faq_en.pdf)
- Commission, Model Horizontal Agreement, 2005, available at: [https://transport.ec.europa.eu/system/files/2016-09/draft\\_horizontal\\_agreement\\_en.pdf](https://transport.ec.europa.eu/system/files/2016-09/draft_horizontal_agreement_en.pdf)
- Commission, Community guidelines on financing of airports and start-up aid to airlines departing from regional airports, Communication 2005/C 312/01
- Commission, Community guidelines on State aid for environmental protection, OJ C 82, 1.4.2008 p. 1
- Commission, Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55 ('EEAG 2014-2020')

- Commission, The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, Communication 2008/C 270/02 ('2008 Banking Communication')
- Commission, Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1–27
- Commission, Notice on a Simplified procedure for the treatment of certain types of State aid, OJ C 136, 16.6.2009, p. 3–12
- Commission, Code of Best Practice for the conduct of State aid control procedures OJ C 136, 16.6.2009, p. 13–20
- Commission, The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, Communication 2009/C 10/03 ('Recapitalisation Communication')
- Commission, The treatment of impaired assets in the Community financial sector, Communication 2009/C 72/01 ('Impaired Assets Communication')
- Commission, The return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, Communication 2009/C 195/04 ('Restructuring Communication')
- Commission, Common principles for an economic assessment of the compatibility of State aid under Article 87.3, Staff Working Paper, 19 May 2009, [https://ec.europa.eu/competition/state\\_aid/reform/economic\\_assessment\\_en.pdf](https://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf)
- Commission, The impact of the volcanic ash cloud crisis on the air transport industry, Information note SEC(2010)533, 27.04.2010, <https://transport.ec.europa.eu/system/files/2016-09/2010-sec-2010-1580-f.pdf>
- Commission, The application, from 1 January 2011, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis, Communication 2010/C 329/07 ('2010 Prolongation Communication')
- Commission, The application, from 1 January 2012, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis, Communication 2011/C 356/07 ('2011 Prolongation Communication')
- Commission, Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis, Communication, OJ C 6, 11.1.2011, p. 5–15
- Commission, The effects of temporary State aid rules adopted in the context of the financial and economic crisis, Staff Working Paper, SEC(2011) 1126 final, 5.10.2011
- Commission (DG Comp), Application of State aid rules to infrastructure investment projects, Note to DG Regio, Doc. COMP/03/2011

- Commission, Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012, p. 4–14
- Commission, European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, p. 15–22
- Commission, Guidance Paper on state aid-compliant financing, restructuring and privatisation of State-owned enterprises, SWD(2012)14 final, 10.2.2012
- Commission, EU State Aid Modernisation (SAM), Communication, COM(2012) 209 final, 8.5.2012
- Commission, The EU's External Aviation Policy - Addressing Future Challenges, Communication COM(2012) 556 final, 27.9.2012
- Commission, The application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis, Communication 2013/C 216/01 ('Banking Communication')
- Commission, Guidelines on State aid to airports and airlines, Communication 2014/C 99/03
- Commission, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Communication 2014/C 249/01
- Commission, European Union Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020, OJ C 204, 1.7.2014, p. 1–97
- Commission, EU ETS Handbook, Brussels, 2015, available at [https://climate.ec.europa.eu/system/files/2017-03/ets\\_handbook\\_en.pdf](https://climate.ec.europa.eu/system/files/2017-03/ets_handbook_en.pdf)
- Commission, Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, OJ C 262, 19.7.2016, p. 1–50
- Commission, Interpretative guidelines on Regulation (EC) No 1008/2008 of the European Parliament and of the Council — Rules on Ownership and Control of EU air carriers, Commission Notice 2017/C 191/01
- Commission, Prolongation of the specific regime for operating aid for airports with up to 700,000 passengers per annum provided for in the Guidelines on State aid to airports and airlines, Communication 2018/C 456/27
- Commission, The European Green Deal, COM(2019) 640 final, 11.12.2019
- Commission, Coordinated economic response to the COVID-19 Outbreak, Communication COM(2020) 112 final, 13.3.2020
- Commission, Guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading post-2021, 2020/C 317/04
- Commission, Overview of the State aid rules and public service obligations rules applicable to the air transport sector during the COVID-19 outbreak, 2020, [https://competition-policy.ec.europa.eu/state-aid/coronavirus/adjustments-and-rules-specific-sectors\\_en](https://competition-policy.ec.europa.eu/state-aid/coronavirus/adjustments-and-rules-specific-sectors_en)

- Commission, Sustainable and Smart Mobility Strategy – putting European transport on track for the future, COM(2020) 789 final, 9.12.2020
- Commission, Guidelines on regional State aid, OJ C 153, 29.4.2021, p. 1–46
- Commission, Notice on the enforcement of State aid rules by national courts, Communication 2021/C 305/01
- Commission, 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality, Communication COM(2021) 550 final, 14.7.2021
- Commission, Proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity, COM(2021) 563 final, 14.7.2021
- Commission, Reducing emissions from aviation, 2021, [https://ec.europa.eu/clima/policies/transport/aviation\\_en](https://ec.europa.eu/clima/policies/transport/aviation_en)
- Commission, Questions and Answers - Emissions Trading – Putting a Price on carbon, 14 July 2021
- Commission, Guidelines on State aid for climate, environmental protection and energy 2022, Communication 2022/C 80/01 ('CEEAG')
- Commission, Staff Working Document Accompanying the Report on Competition Policy 2020, SWD(2021) 177 final, 7.7.2021
- Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, Communication 2020/C 91 I/01
- Commission, Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, Communication 2022/C 426/01
- Commission, RePowerEU: Joint European Action for more affordable, secure and sustainable energy, Communication COM(2022) 108 final, 8.3.2022
- Commission, Framework for State aid for research and development and innovation, Communication 2022/C 414/01
- Commission, Approval of the content of a draft for a Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, Communication 2022/C 435/05
- Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23.2.2022, COM (2022) 71
- Commission, Staff Working Document Accompanying the Report on Competition Policy 2021, SWD(2022) 188 final/2, 26.8.2022
- Commission, Staff Working Document Accompanying the Report on Competition Policy 2022, SWD(2023) 76 final, 4.4.2023
- Commission, State aid Scoreboard 2022, 24.4.2023, available at [https://competition-policy.ec.europa.eu/state-aid/scoreboard\\_en](https://competition-policy.ec.europa.eu/state-aid/scoreboard_en)

- Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Communication C/2023/4752, OJ C 259, 21.7.2023, p. 1–125
- Commission, Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, Communication 2023/C 101/03
- Commission, Amendment to the Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, OJ C, Communication C/2023/1188, 21.11.2023
- Commission, A Green Deal Industrial Plan for the Net-Zero Age, Communication COM(2023) 62 final, 1.2.2023
- Commission, Communication extending the transitional period provided for in the Guidelines on State aid to airports and airlines concerning regional airports, 2023/C 244/01
- Commission, Proposal for a regulation of the European Parliament and of the Council on establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem (Net Zero Industry Act), COM(2023) 161, 16.3.2023
- Commission, Notice on the definition of the relevant market for the purposes of Union competition law, Communication C/2024/1645, 22.2.2024

## **ii. State aid decisions (pre-pandemic)**

- Commission, 27 June 1984, Belgium - Aid granted by the Belgian Government to a producer of polypropylene fibre and yarn, Decision 84/508/EEC, OJ L 283, 27.10.1984, p. 42–44
- Commission, 15 July 1987, France - Aid granted by the French Government to a producer of textiles, clothing and paper products - Boussac Saint Frères, Decision 87/585/EEC
- Commission, 7 October 1987, Greece - Law 1386/1983 by which the Greek Government grants aid to Greek industry, Decision 88/167/EEC, OJ L 76, 22.3.1988, p. 18–22
- Commission, 24 July 1991, Belgium – Sabena, Decision 91/555/EEC
- Commission, 21 December 1993, Ireland – Aer Lingus, Decision 94/118/EC
- Commission, 6 July 1994, Portugal - TAP Air Portugal, Decision 94/698/EC
- Commission, 27 July 1994, France – Air France, Decision 94/653/EC
- Commission, 7 October 1994, Greece - Olympic Airways, Decision 94/696/EC
- Commission, Decision 95/404/EC of 19 July 1995 on a procedure relating to the application of Council Regulation (EEC) No 2407/92 (Swissair/Sabena)
- Commission, 15 March 1996, United Kingdom – Bovine Spongiform Encephalopathy, Aid No. N 299/96, N 290/96, N 278/96 and N 289/96

- Commission, 15 July 1997, Italy – Alitalia, Decision 97/789/EC
- Commission, Aid which Ireland has decided to grant for measures promoting transport of Irish livestock by sea to Continental Europe, Communication 98/C 142/05
- Commission, 20 July 1999, Belgium - Special measures for the poultry, pig meat, eggs and beef sector, as a result of dioxin contamination, 1999/C 253/04
- Commission, 9 February 2000, Belgium – Indemnités en faveur des entreprises agricoles touchées par la crise de la dioxine, case SA.11156
- Commission, 12 April 2000, Denmark - CO2 quotas, case SA.12207
- Commission, 28 November 2001, Great Britain, Emission Trading Scheme, case SA.12525
- Commission, 11 December 2002, France - French airlines, Decision 2003/196/EC
- Commission, 12 March 2002, United Kingdom – Aid to airlines for closure of airspace, Decision C(2002)894 final
- Commission, 17 July 2002, United Kingdom – Network Rail, State aid No. N 356/2002, Decision C(2002)2622 final
- Commission, 30 April 2003, Austria - Austrian air carriers, Decision 2003/637/EC
- Commission, 24 June 2003, Netherlands - NOx Trading Scheme, case SA.14833
- Commission, 19 May 2004, Aid scheme that Italy plans to implement for poultry farms — AIMA programme for the poultry industry, OJ L 32, 6.2.2007, p. 14–22
- Commission, 17 December 2005, Austria - measures to make good damage caused by the Flood 2005, case SA.19862
- Commission, 16 May 2006, N 169/2006 – United Kingdom, Aid of social character air services in the Highlands and Islands of Scotland, OJ C 272, 9.11.2006, p. 10
- Commission, 11 December 2007, N 471/2007 – Portugal, Social allowances to passengers residing in the Autonomous Region of Madeira, OJ C 46, 19.2.2008, p. 2
- Commission, 23 December 2008, Special measures relating to meat products of animal origin from pigs following a dioxin contamination in Ireland, SA.27225
- Commission, 5 January 2011, N 426/2010 – France, Aid of a social character for certain categories of passenger on air services between La Réunion and metropolitan France, OJ C 71, 5.3.2011, p. 5
- Commission, 29 June 2011, SA.32888 – Germany, Exemption from air transport tax as regards flights of people domiciled on islands and other cases, OJ C 70, 8.3.2012, p. 1
- Commission, 1 August 2011, Slovenia – Rectification of consequences of the damage caused to air carriers and airports by earthquake activity in Iceland and the resulting volcano ash in April 2010, SA.32163, C (2011) 5495 final

