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**IMPARTIALITY AND IMBALANCES IN ASSIGNING STATE
AID: A NEW APPROACH TO ASSIGNING STATE AID TO EU
AIRLINES DURING CRISES**

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ABSTRACT

The coronavirus outbreak (Covid-19) has been a worldwide health emergency. Access to state aid has become a necessity, as undertakings struggle in the midst of huge supply- and demand side disturbances. In light of the circumstances and an unsuitable regulatory forefront, the EU has developed a new temporary legal regime in the context of the pandemic. The thesis highlights that the Temporary Framework (the Framework) is an appropriate tool to address the needs of undertakings, but the current process of assignment is not impartial. The work will focus on the airline industry, because where the market extends across borders, equal access to state aid is necessary to prevent unnecessary market distortions which affect consumer welfare, efficiency and the unity of the internal market. Therefore, the purpose of this thesis is to determine the main flaws with the current system resulting in significant imbalances in the distribution of aid and to discuss alternative methods of assigning state aid to EU airlines. The new alternatives provide impartial access to state aid and will respect the notion of a level playing field. The study has theoretical and empirical components and relies on a qualitative methodological approach. The flaws with the current process of assignment are highlighted by interpreting two important state aid decisions. From these findings it is possible to explore alternative methods of assigning state aid.

INTRODUCTION

The Covid-19 pandemic has been an unprecedented health emergency, taking its toll on human life and the life of undertakings worldwide. The pandemic has been especially burdensome for the airline industry where passenger demand has become virtually extinct and where high running costs nevertheless pertain.¹ This is called market failure, which necessitates the granting of state aid for healthy purposes by avoiding a chain of bankruptcies by losing efficient market players, not to mention jobs and other social consequences. EU competition policy has increasingly respected the principle of fairness², understood as an equality of opportunity³ and where a level playing field exists in the hopes of enhancing consumer welfare. For the purposes of gluing the internal market, the Union has been given exclusive competence in the field of competition law.⁴ Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) serves the purpose of prohibiting the granting of state aid, because it leads to an unfair competitive advantage conferred by a single undertaking over others.⁵ If the provision of state aid would not be controlled by a systematic regulatory regime, negative domino effects would result in consumer harm, inefficiency and fragmentation of the internal market.⁶

This thesis focuses on EU state aid law and to the assigning of state aid to EU airlines during the Covid-19 pandemic. The temporary legal regime is in a central role of this work, since it is the instrument governing the assigning of state aid during the pandemic due to the insufficiency of the normal regime to provide the needed flexibility for EU businesses. The worldwide market failures brought by Covid-19 exponentially increases the need for state support, which cannot be

¹ Linka, K., Peirlinck, M., Costabal, F., Kuhl, E. (2020). *Outbreak dynamics of COVID-19 in Europe and the effect of travel restrictions*. Retrieved from <https://www.tandfonline.com/doi/full/10.1080/10255842.2020.1759560>, 06 May 2021.

² Gerard, D. (2018). Fairness in EU Competition Policy: Significance and Implications. *Journal of European Competition law & Practice*, 9, 211–212.

³ De Pablo, A. (2017). Competition Law as Fairness. *Journal of European Competition law & Practice*, 8, 147–148.

⁴ Jones, A., Sufrin, B., Dunne, N. (2019). *EU Competition Law. Text, Cases and Materials*. (7th ed.) Oxford, UK: Oxford University Press, pp. 28–31.

⁵ Craig, P., De Burca, G. (2020). *EU Law: Text, Cases and Materials*. (7th ed.) Oxford, UK: Oxford University Press, pp. 1164–1170.