Commission, 4 August 2017, Netherlands – Start-up aid to airlines operating in the Province of Limburg, SA. 47746, Decision C(2017) 5392 final

Commission, 8 January 2012, Hungary – Malév Hungarian Airlines, case SA.30584

Commission, 15 May 2013, Poland – Rescue aid for LOT Polish Airlines, case SA.35900

Commission, 29 July 2014, Poland – Restructuring aid for LOT Polish Airlines SA, case SA.36874

Commission, 7 May 2014, United Kingdom – Isles of Scilly Air link, C/2014/2626/2, case SA.38441

Commission, 9 January 2015, Cyprus - Cyprus Airways (Public) Ltd, cases SA.35888, SA.37220 and SA.38225

Commission, 6 November 2015, Estonia – Rescue aid to Estonian Air, case SA.35956

Commission, 2 February 2017, France - Aides présumées octroyées aux entreprises de transport en commun par la région Ile-de-France, SA.26763

Commission, 14 July 2017, Ireland - non-application of the Air Travel Tax to transit and transfer passengers, C(2017) 4932, case SA.29064

### **iii. State aid decisions (post-pandemic)**

Commission, 16 August 2021, Synthetic securitisation product under the Pan-European Guarantee Fund in response to the COVID-19 crisis, C(2021) 6126 final, cases SA.63422 - SA.63443

Commission, 15 July 2022, Finland TCF: Guarantee and subsidised loan scheme, C(2022) 5134 final, case SA.103386

iv. Decisions adopted during the pandemic in the aviation sector

(1) Individual aid to airlines

Member State	Case no. (decision date)	Beneficiary	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
Austria	SA.56981 (17.4.2020)	Austrian Airlines	107(3)(b) TFEU	Austrian loan scheme, 90% guarantee	300	n.d.
Austria	SA.57539 (6.7.2020)	Austrian Airlines	107(2)(b) TFEU	Direct grant	150	T-677/20 (rejected) C-591/21 (pending)
Belgium	SA.61709 (24.06.2021)	Air Belgium SA	107(2)(b) TFEU	Capital injection	4.8	n.d.
Belgium	SA.57544 (21.8.2020)	Brussels Airlines	107(3)(b) TFEU § 3.3, 3.11 TF	Loan with subsidised interest rates	290	T-14/21 (rejected)
Croatia	SA.55373 (30.11.2020)	Croatia Airlines	107(2)(b)	Direct grant	11.7	T-111/21 (rejected)
Denmark	SA.56795 (15.4.2020)	SAS (damage compensation)	107(2)(b) TFEU	Guarantee	137	T-378/20 (rejected) C-321/21 (rejected)
Denmark	SA.57543 (17.8.2020)	SAS (II, recapitalization)	107(3)(b) TFEU §3.11 TF	Capital injection, hybrid	583	T-238/21 (annulled)

Member State	Case no. (decision date)	Beneficiary	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
Denmark/ Sweden	SA.57543 and SA.58342 (4.7.2023)	SAS (II, recapitalization, post annulment)	-	-	-	n.d.
Denmark/ Sweden	SA.63250 and SA.6389 (9.7.2021)	SAS (loan)	107(3)(b) TFEU §3.3 TF	Subsidised loan	252	n.d.
Finland	SA.56809 (18.5.2020)	Finnair (I)	107(3)(b) TFEU §3.2	State loan guarantee	540	T-388/20 (rejected) C-353/21 (pending)
Finland	SA.57410 (9.6.2020)	Finnair (II)	107(3)(b) TFEU §3.11	Recapitalisation	286	T-657/20 (rejected) C-588/22 (pending)
Finland	SA.60113 (12.3.2021)	Finnair (III)	107(2)(b) TFEU	Hybrid loan	351.38	T-444/21 (pending)
France	SA.57082 (4.5.2020)	Air France	107(3)(b) TFEU § 3.2 TF	Guarantee, Loan, Repayable advances	7,000	T-216/21 (annulled)
France	SA.59913 (5.4.2021)	Air France	107(3)(b) TFEU §3.11 TF	Equity Participation, Hybrid Instruments	4,000	T-494/21 (annulled)

Member State	Case no. (decision date)	Beneficiary	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
France	SA.58125 (11.12.2020)	Corsair	107(2)(b) TFEU	Tax credit	30.2	n.d.
France	SA.58463 (11.12.2020)	Corsair	107(3)(c) TFEU	Loan/ Repayable advances	106.7	n.d. (formal investigation procedure ongoing)
France	SA.100758 (18.1.2022)	Air Austral	107(3)(c) TFEU	Soft loan	20	n.d.
Germany	SA.57153 (25.6.2020)	Lufthansa	107(3)(b) TFEU § 3.11 TF	Equity participation, silent participation, loan guarantee	6,000	T-34/21 and T-87/21 (annulled) C-457/23 (pending)
Germany	SA.56714 (22.3.2020)	Lufthansa	107(3)(b) TFEU	German loan scheme, 90% guarantee	3,000	n.d.
Germany	SA.56867 (26.4.2020)	Condor (I)	107(2)(b) TFEU	State loan guarantee	(550)	T-665/20 (annulled)
Germany	SA.56867 (26.7.2021)	Condor (I, post annulment)	107(2)(b) TFEU	State loan guarantee	175.3	T-366/22 (pending)
Germany	SA.63617 (26.7.2021)	Condor (II)	107(2)(b) TFEU	State loan	60	n.d.
Germany	SA.63203 (26.7.2021)	Condor	107(3)(c) TFEU	Restructuring and write-off of	110.2	T-28/22 (annulled)

Member State	Case no. (decision date)	Beneficiary	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
				debt and interest		
Germany	SA.59812 (4.1.2021)	TUI	107(3)(b) TFEU §3.11 TF	Recapitalisation, hybrid loan	1,250	n.d.
Greece	SA.59462 (23.12.2020)	Aegean Airlines	107(2)(b) TFEU	Direct grant	120	T-340/21 (pending)
Greece	SA.62588 (02.05.2022)	Ellinair	107(2)(b) TFEU	Direct grant	6.8	n.d.
Italy	SA.58114 (4.9.2020)	Alitalia (I)	107(2)(b) TFEU	Direct grant	199.45	T-225/21 (rejected)
Italy	SA.59188 (29.12.2020)	Alitalia (II)	107(2)(b) TFEU	Direct grant	73.02	T-333/21 (rejected)
Italy	SA.61676 (26.3.2021)	Alitalia (III)	107(2)(b) TFEU	Direct grant	24.7	n.d.
Italy	SA.62542 (12.05.2021)	Alitalia (IV)	107(2)(b) TFEU	Direct grant	12.8	n.d.
Italy	SA.63234 (2.7.2021)	Alitalia (V)	107(2)(b) TFEU	Direct grant	39.65	n.d.
Latvia	SA.56943 (3.7.2020)	airBaltic	107(3)(b) TFEU §3.11 TF	Capital injection	250	T-737/20 (rejected)

Member State	Case no. (decision date)	Beneficiary	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
Latvia	SA.63604 (23.5.2022)	airBaltic	107(3)(b) TFEU §3.11 TF	Recapitalisation	33.4	n.d.
Latvia	SA.101755 (24.05.2022)	airBaltic	107(2)(b) TFEU	Capital injection	11.6	n.d.
Latvia	SA.101032 (21.12.2021)	airBaltic	107(2)(b) TFEU	Capital injection	45	n.d.
The Netherlands	SA.57116 (13.7.2020)	KLM	107(3)(b) TFEU § 3.2 and 3.3 TF	Guarantee, Loan	3,400	T-643/20 (annulled)
The Netherlands	SA.57116 (16.7.2021)	KLM (post annulment)	-	-	-	T-146/22 (annulled)
Poland	SA.59158 (22.12.2020)	LOT	107(3)(b) TFEU §3.3, 3.11	Loan, capital injection	650	T-398/21 (pending)
Portugal	SA.57369 (10.6.2020)	TAP SGPS (rescue)	107(3)(c) TFEU	Rescue Loan	1,200	T-465/20 (annulled)
Portugal	SA.57369 (16.7.2021)	TAP SGPS (rescue, post annulment)	-	-	-	T-743/21 (pending)
Portugal	SA.60165 (21.12.2021)	TAP SGPS (restructuring)	107(3)(c) TFEU	-	-	n.d.

Member State	Case no. (decision date)	Beneficiary	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
Portugal	SA.62304 (23.4.2021)	TAP (compensation I)	107(2)(b) TFEU	Loan	462	T-499/21 (pending)
Portugal	SA.63402 (21.12.2021)	TAP (compensation II)	107(2)(b) TFEU	Capital Injection, Loan	107.7	T-164/22 (pending)
Portugal	SA.100121 (22.12.2021)	TAP (compensation III)	107(2)(b) TFEU	Capital Injection, Loan	71.37	T-185/22 (pending)
Portugal	SA.61771 (30.04.2021)	SATA Air Azores	107(2)(b) TFEU	Direct grant, Interest rate subsidy	12	n.d.
Portugal	SA.58101 (18.8.2020)	SATA Group	107(3)(c) TFEU	Guarantee (then liquidity support)	133	n.d.
Portugal	SA.62043 (30.4.2021)	SATA Group	107(3)(c) and 106(2) TFEU	Liquidity support	255.5	n.d.
Portugal	SA.58101 and SA.62043 (7.6.2022)	SATA Group	107(3)(c) and 106(2) TFEU	Restructuring aid	453.25	n.d.
Romania	SA.56810 (2.10.2020)	TAROM (I)	107(2)(b) TFEU	Guarantee	19.33	T-332/21 (pending)
Romania	SA.63360 (29.4.2022)	TAROM (II)	107(2)(b) TFEU	Capital injection	1.9	T-827/22 (pending)

Member State	Case no. (decision date)	Beneficiary	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
Romania	SA.59344 (5.7.2021)	TAROM (restructuring)	107(3)(c) TFEU	Debt write-off, capital injection, Direct grant	190.7	n.d.
Romania	SA.57026 (20.8.2020)	Blue Air	107(2)(b) and 107(3)(c) TFEU RR guidelines	Guarantee	62	T-142/21 (rejected)
Romania	SA.62829 (17.4.2023)	Blue Air (opening formal inv. procedure)	-	-	-	-
Spain	SA.58343 (22.7.2021)	Air Nostrum	107(2)(b) TFEU	Direct grant	9	n.d.
Sweden	SA.57061 (24.4.2020)	SAS (damage compensation)	107(2)(b) TFEU	Guarantee	137	T-379/20 (rejected) C-320/21 (rejected)
Sweden	SA.58342 (17.8.2020)	SAS (recapitalization)	107(3)(b) TFEU §3.11 TF	Capital injection, hybrid	486	T-238/21 (annulled)

**(2) Aid schemes to airlines**

Member State	Case no. (decision date)	Eligibility criteria	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
Bulgaria	SA.100321 (17.3.2022)	Operating licence issued by national aviation authorities	107(3)(b) TFEU § 3.1, 3.12 TF	Direct grant	30.68	n.d.
Cyprus	SA.57691 (1.7.2020)	All airlines serving any of the MS airports (proportionally to the load factor reduction)	107(3)(b) § 3.1 TF	Direct grant	6.3	n.d.
Denmark	SA.58157 (3.9.2020)	All airlines serving any of the MS airports (excluding cargo; airports included)	107(3)(b) § 3.1 TF	Direct grant	24	n.d.
Denmark	SA.59370 (27.11.2020)	Operating licence issued by national aviation authorities	107(3)(b)	Direct grant	6	n.d.
France	SA.56765 (31.3.2020)	Operating licence issued by national aviation authorities	107(2)(b)	Tax deferment	200.1	T-259/20 (rejected) C-210/21 (rejected)

Member State	Case no. (decision date)	Eligibility criteria	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
Italy	SA.59029 (22.12.2020)	Operating licence issued by national aviation authorities	107(2)(b)	Grant paid by a compensation fund	130	T-268/21 (annulled) C-490/23 (pending)
Romania	SA.57817 (27.7.2020)	All airlines operating at a certain airport (Oradea)	107(3)(b) § 3.1 TF	Direct grant	1	n.d.
Romania	SA.59156 (20.11.2020)	All airlines operating at a certain airport (Sibiu)	107(3)(b) § 3.1 TF	Direct grant	1.66	n.d.
Romania	SA.63319 (7.7.2021)	All airlines operating at a certain airport (Mures)	107(3)(b) § 3.1 TF	Direct grant	1.15	n.d.
Romania	SA.64092	All airlines operating at a certain airport (Maramures)	107(3)(b) § 3.1 TF	Direct grant	1.2	n.d.
Romania	SA.100434	All airlines operating at a certain airport (Arad)	107(3)(b) § 3.1 TF	Direct grant	1	n.d.
Slovakia	SA.100438 (23.3.2022)		107(3)(b) § 3.1, 3.12 TF	Direct grant	3	n.d.

Member State	Case no. (decision date)	Eligibility criteria	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
Slovenia	SA.59124 (16.11.2020)	All airlines serving any of the MS airports	107(3)(b) § 3.1 TF	Direct grant	5	n.d.
Slovenia	SA.101675 (3.3.2022)	Scheme airlines (reintrod.)	107(3)(b) TFEU	Direct grant	7	n.d.
Spain	SA.57659 (31.7.2020)	Scheme general (Iberia)	107(3)(b) TFEU §3.3 and 3.11 TF	Recapitalization fund	750	T-628/20 (rejected) C-441/21 (pending)
Spain	SA.57659 (31.7.2020)	Scheme general (Vueling)	107(3)(b) TFEU §3.3 and 3.11 TF	Recapitalization fund	260	T-628/20 (rejected) C-441/21 (pending)
Sweden	SA.56812 (11.4.2020)	Operating licence issued by national aviation authorities	107(2)(b) § 3.2 TF	Guarantee	455	T-238/20 (rejected) C-209/21 (rejected)

**(3) Aid to airports and other industry operators**

Member State	Case no. (decision date)	Beneficiary / Eligibility Criteria	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
Belgium	SA.57637 (7.7.2020)	Aviapartner	107(3)(b) TFEU § 3.11 TF	Convertible loan	25	n.d.
Belgium	SA.58299 (29.9.2020)	Scheme (Flemish airports)	107(3)(b) TFEU § 3.1 and 3.3 TF	Soft loan, Direct grant	1.1	n.d.
Belgium	SA.56807 (11.04.2020)	Scheme (Walloon airports)	107(3)(b) TFEU § 3.1 TF	Tax deferral	n.d. [redacted]	n.d.
Bulgaria	SA.56905 (14.04.2020)	Scheme (general; aviation industry employees)	107(3)(b) TFEU § 3.10	Direct grant	n.d. [total for all sectors: 767 mln]	n.d.
Croatia	SA.103028 (17.6.2022)	Scheme (general; large enterprises active in the civil aviation sector - airlines, airports, air navigation service providers and maintenance service providers-	107(3)(b) TFEU §3.11	Recapitalisation	85.78	n.d.

Member State	Case no. (decision date)	Beneficiary / Eligibility Criteria	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
		established in Zagreb and Northern Croatia)				
Croatia	SA. 57711 (30.6.2020)	Scheme (general; air, maritime, infrastructure, tourism sectors)	107(3)(b) TFEU § 3.1, 3.2, 3.4	Guarantees	80	n.d.
Estonia	SA.57586 (11.8.2020)	Nordica (wet leasing)	107(3)(b) TFEU § 3.3, 3.11	Capital injection and loan	30	T-769/20 (rejected)
Finland	SA.59132 (04.05.2021)	Finavia	107(2)(b) and 107(3)(b) TFEU § 3.3 and 3.11 TF	Subordinated debt, Equity instruments	350	n.d.
Germany	SA.57644 (23.11.2020)	Scheme (airports)	107(2)(b) and 107(3)(b) TFEU	Direct grant; Tax deferment	1,360	n.d.
Germany	SA.63946 (1.2.2022)	Flughafen Berlin Brandenburg	107(3)(b) TFEU § 3.11	Recapitalisation	1,700	n.d.

Member State	Case no. (decision date)	Beneficiary / Eligibility Criteria	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
Greece	SA.62052 (26.07.2021)	Athens International Airport	107(2)(b) TFEU	direct grant, cancellation of concession fees	110.02	n.d.
Hungary	SA.57767 (7.7.2020)	Scheme (aviation industry)	107(3)(b) TFEU § 3.9, 3.10 TF	Tax allowance	23.5	n.d.
Ireland	SA.59709 (23.2.2021)	Scheme (airports)	107(2)(b) TFEU § 3.1 and 3.12 TF	Direct grants, guarantees and loans	26	n.d.
Italy	SA.63074 (26.07.2021)	Scheme (airports and ground-handling)	107(2)(b) TFEU	Direct grant	800	n.d.
Italy	SA.62539 (14.12.2021)	Scheme (airports)	107(2)(b) TFEU	Direct grant	6.1	n.d.
Italy	SA.59518 (1.3.2021)	Toscana Aeroporti	107(2)(b) TFEU	Direct grant	10	n.d.
Poland	SA.58212 (28.09.2020)	Scheme (airports)	107(2)(b) TFEU	Direct grant	32	
Romania	SA.58676 (23.11.2020)	Scheme (regional airports)	107(2)(b) TFEU	Direct grant	4.4	n.d.

Member State	Case no. (decision date)	Beneficiary / Eligibility Criteria	Legal basis [TFEU (§ TF)]	Type of aid	Amount (mln EUR)	CJEU Case no. (outcome)
Romania	SA.57178 (05.08.2020)	Timisoara airport	107(2)(b) TFEU	Direct grant	0.98	n.d.
Sweden	SA.61298 (10.03.2021)	Scheme (air traffic control services active in Sweden)	107(3)(b) TFEU § 3.3 TF	subsidised interest rates for loans	16.3	n.d.
United Kingdom	SA.58466 (02.12.2020)	Scheme (airports)	107(2)(b) TFEU	Tax allowance	19.64	n.d.

## E. Bibliography

### i. Books, Collective Works, Articles

- ABATE M., CHRISTIDIS P., PURWANTO A., *Government support to airlines in the aftermath of the COVID-19 pandemic*, in *Journal of Air Transport Management*, vol. 89, 2020, Article 101931
- ABE M., *Skytrains: Competitive Pricing, Quality of Service and the Deregulation of the Airline Industry*, in *Rivista internazionale di economia dei trasporti*, vol. 6, 1979, p. 41–47
- ABEYRATNE R., *Article 6*, in R. ABEYRATNE (ed.), *Convention on International Civil Aviation A Commentary*, Cham, 2014
- ABEYRATNE R., *Aviation Security. Legal and Regulatory Aspects*, Abingdon, 2018
- ABEYRATNE R., *Implications of an Avian Flu Pandemic for Air Transport*, in *Air & Space Law*, vol. 31, 2006, pp. 159-171
- ADAM R., TIZZANO A., *Diritto dell'Unione europea*, Turin, 2014
- ALIMONTI G., MARIANI L., PRODI F., ET AL., *A critical assessment of extreme events trends in times of global warming*, in *European Physical Journal Plus*, vol. 137, 2022, p. 112 ff.
- ANTONINI A., *Gli oneri di pubblico servizio e gli aiuti di Stato nel trasporto aereo*, in *Diritto dei Trasporti*, vol. 13, 2000, p. 67-83
- ARHOLD C., *Energy and Coal*, in F. SAECKER, F. MONTAG (eds), *European State Aid Law*, Munich, 2016, p. 1236 ff.
- ARRHENIUS S., *On the influence of carbonic acid in the air upon the temperature of the ground*, in *The London, Edinburgh, and Dublin Philosophical Magazine and Journal of Science*, vol. 41:251, 1896
- AVOGADRO N. ET AL., *A tale of airline competition: When full-service carriers undercut low-cost carriers fares*, in *Journal of Air Transport Management*, vol. 92, 2021, Art. 102027
- BARBANO M., *L'inserimento della prospettiva ambientale nella valutazione degli aiuti*, in M. SEBASTIANI ET AL. (eds), *Trasformazioni e sviluppo del sistema della mobilità: scenari prospettici, PNRR e strategia UE per una mobilità sostenibile*, Rapporto SIPOTRA 2023, forthcoming
- BARBANO M., *La chiusura dello spazio aereo: il caso della misura restrittiva adottata dall'Unione europea nei confronti della Russia in occasione del conflitto ucraino*, in *Il Diritto dell'Unione europea*, no. 3-4, 2022, p. 547-582
- BARBANO M., *Le sentenze del Tribunale dell'Unione sulla vicenda Air Berlin (cause T-240/18 e T-296/18): to O&D or not to O&D?*, in *Quaderni AISDUE*, no. 1, 2021, p. 135-144
- BARBANO M., *Sovvenzioni estere distorsive: ambito di applicazione ed enforcement settoriale del regolamento (UE) n. 2560/2022*, in *Quaderni AISDUE*, no. 2, 2023, p. 119-132
- BARBANO M., *Verso un antitrust italiano 4.0? I GAFAM e i big data all'esame dell'AGCM*, in *Diritto del Commercio Internazionale*, 2021, p. 957-987