⁶ Motta, M., Peitz, M. (2020). *EU state aid policies in the time of COVID-19*. Retrieved from <https://voxeu.org/article/eu-state-aid-policies-time-covid-19>, 23 March 2021.

matched by the normal provisions on state aid.⁷ One of the ultimate purposes of state aid is to enable its provision in the case of market failures.⁸ This was no longer possible through the normal regime in the context of the pandemic and thus called for the adoption of the Framework to enlarge the support possibilities available to the member states.⁹

The problem that the thesis addresses is concerned with the lack of impartiality and imbalances in the assignment of state aid which pertains from the current system. Even though the EU has adopted appropriate measures to tackle the pandemic through levying the strictness of state aid rules on a temporary basis, the current process of assigning state aid to airlines nevertheless seems to lack impartiality, since some airlines are receiving a load of aid while others receive very little or no aid.¹⁰ In case of the European airline industry, where the market extends across borders and is almost entirely European, it is important that significant imbalances in the distribution of aid would not result, since this will have dire consequences throughout the market with the possible escalation of the above-mentioned domino effects.¹¹

The research establishes that imbalances pertain in the assigning of state aid as a result of the current system, whereby airlines receive considerably different amounts of aid in relation to their annual turnovers, making some undertakings better-off in circumstances where all participants are in desire need for support. Furthermore, the research will establish and discuss alternative methods of assigning state aid to European airlines which are *de facto* constructed on impartial criteria and which meet the wider scope of impartiality within the meaning of this thesis. Impartiality within this thesis is understood as an equality of opportunity to receive aid, which ultimately determines the undertaking's ability to compete effectively, and whereby the process of assignation is strictly merit-based rather than determined in terms of nationality. A prime example of this could be the assignation of state aid through the United Kingdom (UK) based Corporate Covid Financing Facility (CCFF) which uses criteria that enables foreign undertakings to obtain aid from the UK, given that they possess a certain financial rating and materially

⁷ Communication from the Commission (EC) No C(2021) 564 of 28 January 2021 Temporary Framework for state aid measures to support the economy in the current COVID-19 outbreak.

⁸ Craig., De Burca. (2020), *supra nota* 5, pp. 1177–1180.

⁹ Communication from the Commission (EC) No C(2021) 564 of 28 January 2021, *supra nota* 7.

¹⁰ Bailey, J. (2020). *Is It Fair That Only Some EU Airlines Are Getting State Aid?* Retrieved from <https://simpleflying.com/state-aid-fairness/>, 07 May 2021.

¹¹ Motta., Peitz. (2020), *supra nota* 6.

contribute towards the UK economy.¹² This type of criteria could be defined as duly merit-based, which also mitigates the state's sole backing of their National Champions.

As it currently stands, state aid is granted at the national level after the proposed aid measure has been approved for implementation by the European Commission (the Commission) pursuant to the notification obligation of Article 108(3) TFEU.¹³ Although aid must be directed through the Commission which enjoys wide discretionary powers in relation to the determinations made under Articles 107(2) and 107(3) TFEU¹⁴, it does nevertheless not stop the unequal distribution of aid throughout the internal market. The assignment of aid is largely dependent on the individual characteristics and the subjective interests of the member states, such as the financial capabilities or the reliance of the economy towards a particular industry sector.¹⁵ This will undoubtedly lead to imbalances resulting in market distortions through the advantages conferred by certain airlines. Ultimately, these effects can stem in consumer harm through increased prices and the lower variety or quality of products¹⁶, inefficiency through the elimination of efficient competitors and potential subsidy races as well as to the fragmentation of the internal market where the undertakings of certain states prevail in relation to other regions within the Union.¹⁷

This thesis states that: Impartiality and imbalances in the assigning of state aid: a new approach to assigning state aid to EU airlines. The new approach is an elaboration from the state of the art proposed by Motta and Peitz at the beginning of the pandemic for the establishment of an EU-wide state aid fund.¹⁸ In continuation this thesis will clarify the rationales as to why such a supranational fund would be more beneficial and more supportive of consumer welfare, fairness and *inter alia* the internal market in comparison with the current system. This work will further attempt to fill in the gaps in the state of the art by defining a set of impartial criteria from which the supranational state aid fund could benefit. The thesis will rely on a qualitative research approach and methods by highlighting the issues of assigning state aid at the national level through two state aid decisions. These examples from the airline industry are a Swedish loan

¹² Covid Corporate Financing Facility (CCFF) (2020). The Bank of England. Retrieved from <https://www.bankofengland.co.uk/markets/covid-corporate-financing-facility>, 12 April 2021.