- BAUR J., *EU-Russia Aviation Relations and the Issue of Siberian Overflights*, in *Air and Space Law*, vol. 35, 2010, p. 225-247
- BELLIENI N., *Art. 84*, in R. QUADRI, R. MONACO, A. TRABUCCHI (eds), *Commentario al Trattato istitutivo della Comunità economica europea*, Milan, 1965, p. 588 ff.
- BENINTENDI P., *Bankrupt in Europe: A Case Study of Three Recent Airline Insolvencies*, in *Air & Space Law*, vol. 44, n. 3, 2019, p. 241–260
- BERGSTRÖM M., IACOVIDES M., STRAND M. (eds), *Harmonising EU Competition Litigation. The New Directive and Beyond*, London, 2018
- BIAGIONI G., *Il rapporto tra l'art. 107 TFUE e le altre norme dei Trattati*, in L.F. PACE (ed), *Dizionario Sistematico della Concorrenza*, 2<sup>nd</sup> ed., Milan, 2020, p. 711 ff.
- BIONDI A., *Competition Policy supporting the Green Deal: Some observations on state aid control*, Reply to European Commission Call for Contributions, 2020, at: [https://competition-policy.ec.europa.eu/policy/green-gazette/conference-2021\\_en](https://competition-policy.ec.europa.eu/policy/green-gazette/conference-2021_en)
- BIONDI A., *The Rationale of State Aid Control: A Return to Orthodoxy*, in *Cambridge Yearbook of European Legal Studies*, vol. 12, 2010, p. 35–52
- BIRNIE P., BOYLE A., REDGWELL C., *International Law and the Environment*, 3<sup>rd</sup> ed., Oxford, 2009
- BITETTO A., “Low cost” e dominio (abusato?) dei cieli, in *Mercato concorrenza regole*, 2015, p. 513 ff.
- BITTENCOURT NETO (DE O.) O., *Outer Space as a Global Commons and the Role of Space Law*, in K. SCHROGL, C. GIANNOPAPA, N. ANTONI (eds), *A Research Agenda for Space Policy*, Cheltenham, 2021, p. 1-18
- BLANKE H., MANGIAMELI S., *Article 5*, in BLANKE H., MANGIAMELI S. (eds), *The Treaty on European Union. A commentary*, Heidelberg, 2013, p. 255-286
- BODANSKY D., BOYLE A., FREESTONE D., *International Law & Sustainable Development*, Oxford, 1999
- BOELKE S., *Strategic Marketing Approaches within Airline Management*, Hamburg, 2015
- BOI G., *Gli accordi di traffico aereo: la nuova frontiera degli Open Skies*, in VV.AA., *Il nuovo diritto aeronautico. In ricordo di Gabriele Silingardi*, Milan, 2002, p. 65 ff.
- BOWEN J., LAROE C., *Airline Networks and the International Diffusion of Severe Acute Respiratory Syndrome (SARS)*, in *The Geographical Journal*, vol. 172, 2006, pp. 130–144
- BRUNNÉE J., RAJAMANI L., *International Climate Change Law*, Oxford, 2017
- BRUZZONE G., BELLO F.P., *La velocizzazione dell'esame delle notifiche: sfide per la Commissione e le autorità nazionali*, in M. SEBASTIANI ET AL. (eds), *Rapporto Sipotra 2023*, forthcoming
- BRUZZONE G., CAPOZZI S., *A Pro-Competitive Strategy for EU Sustainable Growth*, SSRN, 2020, <http://dx.doi.org/10.2139/ssrn.3779819>

- BUISSING N., *Challenging the 'Balanced Approach to Aircraft Noise Management' Principle: Will the Dutch Approach Stand or Will the Principle Prevail?*, in *Air & Space Law*, vol. 49, 2024, pp. 1-34
- BURGHOUWT G., *Influencing Air Connectivity Outcomes*, ITF Discussion Paper No. 2017-24, 2017, <https://www.itf-oecd.org/sites/default/files/docs/influencing-air-connectivity-outcomes.pdf>
- BYRNE B., ADLER E., *State aid to airports and airlines*, in L. HANCHER, J. PIERNAS LÓPEZ (eds), *Research handbook on European State aid law*, Cheltenham, 2021, p. 269-296
- CALZOLARI L., *La selettività degli aiuti di Stato e il principio di parità di trattamento delle imprese nella recente giurisprudenza della Corte di giustizia*, in *Diritto del Commercio Internazionale*, no. 2, 2015, p. 481-507
- CAMPO COMBA M., *EU Competition Law and Sustainability. The Need for an Approach Focused on the Objectives of Sustainability Agreements*, in *Erasmus Law Review*, no. 3, 2022, Article No. 217
- CARPANELLI E., *Between global climate governance and unilateral action: The establishment of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSLA)*, in J. WALULIK (ed), *Harmonizing regulatory and antitrust regimes for international air transport*, Abingdon, 2020, p. 125-141
- CARPANELLI E., *La pratica dei pagamenti per i diritti di sorvolo della siberia: ultimi sviluppi*, in *Diritto dei trasporti*, n. 1, 2012, p. 1-34
- CELLERINO C., *La sentenza della Corte di giustizia del 23 gennaio 2019 relativa al caso Traghetti del Mediterraneo (IV): una "mano tesa" alla Corte di Cassazione nella condanna dello Stato italiano*, in *Diritto dell'Unione Europea*, 2019, p. 571-579
- CHENG B., *The Law of International Air Transport*, in KEETON G., SCHWARZENBERGER G. (eds.), *The Yearbook of World Affairs*, London, 1962
- CINI M., *State aid control from a political science perspective*, in L. HANCHER, J. PIERNAS LÓPEZ (eds), *Research handbook on European State aid law*, Cheltenham, 2021, p. 1-14
- CLEGG C., *The Aviation Industry and the Transmission of Communicable Disease: The Case of H1N1 Swine Influenza*, in *J. Air L. & Com.*, vol. 75, 2010, pp. 437-467
- COLANGELO M., ZENO-ZENCOVICH V., *Introduction to European Union Transport Law*, Roma, 2019
- COOK G., BILLIG B., *Airline Operations and Management*, Abingdon, 2017
- CORDES J., *Flying the Open Skies: an Analysis and Historical Perspective of the U.S.-Netherlands Bilateral Air Transport Agreement of September 4, 1992*, in *Transnational Law*, vol. 6, 1993, p. 301 ff.
- CORNES R., SANDLER T., *The Theory of Externalities, Public Goods, and Club Goods*, Cambridge, 1986
- CORREIA V., *The General Court's Decisions on State Aid Law in Times of COVID-19 Pandemic*, in *Air & Space Law*, vol 47, 2022, p. 1-24

- CYNDECKA M., *State aid and the financial sector: the crisis and beyond*, in L. HANCHER, J. PIERNAS LÓPEZ (eds), *Research handbook on European State aid law*, Cheltenham, 2021, p. 134-152
- CYNDECKA M., *The Market Economy Investor Test in EU State Aid Law*, Alphen aan den Rijn, 2016
- DE BAERE G., RYNGAERT C., *The ECJ's Judgment in Air Transport Association of America and the International Legal Context of the EU's Climate Change Policy*, in *European Foreign Affairs Review*, 2013, p. 389-409
- DE COCK W., *Het Gerecht vernietigt de goedkeuringsbesluiten van de staatssteun aan KLM en TAP: een (pyrrus)overwinning voor Ryanair?*, in *Tijdschrift voor Europees en economisch recht*, n. 3, 2022, p. 177-183
- DE MESTRAL A., FITZGERALD P., TANVEER AHMAD MD (eds), *Sustainable development, international aviation, and treaty implementation*, Cambridge, 2018
- DE RUGY V., LEFF G., *The Case against Bailing Out the Airline Industry*, in *Mercatus Center – Policy Brief*, Special Edition, 25 Mar. 2020, <https://dx.doi.org/10.2139/ssrn.3571441>
- DE SADELEER N., *EU Environmental Law and the Internal Market*, Oxford, 2014
- DE STEFANO G., DUTILLIEUX M. W., *Risk Finance Aid: Facilitating Access to Finance for SMEs, Start-ups and Small or Innovative Middle-Capitalisation Firms*, in *EStAL*, vol. 21, no. 3, 2022, p. 222 ff.
- DELARUE J., BECTHEL S., *Access to justice in State aid: how recent legal developments are opening ways to challenge Commission State aid decisions that may breach EU environmental law*, in *ERA Forum*, vol. 22, 2021, p. 253–268
- DENZA E., *International Aviation and the EU Carbon Trading Scheme: Comment on the Air Transport Association of America Case*, in *European Law Review*, 2012, p.314-326
- DI BUCCI V., *The Modernisation of State Aid Control and Its Objectives: Clarity, Relevance, Effectiveness*, in *Italian Antitrust Review*, no. 3, 2014, p. 7-23
- DIVERIO D., *Gli aiuti di Stato al trasporto aereo e alle banche*, Milano, 2010
- DOBRSZKES F., MATTIOLI G., MATHIEU L., *Banning super short-haul flights: Environmental evidence or political turbulence?*, in *Journal of Transport Geography*, vol. 104, 2022, Article 103457
- DOGANIS R., *The Airline Business*, 2<sup>nd</sup> ed., Abingdon, 2006
- DUBE K., NHAMO G., CHIKODZI D., *COVID-19 pandemic and prospects for recovery of the global aviation industry*, in *Journal of Air Transport Management*, vol. 92, 2021, Article 102022
- EBNER M., GAMBARO E., *The Notion of State Aid*, in A. SANTA MARIA, C. BISCARETTI DI RUFFIA (eds), *Competition and State Aid – An Analysis of the EC Practice*, Alphen aan den Rijn, 2007, p. 17 ff.
- ELIAS B., *Addressing COVID-19 Pandemic Impacts on Civil Aviation Operations*, CRS Paper no. R46483, Ago. 2020

- ELLERMAN A., CONVERY F., DE PERTHUIS C., *Pricing Carbon: The European Union Emissions Trading Scheme*, Cambridge, 2010
- FENNEL P., *The Transport Policy Case*, in *European Law Review*, 1985 p.264-276
- FICHERT F., FORSYTH P., NIEMEIER H. (eds), *Aviation and Climate Change*, Abingdon, 2020
- FITZMAURICE M., FRENCH D. (eds), *International Environmental Law and Governance*, Leiden, 2015
- FOURIER J., *Memoire sur les Temperatures du Globe Terrestre et des Espaces Planetaires*, in *Memoires de l'Academie Royale des Sciences de l'Institute de France*, vol. VII, 1827, p. 570-604
- FRIEDERISZICK H., ROELLER L., VEROUDEN V., *European State Aid Control: an economic framework*, in P. BUCCIROSSI (ed.), *Handbook of antitrust economics*, Cambridge, 2008, p. 625–669
- GALLO D., *Public Services and EU Competition Law*, Abingdon, 2022
- GARBEN S., *Article 191 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, New York, 2019, p. 1516-1525
- GATTINI A., *Between Splendid Isolation and Tentative Imperialism: The EU's Extension of its Emission Trading Scheme to International Aviation and The ECJ's Judgment in the ATA Case*, in *International and Comparative Law Quarterly*, 2012 p. 977-991
- GIACCO A., STECCHETTI L., *La saga Alitalia e il mantello dello Stato salvatore*, in *Mercato Concorrenza Regole*, no. 2, 2020, p. 305-331
- GIANNINO M., *State Aid to Aviation at the Time of Covid-19: The Developing Case Law of the General Court of the European Union*, in *Transnational Dispute Management*, vol. 18, 2021, Article no. 8
- GIEMULLA E., WEBER L., *International and EU Aviation Law*, Alphen aan den Rijn, 2011
- GOESSLING S., HUMPE A., *The global scale, distribution and growth of aviation: Implications for climate change*, in *Global Environmental Change*, 2020, p. 65 ff.
- GULDIMANN W., *Cuius est Solum, Eius est Usque ad Coelum*, in *Zeitschrift für Luft- und Weltraumrecht*, vol. 1, no. 3, 1952, p. 213-233
- HAAG K., *International action and the role of ICAO*, in F. FICHERT, P. FORSYTH, H. NIEMEIER (eds), *Aviation and Climate Change*, Abingdon, 2020, p. 104-116
- HAANAPPEL P.C., *LATA Tariff Co-ordination and Competition Law*, in *Air & Space Law*, vol. 20, 1995, p. 82-86
- HANCHER L., *Euratom, State aid and environmental protection: Hinkley Point: Case C-594/18 P, Republic of Austria v. Commission*, in *Common Market Law Review*, vol. 58, 2021 p. 1491-1522
- HANSJEURGENS B. (ed), *Emissions Trading for Climate Policy. US and European Perspectives*, Cambridge, 2005

- HASLINGER B., *Aid for environmental protection*, in F. SAECKER, F. MONTAG (eds), *European State Aid Law*, Munich, 2016, p. 826 ff.
- HAVEL B., *In Search of Open Skies: Law and Policy for a New Era in International Aviation*, Boston, 1997
- HEGER A., *State Aid Control with Regard to European Aviation in the COVID-19 Pandemic - European Court Ruling regarding Ryanair DAC/Commission*, in *Zeitschrift für Luftrecht und Weltraumrechtsfragen*, vol. 70, 2021, p. 178-189
- HENRICKSON K., WILSON W., *The Convergence of Low-Cost and Legacy Airline Operations*, in J. BITZAN, J. PEOPLES, W. WILSON (eds), *Airline Efficiency*, Bingley, UK, 2016, p. 355-375
- HOFFMANN L., *Fairness in the Digital Markets Act*, in *European Papers*, Vol. 8, 2023, pp. 17-23
- HOLTAN LAKSÅ S., *Proportionality of the Sectoral Application of the Covid-19 Temporary Framework*, in *European State Aid Law Quarterly*, no. 4, 2023, p. 356-370
- HONKONEN T., *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements*, Alphen aan den Rijn, 2009
- HUANG J., *Aviation Safety Through the Rule of Law*, Alphen aan den Rijn, 2009
- HUMPHREYS B., *The Regulation of Air Transport*, Abingdon, 2023
- HUNTER L., *Low Cost Airlines: Business Model and Employment Relations*, in *European Management Journal*, vol. 24, 2006, p. 315-321
- JACOBS F., *Introduction*, in A. BIONDI, P. EECKHOUT, J. FLYNN (eds.), *The law of state aid in the European Union*, Oxford, 2004
- JOURDAN-ANDERSEN B., SKJONBORG BRUNT A., *State Aid (CEEAG) and Taxonomy: Two Novel Pieces of Legislation at the Heart of Europe's Green Transition*, in *EStAL*, vol. 21, no. 3, 2022, p. 266-277
- KAHN A., *Airline Deregulation - A Mixed Bag, But a Clear Success Nevertheless*, in *Transportation Law Journal*, vol. 16, 1988, p. 229-252
- KHEMANI R. S., SHAPIRO D. M., *Glossary of Industrial Organisation Economics*, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, Paris, 1993
- KLAMERT M., *Article 5 TEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, New York, 2019, p. 61-78
- KREUSCHITZ V., *Compatible and incompatible aid (Art. 107(3) TFEU)*, in F. SÄCKER, F. MONTAG (eds), *European State Aid Law*, München, 2016, p. 279 ff.
- LAMB T., ET AL., *A qualitative analysis of social and emotional perspectives of airline passengers during the COVID-19 pandemic*, in *Journal of Air Transport Management*, Vol. 94, 2021, Article 102079
- LANDI N., *Exemptions from the General Incompatibility Principle under Article 87 (2) and (3) of the EC Treaty*, in A. SANTA MARIA, C. BISCARETTI DI RUFFIA (eds),

- Competition and State Aid – An Analysis of the EC Practice*, Alphen aan den Rijn, 2007
- LANDI N., *Le deroghe al principio generale d'incompatibilità ex art. 107 §§ 2 e 3 TFUE ed i regolamenti di esenzione per categoria*, in L.F. PACE (ed), *Dizionario Sistematico della Concorrenza*, 2<sup>nd</sup> ed., Milan, 2020, p. 681
- LAW J. (ed.), *A Dictionary of Law - entry Airspace*, 8<sup>th</sup> ed., Oxford, 2015, <https://www.oxfordreference.com/display/10.1093/acref/9780199664924.001.0001/acref-9780199664924-e-165>
- LELIEUR I., *Law and Policy of Substantial Ownership and Effective Control of Airlines*, Abingdon, 2003
- LÜBBIG T., *The New Best Practices Code for State Aid: A Check against Reality*, in *Journal of European Competition Law & Practice*, vol. 10, 2019, p. 3 ff.
- LUJA R., *Ryanair DAC v Commission. French Covid-19 state aid to support airlines is not discriminatory*, *Highlights & Insights on European Taxation*, n. 5, 2021, Article no. 26
- LYKOTRAFITI A., *Low Cost Carriers and State Aids: A Paradox? Reflections on the Ryanair/Charleroi Case*, in *European State Aid Law Quarterly*, vol. 7(2), 2008, p. 214–229
- LYKOTRAFITI A., *What Does Europe Do About Fair Competition in International Air Transport? A Critique of Recent Actions*, in *Common Market Law Review*, 2020, pp. 831–860
- MACKENZIE D., *ICAO: A History of the International Civil Aviation Organization*, Toronto, 2010
- MAGDALINA A., BOUZAIMA M., *An empirical investigation of European airline business models: Classification and hybridisation*, in *Journal of Air Transport Management*, vol. 93, 2021, Art. 102059
- MALAVOLTI E., MARTY F., *State aid to low-cost airlines: Worthwhile if durable?*, in A. GRAHAM ET AL. (eds), *Air Transport and Regional Development Policies*, Abingdon, 2020, p. 206-226
- MANZINI P., MASUTTI A., *The Application of the EU ETS System to the Aviation Sector: From Legal Disputes to International Retaliations?*, in *Air & Space Law*, vol. 37, no. 4-5, 2012, p. 307–324
- MARCHESE U., *Lineamenti e problemi di economia dei trasporti*, Genova, 2000
- MARCONI F., *Aiuti di Stato nell'emergenza pandemica: il caso delle compagnie aeree tra circostanze eccezionali e grave turbamento dell'economia*, in *Eurojus*, n. 2, 2022, p. 147-165
- MASSON-ZWAAN T., HOFMANN M., *Introduction to Space Law*, 4<sup>th</sup> ed., Alphen aan den Rijn, 2019
- MASTROIANNI R., *Art. 351 TFUE*, in A. TIZZANO (ed.), *Trattati dell'Unione Europea*, 2<sup>nd</sup> ed., Milan, 2014, p. 2541 ff., esp. 2546-2547
- MASUTTI A., *Diritto aeronautico*, 3<sup>rd</sup> ed., Bologna, 2021

- MATHOUX S., *Single Economic Unit or Separate Legal Entities? Legal Issues Arising from EU State Aid Measures Granted to Airline Groups of Companies in the Context of the Covid-19 Pandemic*, in *Aviation & Space Journal*, n. 2, 2021, p. 7-14
- MAVROIDIS P., *The General Agreement on Trade in Services*, in *The Regulation of International Trade*, Vol. 3, Cambridge, 2020
- MAXIAN RUSCHE T., *Article 100 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, New York, 2019, p. 983-991
- MAZZARELLA D., *The Integration of Aviation Law in the EC: Teleological Jurisprudence and the European Court of Justice*, in *Transportation Law Journal*, Vol. 20, 1991, p. 353 ff.
- MCMAHON C., *State Aid Junkies, Viruses and the Aviation Industry: Ryanair's Litigation against Approved Aid Measures for Airlines during the Pandemic*, in *European State Aid Law Quarterly*, vol. 20, 2021, p. 249-257
- MEHTA J., *The Changing Face of State-Owned Infrastructure - Leipzig- Halle and Beyond*, in *European State Aid Law Quarterly*, 2013, p.701-708
- MENDES DE LEON P., *Before and After the Tenth Anniversary of the Open Skies Agreement Netherlands-US of 1992*, in *Air & Space Law*, vol. 27, 2002, p. 280–314
- MENDES DE LEON P., *Introduction to Air Law*, 11th ed., Alphen aan den Rijn, 2022
- MENDES DE LEON P., *National Reflexes Following the COVID-19 Outbreak: Is Sovereignty Back in the Air?*, in *Air & Space Law*, vol. 45, Special issue, 2020, pp. 17-38
- MENG H., KUN W., HANGJUN Y., *Hub airport slot Re-allocation and subsidy policy to speed up air traffic recovery amid COVID-19 pandemic - case on the Chinese airline market*, in *Journal of Air Transport Management*, vol. 93, June 2021, Article 102047
- MENGOZZI P. (ed.), *International Trade Law on the 50th Anniversary of the Multilateral Trade System*, Milano, 1999
- MILLIGAN J., *European Union Competition Law in the Airline Industry*, Alphen aan den Rijn, 2017
- MILLIGAN J., *General Court Rejects Ryanair Challenges to National Covid-19 Aid Schemes in France and Sweden*, in *Air & Space Law*, vol. 46, 2021, p. 469–474
- MINAS S., NTOUSAS V. (eds.), *EU Climate Diplomacy Politics, Law and Negotiations*, London, 2018; D.G. VICTOR, *The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming*, Princeton-Oxford, 2001
- MINERVINI V., *Insolvency, Competition, and the Theory of the firm*, in *European Business Law Review*, vol. 32, 2021, p. 743-768
- MUNARI F., BARBANO M., *L'evoluzione del controllo degli aiuti nel settore delle infrastrutture*, in M. SEBASTIANI ET AL. (eds), *Trasformazioni e sviluppo del sistema della mobilità: scenari prospettici, PNRR e strategia UE per una mobilità sostenibile*, Rapporto SIPOTRA 2023, forthcoming