¹³ Craig., De Burca. (2020), *supra nota* 5, pp. 1177–1180.

¹⁴ *Ibid.*, pp. 1162.

¹⁵ Abate, M., Christidis, P., Purwanto, A. (2020). *Government support to airlines in the aftermath of the COVID-19 pandemic*. Retrieved from <https://www.sciencedirect.com/science/article/abs/pii/S0969699720305147?via%3Dihub>, 12 April 2021.

¹⁶ Jones., Sufrin., Dunne. (2019), *supra nota* 4, pp. 28–31.

¹⁷ Schito, M. (2021). The politics of State aid in the European Union: explaining variation in aid allocation among Member States. *Journal of Public Policy*, 41, 277–306.

¹⁸ Motta., Peitz. (2020), *supra nota* 6.

guarantee scheme and a French tax deferral scheme, which became subject to controversy after the complaints of Ryanair over their legality. These state aid decisions will help to understand the underlying issues with the current process of assignation and to propose concrete alternatives for change based on the findings and in accordance with the research purpose of this thesis. This work will contribute towards the finding of reform through an implementable system in times of crises.

The thesis is divided into three main sections. Starting with the most general part by defining crises and discussing the impacts of Covid-19 upon the states and upon the airline industry. In the second part, the thesis will talk about some of the most important objectives and principles of competition law in order to determine the needs of the research aim. In the final section, the thesis will focus on regulatory aspects by providing a short overview of EU state aid law, including the defining nature of state aid, exemptions and procedure. This section will also provide an overview of the Framework, before moving on to discuss the case studies and proposed solutions for reform.

1. THE IMPACT OF CRISES

Crises are usually defined in law as something which occurs unexpectedly and is unforeseeable and something which drastically contradicts from the normal course of life and which has widespread negative impacts upon an entire society.¹⁹ Crises have occurred throughout the time of life in various forms. There have been natural disasters, such as tsunamis or nuclear accidents, terrorist attacks and *inter alia* financial disasters. It is impossible to predict the magnitude, nature and duration of crises.

So far, the Covid-19 pandemic has been an unprecedented health disaster, which has taken a toll on human life and the livelihoods of people through bankruptcies of undertakings as a result of large market failures. The spread of a deadly, unknown virus has naturally made people and the states on the verge of anxiety and has called for extraordinary measures through *inter alia* social distancing, travel restrictions, movement restrictions, closing of hobbies and even entire lockdowns.²⁰ For the first time in its history, the EU closed all of its external borders on March 17, 2020 in the hopes of containing the virus.²¹ These radical measures will undisputedly have an impact, not only on the daily lives of individuals but also on the entire economy. Companies can no longer function normally and suffer from lower demand or no supply. As the necessary financial contributions keep on running, while no income arrives, there is no choice but to cease from operating in the particular line of trade.²²

¹⁹ Oinonen, M. (2020). EU:n kilpailusääntöjen soveltaminen kriisiaikoina. *Defensor Legis*, 4, pp. 594–609.

²⁰ Didier, T., Huneus, F., Larrain, M., Schmukler, S. (2020). *Hibernation: Keeping firms afloat during the COVID-19 crises*. Retrieved from <https://voxeu.org/article/keeping-firms-afloat-during-covid-19-crisis>, 06 May 2021.

²¹ Linka., Peirlinck., Costabal., Kuhl. (2020), *supra nota* 1.

²² *Overview of the State aid rules and public service obligations rules applicable to the air transport sector during the COVID-19 outbreak* (2020). European Commission. Retrieved from https://ec.europa.eu/competition/state_aid/what_is_new/air_transport_overview_sa_rules_during_coronavirus.pdf, 12 April 2021.