- MUNARI F., BARBANO M., *La Direttiva Damages: dalle origini del sistema europeo di private antitrust enforcement alla Dir. 104/2014*, in L.F. PACE (ed.), *Dizionario Sistematico del Diritto della Concorrenza*, 2<sup>nd</sup> ed., Milan, 2020, p. 357-371
- MUNARI F., CELLERINO C., *Art. 107 TFUE*, in A. TIZZANO (ed.), *Trattati dell'Unione Europea*, 2<sup>nd</sup> ed., Milan, 2014, p. 1073-1190
- MUNARI F., CELLERINO C., *Art. 108 TFUE*, in A. TIZZANO (ed.), *Trattati dell'Unione Europea*, 2<sup>nd</sup> ed., Milan, 2014, p. 1164-1190
- MUNARI F., *Il diritto comunitario dei trasporti*, Milano, 1996
- MUNARI F., *L'inadeguata percezione della scienza nel diritto internazionale dell'ambiente e l'esigenza di un cambiamento di paradigma*, in *Rivista Giuridica dell'Ambiente*, no. 2, 2023, p. 443-472
- MUNARI F., *Lifting the veil: COVID-19 and the need to re-consider airline regulation*, in *European Papers*, no. 5, 2020, p. 533-559;
- MUNARI F., SCHIANO DI PEPE L., *Tutela transnazionale dell'ambiente*, Bologna, 2012
- MUNARI F., *To What Extent Do the Contemporary International Law of the Sea, International Maritime Law, and International Labor Law Address Public Health Threats such as Pandemics?*, in *Ocean Yearbook*, vol. 35, 2021, p. 388-422
- MUNARI F., *Tutela internazionale dell'ambiente*, in S.M. CARBONE ET AL. (eds), *Istituzioni di diritto internazionale*, Turin, 2021, p. 497-535
- MURPHY A., *Aviation and climate: who acts?*, in F. MUNARI (ed.), *Cambiamenti climatici e trasporti. Un approccio interdisciplinare*, Rome, 2017, p. 125 ff.
- MUSSO E., *Trasporti: l'economia, la storia, le imprese, l'ambiente*, Turin, 2023
- NANDAN S.N., ROSENNE S., GRANDY N.R. (eds), *United Nations Convention on the Law of the Sea 1982. A Commentary*, Dordrecht, 1993
- NEBBIA P., *Il concetto di aiuto di Stato*, in L.F. PACE (ed), *Dizionario Sistematico della Concorrenza*, 2<sup>nd</sup> ed., Milan, 2020, p. 673 ff.
- NICOLAIDES P., *Shedding light into the 'black box' of state aid: the impact of Hinkley Point C on the assessment of the compatibility of state aid: C-594/18 P*, in *European State Aid Law Quarterly*, vol. 20, 2021, p. 4-14
- NICOLAIDES P., *The appropriateness of state aid and the principle of non- discrimination*, in *European Competition Law Review*, vol. 43, 2022, p. 264-269
- NICOLAIDES P., *The Court of Justice Allows Member States to Compensate the Undertaking of their Choice: a Critique*, in *European State Aid Law Quarterly*, no. 4, 2023, p. 371-380
- NICOLAIDES P., *The Evolving Interpretation of Article 107(3)(b) TFEU*, in *European State Aid Law Quarterly*, vol. 21, no. 1, 2022, p. 31-42
- NOWAG J., *Environmental Integration in Competition and Free- Movement Laws*, Oxford, 2016
- OZGUR N., *Global Governance of Civil Aviation Safety*, Abingdon, 2023

- PANTAZI T., *State Aid to Airlines in the Context of Covid-19: Damages, Disturbances, and Equal Treatment*, in *Journal of European Competition Law & Practice*, vol. 13, 2022, p. 268–277
- PAPPALARDO A., *Il diritto della concorrenza dell'Unione Europea*, Milan, 2018
- PASTOR-MERCHANTE F., *The European Perspective*, in F. WOLLENSCHLÄGER, W. WURMNEST, T. M.J. MÖLLERS (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward*, Alphen aan den Rijn, 2020, p. 197-215
- PAULUS C., *Competition Law versus Insolvency Law*, in *Unif. L. Rev.*, 2013, p. 1–13
- PEIFFERT O., *L'application du droit des aides d'État aux mesures de protection de l'environnement*, Paris, 2015
- PELS E., *Optimality of the hub-spoke system: A review of the literature, and directions for future research*, in *Transport Policy*, vol. 104, 2021, at A1-A10
- PEPP M., *European State Aid Rules in Times of Pandemic: Distorting Competition between European Airlines?*, in *Hungarian Y.B. Int'l L. & Eur. L.*, 2021, p. 51 ff.
- PETROV P., *State Aid and COVID-19: With a Particular Focus on the Air Transport Sector*, in *Eur. St. Aid L.Q.*, vol. 20, 2021, p. 461 ff.
- PEZZOLI A., *La politica della concorrenza ai tempi del virus e la rilegittimazione dell'intervento pubblico*, in *Mercato Concorrenza Regole*, no. 1, 2020, p. 139-155
- PIENAAR G., *The Spatial Aspect of Ownership of Immovable Property: The Cuius est Solum Principle*, in *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, vol. 52, no. 2, 1989, p. 216-227
- PIERA A., *Getting to global Cooperation: The ICAO and Climate Change*, in P. FITZGERALD, MD TANVEER AHMAD (eds), *Sustainable development, international aviation, and treaty implementation*, Cambridge, 2018, p. 247-281
- PIERNAS LÓPEZ J., *The Concept of State Aid Under EU Law: From internal market to competition and beyond*, Oxford, 2015
- PIERNAS LOPEZ J., *The COVID-19 State Aid Judgments of the General Court. Every Man for Himself?*, in *Eur. St. Aid L.Q.*, vol. 20, 2021, p. 258-269
- PIRODDI P., *La procedura della commissione relativa agli aiuti di Stato nuovi*, in L.F. PACE (ed.), *Dizionario Sistematico della Concorrenza*, 2<sup>nd</sup> ed., Milan, 2020, p. 727 ff.
- POWER V., *Ryanair v. European Commission: The European Court of First Instance's Judgment on Alleged State Aid at Charleroi Airport*, in *Issues in Aviation Law and Policy*, vol. 8, 2009, p. 183-216
- REINS L., VERSCHUUREN J. (eds), *Research Handbook on Climate Change Mitigation Law*, Cheltenham, 2022
- RIGHINI E., TOMAT F., *State aid procedures*, in L. HANCHER, J. PIERNAS LÓPEZ (eds), *Research handbook on European State aid law*, Cheltenham, 2021, p. 249-268
- RITCHIE L., *Prohibited Areas in International Air Law*, IASL Repository, Montreal, 1969, at <https://escholarship.mcgill.ca>

- ROBINS N., PUGLISI L., *The market economy operator principle: an economic role model for assessing economic advantage*, in L. HANCHER, J. PIERNAS LÓPEZ (eds), *Research handbook on European State aid law*, Cheltenham, 2021, p. 15-39
- ROTHWELL D., STEPHENS T., *The International Law of the Sea*, 2<sup>nd</sup> ed., Oxford, 2016
- SAECKER F., *Legal exemptions (Art. 107(2) TFEU)*, in F. SAECKER, F. MONTAG (eds), *European State Aid Law*, Munich, 2016, p. 245 ff.
- SAND P., et al., *An Historical Survey of International Air Law before the Second World War*, in *McGill Law Journal*, vol. 7, no. 1, 1960
- SANDS P., *Principles of International Environmental Law*, 2<sup>nd</sup> ed., Cambridge, 2003
- SANTA MARIA A., *Il diritto internazionale dell'economia*, in S. M. CARBONE ET AL. (ed.), *Istituzioni di diritto internazionale*, Turin, 2021, p. 579 ff.
- SCHEPISI C. (ed.), *La "modernizzazione" della disciplina sugli aiuti di Stato*, Turin, 2011
- SCHIANO DI PEPE L., *Art. 100 TFEU*, in A. TIZZANO, (a cura di), *Trattati dell'Unione europea*, 2<sup>a</sup> ed., Milan, 2014, p. 994-1018
- SCHIANO DI PEPE L., *Il diritto del Mare*, in S.M. CARBONE ET AL. (eds), *Istituzioni di diritto internazionale*, Turin, 2021, p. 450-496
- SCHMAUCH M., *EU Law on State Aid to Airlines*, Berlin, 2012
- SCHUTTE M., *Rescue and Restructuring Aid*, in F. SAECKER, F. MONTAG (eds), *European State Aid Law*, Munich, 2016, p. 911 ff.
- SCOTFORD E., *Environmental Principles and the Evolution of Environmental Law*, Oxford, 2017
- SCOTT B. ET AL., *National Aviation Law Responses to COVID-19*, in *Air & Space Law*, vol. 45, Special issue, 2020, pp. 195-272
- SCOTT B., TRIMARCHI A., *Fundamentals of Aviation Law and Policy*, Abingdon, 2020
- SENNINGER R., FINKE D., BLOM-HANSEN J., *Coordination inside government administrations: Lessons from the EU Commission*, in *Governance*, vol. 34, 2021, p. 707–726
- SERPONE M., *La disciplina degli aiuti di Stato*, in C. CATRICALÀ, C. CAZZATO, F. FIMMANÒ (eds), *Diritto antitrust*, Milan, 2021, p. 1142 ff.
- SJÄFJELL B., WIESBROCK A. (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously*, Abingdon, 2015
- STAMELOS H., *The Legal Regime of Air Transport in Cyprus*, in *Entha*, vol. 9, 2018, p. 5-14
- STANGHELLINI L., *Caso Alitalia e procedure concorsuali*, in *Analisi Giuridica dell'Economia*, n. 2, 2010, p. 383 ff.
- STEWART M., *Freedom of Overflight: A Study of Coastal State Jurisdiction in International Airspace*, Alphen aan den Rijn, 2021

- STIRLING G., *COVID-19 Related State Aid for the Airline Sector: EU Courts Not Hesitant to Remove the Commission's Stamp of Approval*, in *Air & Space Law*, vol. 47, 2022, p. 145–166
- STORM M., *European Union Competition Law Developments in the Aviation Sector: July to December 2021*, in *Air & Space Law*, 47, 2022, p. 167–208
- TESAURO G., DE PASQUALE P., FERRARO F. (eds), *Manuale di Diritto dell'Unione europea*, 3<sup>rd</sup> ed., vol. II, 2021
- TIROLE J., *Some Economics of Global Warming*, in *Rivista di Politica Economica*, Vol. 98, No. 6, 2008, p. 9–42
- TOH R., HIGGINS R., *The Impact of Hub and Spoke Network Centralization and Route Monopoly on Domestic Airline Profitability*, in *Transportation Journal*, vol. 24, 1985, p. 16–27
- TRIMARCHI A., *EU Regulation 868/2004: report of a unilateral approach on regulating unfair subsidisation and unfair pricing practices and its failure*, in *European Competition Law Review*, vol. 38, 2017, p. 72-79
- TRIMARCHI A., *International Aviation Labour Law*, Abingdon, 2022
- TRIMARCHI A., *State Aid to Airlines in Times of Pandemic in the European Union: Between Regression and Fair Competition?*, in *Transnational Dispute Management*, vol. 18, 2021, Article 9
- TRUXAL S., *Competition and Regulation in the Airline Industry*, Abingdon, 2013
- TRUXAL S., *Economic and Environmental Regulation of International Aviation*, Abingdon, 2017
- TRUXAL S., *State Aid and Air Transport in the Shadow of COVID-19*, in *Air & Space Law*, vol. 45, Special Issue, 2020, p. 61–82
- TRUXAL S., *The EU–UK Competition and State Aid Regulatory Environment for Airlines: Post-Brexit, Post-Transition*, in *Air & Space Law*, vol. 46, Special Issue, 2021, p. 29–44
- TUFANO M., *Sui ritardi del Consiglio in materia di politica comunitaria dei trasporti*, in *Il Foro italiano*, vol. IV, 1986, col. 253-263
- TUO C., *Il trasporto aereo nell'Unione europea tra libertà fondamentali e relazioni esterne*, Turin, 2008
- U. SCHWALBE, *Economic principles of State Aid Control*, in F. SAECKER, F. MONTAG (eds), *European State Aid Law*, Munich, 2016, p. 8 ff.
- VAN CALSTER G., REINS L., *EU Environmental Law*, Cheltenham, 2017
- VAN DRUENEN R., *Permission to bail out EU's national flag carriers? Technocratic and political determinants of commission approval of state aid to national airlines in difficulties in the pre-COVID era*, in *Journal of Public Policy*, vol. 42, 2022, p. 553-572
- VAN DRUENEN R., ZWAAN P., MASTENBROEK E., *Getting State Aid Approved by the European Commission: Explaining the Duration of Preliminary Investigations in the State*

- Aid Notification Procedure*, in *Journal of Common Market Studies*, vol. 60, 2022, p. 545–561
- VAN DUREN S., KNOOK A., *State aid in times of crisis*, Deventer, 2021
- VAN HOUTEN L., *Flexing the slot regime: airport slot coordination in light of evolving market realities: a regulatory perspective*, IIASL Repository, Leiden, 2021, available at <https://hdl.handle.net/1887/3247125>
- VAN HOUTEN, L., BURGHOUWT G., *The fight for airport slots: the case of Amsterdam Airport Schiphol*, in R. MACÁRIO, E. VAN DE VOORDE (eds), *Contemporary Issues in Air Transport*, New York, 2022, pp. 171 ff.
- VAN ZEMEN J., ROWELL A., *A Guide to EU Environmental Law*, Oakland, 2020; L. KRÄMER, *EU Environmental Law*, 8<sup>th</sup> ed., London, 2016
- VARSAMOS S., *Airport Competition Regulation in Europe*, Alphen aan den Rijn, 2016, p. 123 ff.
- VASIGH B., FLEMING K., TACKER T., *Introduction to Air Transport Economics*, Abingdon, 2018
- VON WENDLAND B., *State aid for R&D&I*, in F. SAECKER, J. MONTAG (eds), *European State Aid Law*, Munich, 2016, p. 759 ff.
- WALKER T., BERGANTINO A.S. ET AL. (eds), *Sustainable Aviation: Greening the Flight Path*, Cham, 2020
- WERNER P., *Art. 108 TFEU*, in F. SAECKER, J. MONTAG (eds), *European State Aid Law*, Munich, 2016, p. 1509 ff.
- WILLIAMS G., *European experience of Public Service Obligations*, in G. WILLIAMS, S. BRAATHEN (eds), *Air Transport Provision in Remoter Regions*, Abingdon, 2010, p. 99 ff.
- WOLF M., *Exemptions pursuant Article 106(2) TFEU and the SGEI Framework*, in F. SÄCKER, F. MONTAG (ed.), *European State Aid Law*, München, 2016, p. 328 ff.
- WOLFRUM R., STOLL P. (eds), *Max Planck Commentaries on World Trade Law*, Dodrecht, 2008
- WOOLDRIDGE F., *The German Limited and Silent Partnerships*, in *Amicus Curiae*, vol. 80, 2009, p. 29-32

## ii. Reports and Policy Briefs

- Air Transport Action Group (ATAG), *Waypoint 2050*, 1<sup>st</sup> ed., 2020, at [https://aviationbenefits.org/media/167187/w2050\\_full.pdf](https://aviationbenefits.org/media/167187/w2050_full.pdf)
- Boeing, *World Air cargo Forecast 2018-2037*, 2018, at [https://www.boeing.com/resources/boeingdotcom/commercial/about-our-market/cargo-market-detail-wacf/download-report/assets/pdfs/2018\\_WACF.pdf](https://www.boeing.com/resources/boeingdotcom/commercial/about-our-market/cargo-market-detail-wacf/download-report/assets/pdfs/2018_WACF.pdf)
- Climate Change Service, *The European heatwave of July 2023 in a longer-term context*, Copernicus Programme, 20 July 2023,

<https://climate.copernicus.eu/european-heatwave-july-2023-longer-term-context>

Conférence Internationale de navigation aérienne, Procès-verbaux des séances et annexes, Paris, 18 mai – 29 juin 1910, 268 ff., available at: <https://archive.org/details/procsverbauxde00conf/page/268/mode/2up?view=theater>

EASA-EEA-Eurocontrol, European Aviation Environmental Report 2022, Cologne, 2023

Eurocontrol, Ash-cloud of April and May 2010: Impact on Air Traffic, STATFOR/Doc394 v1.0, 28.10.2010, available at <https://www.eurocontrol.int/sites/default/files/article/attachments/201004-ash-impact-on-traffic.pdf>

Eurocontrol, COVID-19 Impact on European Air Traffic – Comprehensive Assessment. Air Traffic situation for Wednesday 1 July 2020 compared with equivalent period in 2019, available at: [www.eurocontrol.int/publication/eurocontrol-comprehensive-assessment-covid-19s-impact-european-air-traffic](http://www.eurocontrol.int/publication/eurocontrol-comprehensive-assessment-covid-19s-impact-european-air-traffic)

Eurocontrol, Charting the European Aviation recovery: 2021 COVID- 19 impacts and 2022 outlook, Aviation Intelligence Unit, Think Paper no. 15, 1 Jan. 2022

European Parliament, Competition in Air Transport, PE 618.984, 2018

Gordon-Harper G., *CORSIA Baseline Adjustment in Response to COVID-19: A Blessing or a Curse?*, IISD Policy Brief, 8.9.2020, <https://sdg.iisd.org/commentary/policy-briefs/corsia-baseline-adjustment-in-response-to-covid-19-a-blessing-or-a-curse/>

ICAO Council, Report to Contracting States on the Definition of a Scheduled International Air Service and the Analysis of the Rights Conferred by Article 5 of the Convention, Doc. 7278, C/841, 10 May 1952

ICAO, Policy and Guidance Material on the Economic Regulation of International Air Transport, 4th ed., Doc. 9587, Montreal, 2017

ICAO, Manual on the Regulation of International Air Transport, Doc. 9626, 2018

ICAO Carbon Emissions Calculator Methodology, version 11.8, 2018

ICAO, CO2 Emissions from Commercial Aviation - 2018, A40-WP/560, 10.9.2019

ICAO, 2022 Environmental Report, Montreal, 2022

ICAO, The Long-Term Aspirational Goal, Special Supplement to 2022 Environmental Report, Montreal, 2022

ICAO, Effects of Novel Coronavirus (COVID-19) on Civil Aviation: Economic Impact Analysis, Air Transport Bureau, 27.4.2023, [https://www.icao.int/sustainability/Documents/Covid-19/ICAO\\_coronavirus\\_Econ\\_Impact.pdf](https://www.icao.int/sustainability/Documents/Covid-19/ICAO_coronavirus_Econ_Impact.pdf)

- ICAO, Global Framework for SAF, LCAF and other Aviation Cleaner Energies, adopted by CAAF/3 on 24 November 2023, available at [https://www.icao.int/Meetings/CAAF3/Documents/ICAO%20Global%20Framework%20on%20Aviation%20Cleaner%20Energies\\_24Nov2023.pdf](https://www.icao.int/Meetings/CAAF3/Documents/ICAO%20Global%20Framework%20on%20Aviation%20Cleaner%20Energies_24Nov2023.pdf)
- ICAO, The Postal History of ICAO. Annex 16 – Environmental Protection, 2023, [https://applications.icao.int/postalhistory/annex\\_16\\_environmental\\_protection.htm](https://applications.icao.int/postalhistory/annex_16_environmental_protection.htm)
- Intergovernmental Committee on European Integration, The Brussels Report on The General Common Market (Spaak Report), Luxembourg, 1956, available at <http://aei.pitt.edu/995/>
- Intergovernmental Panel on Climate Change (IPCC), Climate Change 2014: Synthesis Report. Fifth Assessment Report, Geneva, 2014
- Intergovernmental Panel on Climate Change (IPCC), Climate Change 2023. AR6 Synthesis Report, 2023, at <https://www.ipcc.ch/report/ar6/syr/>
- International Air Transport Association (IATA), Value of aviation, 1 June 2019, at <https://www.iata.org/en/iata-repository/publications/economic-reports>
- International Air Transport Association (IATA), Airline Profitability Outlook Strengthens, press release no. 26, 5.6.2023
- International Transport Forum (ITF), Decarbonising Air Transport: Acting Now for the Future, ITF Policy Paper No. 94, Paris, 2021
- International Transport Forum (ITF), Liberalisation of Air Transport, ITF Research Reports, Paris, 2019
- Jeanne N. et al., Analysis of state aid to selected Ryanair airports, Transport & Environment Report, July 2019, [https://www.transportenvironment.org/wp-content/uploads/2021/07/2019\\_07\\_Report\\_analysis\\_state\\_aid\\_Ryanair\\_airports.pdf](https://www.transportenvironment.org/wp-content/uploads/2021/07/2019_07_Report_analysis_state_aid_Ryanair_airports.pdf)
- Lufthansa Group, Annual Report 2022, <https://investor-relations.lufthansagroup.com/fileadmin/downloads/en/financial-reports/annual-reports/LH-AR-2022-e.pdf>
- Organization for Economic Cooperation and Development (OECD), State Support to the Air Transport Sector: Monitoring developments related to the Covid-19 crisis, Paris, 22.4.2021, <https://www.oecd.org/corporate/State-Support-to-the-Air-Transport-Sector-Monitoring-Developments-Related-to-the-COVID-19-Crisis.pdf>
- Pearce B., COVID-19 Outlook for air travel in the next 5 years, IATA, 13 May 2020
- Routaboul C., Wainwright S., Study on the impacts of the COVID-19 pandemic on the aviation market, Steer, presentation at the 18th Florence Air Forum, 13 May 2022, <https://fsr.eui.eu/wp-content/uploads/2022/02/Clemence-Routaboul-Steer.pdf>