The effects of the pandemic can strike any type of undertaking, even if the undertaking is financially stable, prepared and efficiently run.²³ Nevertheless, it has become evident that some industry sectors have suffered more than others due to their nature and due to the nature of the health emergency. Thus, it has been particularly difficult for the air travel industry, which relies on free movement and passenger confidence. However, in order to prevent a drastic economic downturn, it is necessary to react with existing law and by the adoption of new legislation which is suited to answering the needs of businesses. Especially so that healthy undertakings which have drifted into difficulties only as a result of the Covid-19 outbreak have the possibilities to survive.²⁴

There is no doubt that the whole airline industry has been among the worst-hit industries during the Covid-19 outbreak. Travel restrictions, quarantines and lockdowns among the several other restrictive measures all have negative impacts upon air travel by making it un-viable. As a result, demand for passenger air travel has become virtually extinct, causing huge problems for airlines in terms of liquidity, at an industry where operational costs are already huge.²⁵ Aircrafts, which are intended for profit making are stranded at airports generating nothing but costs to airlines.²⁶ Larger carriers who have expanded their operations in the hopes of gaining economies of scale envisage outstanding costs when demand goes numb. This is because these undertakings will have to operate a larger fleet with more employees in order to remain committed to their day-to-day operations.

According to the International Air Transport Association (IATA) the industry wide revenues have shanked by \$118 billion with a decrease in demand of 65.9% in comparison to the values in 2019. The drop in demand began sharply in February 2020 and reached its bottom in April of the same year when revenue passenger-kilometres (RPK) were down by 98%. According to IATA's data the international air travel market has suffered more severely in comparison to the domestic market where RPK was down by 86% at its worst. The domestic market has also prevailed in recovery after the levying of restrictions in May of 2020. However, the recovery of both markets

²³ Communication from the Commission (EC) No C(2021) 564 of 28 January 2021, *supra nota* 7.

²⁴ *Ibid.*

²⁵ Linka., Peirlinck., Costabal., Kuhl. (2020), *supra nota* 1.

²⁶ Albers, S., Rundshagen, V. (2020). *European airlines' strategic responses to the COVID-19 pandemic (January-May, 2020)*. Retrieved from https://www.sciencedirect.com/science/article/pii/S0969699720303410?casa_token=cIVtVAhkgTAAAAAA:8cg79gfeMvKSzugh3wXaaV4OooCFsl2NI_ZmJxmZhz4T9AdzoXW5_NbGuQ1LahfTArYtDtafMg, 15 March 2021.

was short-lived as the spread of the virus accelerated again in the autumn of 2020. Currently, it remains extremely uncertain as to when a true recovery of the whole industry can begin.²⁷

In order to mitigate the effects of the crises and meet liquidity needs, European airlines have adopted different crises management tools. The Air France-KLM group have retired certain aircraft types which are expensive to maintain, while others have cancelled their aircraft orders and reduced the size of overall fleet. Other airlines such as Finnair and many more have adopted innovative solutions by transforming some aircraft as cargo planes to reduce the effects of passenger demand shortage. Sadly, some airlines have exited the European air travel market as a result of the crises, among them are City Jet, Norwegian Air Shuttle in Sweden and Denmark and Germanwings, which was shut down by the Lufthansa Group.²⁸ These exits can reconfigure the concentration of the air travel market and can result in opportunities to gain market share post-pandemic for airlines who can survive through the outbreak.

²⁷ *Air passenger market analysis* (2021). International Air Transport Association. Retrieved from <https://www.iata.org/en/iata-repository/publications/economic-reports/air-passenger-monthly-analysis---january-2021/>, 15 March 2021.

²⁸ Albers, S., Rundshagen, V. (2020), *supra nota* 26.