Transport & Environment, Bailout tracker, 9 Apr. 2021, [www.transportenvironment.org/challenges/planes/subsidies-in-aviation/bailout-tracker/](http://www.transportenvironment.org/challenges/planes/subsidies-in-aviation/bailout-tracker/)

UK Department for Transport, Airline insolvency review, Final report, 9 May 2019

UNFCCC Secretariat, Nationally determined contributions under the Paris Agreement – Synthesis Report, FCCC/PA/CMA/2022/4, 26.10.2022

United States-Netherlands, Memorandum of Consultations, September 1-4, 1992

US Department of Treasury, Assistance for American Industry, 2020, available at <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-american-industry>

US House of Representatives, COVID-19's effects on U.S. aviation and the flightpath to recovery, Remote hearing before the Subcommittee on aviation of the Committee on transportation and infrastructure, 117<sup>th</sup> Congress, 2.3.2021, <https://www.govinfo.gov/content/pkg/CHRG-117hrg44274/html/CHRG-117hrg44274.htm>

US White House, Building a clean energy economy: a guidebook to the inflation reduction act's investments in clean energy and climate action, version 2, Jan. 2023, <https://www.whitehouse.gov/wp-content/uploads/2022/12/Inflation-Reduction-Act-Guidebook.pdf>

World Bank, Air transport, passengers carried, World Bank Open Data, at <https://data.worldbank.org/indicator/IS.AIR.PSGR>

World Health Organization (WHO), Review of the GATS Annex on Air Transport Services, Communication from the European Communities and its Member States to the Council for Trade in Services, S/C/W/280, 28 February 2007

World Health Organization (WHO), Negotiations on Trade in Services, Report by the Chairman to the Trade Negotiations Committee, TN/S/36, 21 April 2011

World Health Organization (WHO), Naming the Coronavirus Disease (COVID-19) and The Virus That Causes It, Technical guidance, 11.2.2020, [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it)

### iii. Scientific blogs, press releases, newspaper articles

Air Malta, A short history, 2019, <https://airmalta.com/en/about/about-air-malta/history#:~:text=Air%20Malta%20is%20set%20up,starting%20from%201st%20April%201973>.

BARBANO M., *Turbulence in the air and space industry: EU sanctions against Russia*, in *Leiden Law Blog*, 29.4.2022, <https://www.leidenlawblog.nl/articles/turbulence-in-the-air-and-space-industry-eu-sanctions-against-russia>

- BATRAWY A., *Emirates to start paying back Dubai for its \$4B lifeline*, *ABC News*, 10 May 2022, <https://abcnews.go.com/International/wireStory/emirates-start-paying-back-dubai-4b-lifeline-84617909>
- Commission, State aid: Commission will phase out State aid COVID Temporary Framework, STATEMENT/22/2980, 12.5.2022
- DUDLEY D., *Qatar Airways Receives \$2 Billion Government Bailout*, *Forbes*, 28 Sep. 2020, <https://www.forbes.com/sites/dominicdudley/2020/09/28/qatar-airways-receives-2-billion-government-bailout/>
- DUTHEIL G., *Ryanair puts the global pandemic behind it*, in *Le Monde*, 9 Nov. 2022. [https://www.lemonde.fr/en/economy/article/2022/11/09/ryanair-puts-the-global-pandemic-behind-it\\_6003521\\_19.html](https://www.lemonde.fr/en/economy/article/2022/11/09/ryanair-puts-the-global-pandemic-behind-it_6003521_19.html)
- FERRI B., *The new German Competition Law tackling online platform supremacy – an attempt of balancing authoritative flexibility and legal certainty*, in *Media Laws*, 11 Jan. 2021, <http://www.medialaws.eu/the-new-german-competition-law-tackling-online-platform-supremacy-an-attempt-of-balancing-authoritative-flexibility-and-legal-certainty/>
- HARDIMAN J., *Connecting Portugal to the World: the History of TAP Air Portugal*, in *Simpleflying*, 14.11.2021, <https://simpleflying.com/tap-history/>
- HOLDEN E., *\$2bn US coronavirus relief comes without climate stipulations*, in *The Guardian*, 26 Mar. 2020, [www.theguardian.com/us-news/2020/mar/26/us-coronavirus-relief-package-airlines-fossil-fuel-companies-climate](http://www.theguardian.com/us-news/2020/mar/26/us-coronavirus-relief-package-airlines-fossil-fuel-companies-climate)
- ICAO, 2020 passenger totals drop 60 percent as COVID-19 assault on international mobility continues, press release, 15 Jan. 2021
- ICAO, 2021 global air passenger totals show improvement from 2020, but still only half pre-pandemic levels, press release, 17 Jan. 2021, <https://www.icao.int/Newsroom/Pages/2021-global-air-passenger-totals-show-improvement.aspx>
- ICAO, ICAO and Google to collaborate on improving methodology for calculating flight carbon emissions, press release, 7 Dec. 2023
- ICAO, *Over 500 new air service agreements signed*, press release, 29 Jan. 2024, <https://www.icao.int/Newsroom/Pages/Over-500-new-air-service-agreements-signed.aspx>
- LEPIÈCE A., *State aid: following appeals by Ryanair, the General Court of the EU annuls the Commission's decisions approving aid for SAS, Deutsche Lufthansa and Italian airlines*, in *CMS-Law blog*, 1 June 2023
- LITTLE B., *SARS Pandemic: How the Virus Spread Around the World in 2003*, in *History.com*, 5 May 2023, <https://www.history.com/news/sars-outbreak-china-lessons>
- MARTIN G., *Austria introduces minimum air fare*, in *Ch-Aviation*, 16 June 2020, <https://www.ch-aviation.com/news/91957-austria-introduces-minimum-air-fare>

- MARTIN I., *Ryanair subsidiary Malta Air and Air Malta 'can live happily ever after'*, in *Times of Malta*, 11.6.2019
- NICOLAIDES P., *Compensation for Damage*, in *State Aid Uncovered Blog*, 17.10.2023
- NICOLAIDES P., *How the Infringement of Non-State aid Rules Can Affect the Compatibility of State aid*, in *State Aid Uncovered Blog*, 11.6.2023
- NOVAK M., *Slovenia's Adria Airways files for bankruptcy*, Reuters, 30.9.2019, <https://www.reuters.com/article/us-slovenia-adria-idUSKBN1WF1OL>
- PRATAMA G., *Shooting down Chinese high-altitude balloon: Unlawful use of force?*, in *Leiden Law Blog*, 13 Mar. 2023, <https://www.leidenlawblog.nl/articles/shooting-down-chinese-high-altitude-balloon-unlawful-use-of-force>
- Reuters, *Air France must be good Airbus customer - finance minister*, 29 April 2020
- SAEED S., *Ryanair protests put Irish labor law in the spotlight*, in *Politico*, 6 Ago. 2018, <https://www.politico.eu/article/ryanair-strike-august-flight-cancel-protests-put-irish-labor-law-in-the-spotlight/>
- SHAW R., *Laker Airways Skytrain: the world's first LCC*, in *Airliners*, July 2007
- SOLTÉSZ U., *Ryanair's Food Envy – Who Allocates Corona Aid?*, in *Kluwer Competition Law Blog*, 19 Feb. 2021
- TRIMARCHI A., *Legge previdenziale applicabile al personale navigante delle compagnie aeree: nuovi spunti dalla giurisprudenza dell'Unione (causa C-33/21)*, in *BlogDUE*, 7.11.2022
- VESTAGER M., *EU State aid: strong principles, in crisis and in change*, remarks at the State aid and tax conference held in Copenhagen, 20 March 2023, SPEECH/23/1792
- WATTS J., *Is the Covid-19 crisis the catalyst for greening the world's airlines?*, *The Guardian*, 17 May 2020
- WECK T., *The New Abuse Rules in the German Competition Act – What's in it for the EU?*, in *CPI*, Apr. 2020, <https://www.competitionpolicyinternational.com/the-new-abuse-rules-in-the-german-competition-act-whats-in-it-for-the-eu/>
- WILSON T., *New Code of Best Practices for State Aid Procedures*, in *Kluwer Competition Law Blog*, 10 August 2018

#### iv. Legislation and jurisprudence from other jurisdictions

Airline Deregulation Act of 1978, 49 Pub. L. No. 95–504, 92 Stat. 1705

Consiglio di Stato, 31 January 2022, no. 3239

EFTA Surveillance Authority, 17.4.2020, case 85047, COVID-19 Grant scheme for undertakings suffering a substantial loss of turnover, Decision No 039/20/COL

EFTA Surveillance Authority, 24.3.2022, Norway - Aid for the Topeka Natstruten project, 268/21/COL

German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen – GWB), as introduced by the GWB-Digitalisierungsgesetz, 18 Jan. 2021, Bundesgesetzblatt 2021:I:1

International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 35 (1980), 49

Loi no 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets, in JORF, 24.8.2021 ('Loi Climat')

Subsidy Control Act 2022 [2022, ch. 23], available at <https://www.legislation.gov.uk/ukpga/2022/23/enacted>

T.A.R. Lazio Roma, 14 February 2024, no. 3030

Title 49 U.S.C. Sec. 40102(a)(15)(C)

*United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945)

US Inflation Reduction Act of 2022, 136 Stat. 1818, Public Law 117–169, 16.8.2022