2. OBJECTIVES OF COMPETITION LAW AND POLICY

In the EU competition law has been understood to mainly consist of four branches: state aid, abuse of a dominant position, restrictive agreements and mergers which lead to anti-competitive constraints.²⁹ The relevant provisions of EU competition law are found in the TFEU. State aid is regulated in Articles 106-109 TFEU, while abuses of dominance and restrictive agreements are covered by Articles 102 and 101 TFEU respectively. Finally, mergers are covered by an independent regulation.³⁰

Essentially, the competition provisions are dedicated to ensuring the sustainability and development of the level playing field. This means that the law is in place in order to prevent unnecessary distortions of competition which imply negatively to consumers, market participants and development.³¹ Over the years there have been discussions as to what competition law should truly seek to achieve. For example, the Chicago School has actively opted that competition law should solely be in place to achieve economic efficiency and welfare, while others view the objectives of competition law as wider ranged, to thrive for more ambiguous goals. Next, I will turn to some of the goals which could be the concern of competition law.³²

2.1. Welfare and efficiency

In the EU the Commission has preferred the adoption of a consumer orientated welfare approach, along with many other jurisdictions. Ultimately, this means that competition law is directed at enhancing the position of the consumer. Consumer welfare can be increased through effective competition, since competition can lead to lower prices, new innovative products and

²⁹ Craig., De Burca. (2020), *supra nota* 5, pp. 1034–1176.

³⁰ *Ibid.*, pp. 1034–1176.

³¹ Jones., Sufirin., Dunne. (2019), *supra nota* 4, pp. 28–31.

³² *Ibid.*, pp. 28–31.

even better customer service and quality of products.³³ The consumer welfare standard is popular among jurisdictions, mainly because it is easier to apply. An administrative body in its fact-finding usually only needs to show how consumers are harmed and thus, why a particular action should be prohibited. On the other hand, total welfare is a wider concept which allows some consumer harm in the light of efficiency. It could be harder to construct a cohesive competition policy around total welfare where fact-finding needs to also take into account a greater number of aspects. Especially, since outcomes will often be the same no matter which one of the two approaches is used.³⁴

Efficiency is also an integral part of competition law and can be achieved through different forms of efficiency. Efficiency can *inter alia* be divided into productive efficiency, allocative efficiency and dynamic efficiency.³⁵ Productive efficiency refers to a process where the maximum amount of goods and services are produced with the minimal wasting of resources, while allocative efficiency refers to the effective allocation of resources. Allocative efficiency denotes the idea of selling products solely to those buyers who value them the most, in terms of willingness to pay or willingness to go through other consumption possibilities. Lastly, dynamic efficiency is understood as achieving efficiency through research and development and innovation which can boost the development of new and more efficient solutions.³⁶

2.2. Functioning of the internal market and public policy

EU competition law has a unique goal of integrating national markets and promoting the functioning of the single market. The single market is understood as an area without internal frontiers, where goods, services, people and capital move freely between the member states.³⁷ Among others competition Commissioner Vestager has stated that economic integration in order to form the internal market could not be achieved without a strong and unified competition policy enforced by a central competition authority. Therefore, the function of EU competition

³³ *Ibid.*, pp. 28–31.

³⁴ Nazzini, R. (2011). *The Foundations of European Competition Law: The Objectives and Principles of Article 102*. Oxford, UK: Oxford University Press.

³⁵ Kocmut, M., Jur, M. (2005). *The Role of Efficiency Considerations Under the EU Merger Control*. The University of Oxford Centre for Competition Law and Policy. Retrieved from https://www.law.ox.ac.uk/sites/files/oxlaw/cclp_1_09-05.pdf, 03 March 2021.

³⁶ *Ibid.*

³⁷ Barnard, C. (2019). *The Substantive Law of the EU, The Four Freedoms*. (6th ed.) Oxford, UK: Oxford University Press.

law is also to enable and further develop the internal market. Thus, it is an essential element in the functioning of the EU, and an area of policy where the Union holds exclusive competence.³⁸

Competition law can also be used to push other public policy objectives. In the EU, some state aid decisions could be conditional on achieving certain objectives of common European interest, for instance, to achieve climate neutrality by the year 2050. However, it is often said that public policy objectives greatly contradict with the aims of competition law and could be more effectively achieved through other means.³⁹

2.3. Fairness

Fairness in this context is a vague concept and therefore competition law pursuing fairness objectives should be clear about whom fairness is deemed to protect. Researchers have identified at least four notions of fairness in EU competition law: 1.) fairness between consumers, 2.) fairness between producers, 3.) fairness between consumers and producers as well as, 4.) procedural fairness.⁴⁰ On the consumer side EU law has the objective of promoting fairness by prohibiting all kinds of discriminatory practices conducted by undertakings, including discriminatory pricing. Between producers the fairness objective could be understood as the equality of opportunity, whereby firms are prohibited from establishing artificial barriers of entry to the detriment of efficient firms wanting to penetrate the market. Finally, according to the researchers, fairness between consumers and producers is dependent on the choice of welfare standard, which in the EU is directed towards consumers. In addition, procedural fairness is unsurprisingly a rightful concern of competition law as a result of its importance in due process as well as in public and private enforcement.⁴¹

Some have argued that competition law does not need to address fairness, as its natural outcome already results in fairness. As Lamadrid De Pablo states “protecting the competitive process will naturally benefit all participants in the process, consumers, counterparts, employees, and society overall. The sound application of competition law will often result in a more efficient economy,

³⁸ Jones., Sufrin., Dunne. (2019), *supra nota* 4, pp. 28–31.

³⁹ *Ibid.*, pp. 28–31.

⁴⁰ Trebilcock, M., Ducci, F. (2017). *The Multifaceted Nature Of Fairness In Competition Policy*. Retrieved from <https://www.competitionpolicyinternational.com/the-multifaceted-nature-of-fairness-in-competition-policy/>, 03 March 2021.

⁴¹ *Ibid.*

but this is not the point of the discipline: what ultimately matters is that the application of competition law has a good chance of resulting in a fairer society.”⁴²

⁴² De Pablo. (2017), *supra nota* 3.

3. CURRENT REGIME

Law on state aid promotes the functioning of a level playing field, by prohibiting aid which places certain undertakings at an advantageous position. The Commission holds wide influence in regard to evaluating the compatibility of aid with the internal market. Its decisions are applicable for judicial review, although the EU courts will generally not substitute their view from the stance of the Commission in relation to determinations made under Articles 107(2) and 107(3) TFEU. Rather, review is limited to verifying whether the Commission has abided by the necessary rules, including procedure, accuracy of facts under which decisions have been made and whether there has been any misuse of power or manifest error of judgement by the Commission.⁴³

The Commission is also the developer in terms of policy and holds discretionary powers in regard to state aid. In general terms, aid for restructuring an undertaking, rescuing an undertaking or to help it with operating costs can be compatible with the internal market. Under Article 109 TFEU, the Commission has developed further legislation, including the *de minimis* notion, under which small aid will be compatible as *per se* with the internal market without having to notify it. Other legislation has been passed concerning small and medium-sized enterprises, training aid, employment aid and procedural matters. Furthermore, the Commission can develop policy through informal rulemaking, under which several policy frameworks have been established.⁴⁴ These various tools of enactment aim towards more consistent rulemaking and enforcement by facilitating legal security, transparency and credibility for the benefit of governments and industries.⁴⁵

⁴³ Craig, De Burca. (2020), *supra nota* 5, pp. 1162.

⁴⁴ *Ibid.*, pp. 1162.

⁴⁵ Schütze, R. (2015). *An Introduction to European Law*. (2nd ed.) Durham, UK: Cambridge University Press, pp. 12–33.

3.1. Definition of state aid

Article 107 TFEU comprises of three paragraphs. Article 107(1) TFEU contains the general prohibition for state aid, while Articles 107(2) and 107(3) TFEU contain rules for exempting aid as compatible with the internal market under certain conditions. There is no definition as *per se* of state aid in EU law, but rather there are four cumulative conditions which must be met in order for a measure to constitute state aid within the meaning of Article 107 TFEU.⁴⁶ In addition, the conditions of Article 107(1) TFEU will not be met, unless aid is provided to an undertaking engaged in an economic activity.⁴⁷ In case of airlines, it is clear that the notion of undertaking and economic activity is fulfilled, as the provision of transport services for individuals and firms is considered as engaging in an economic activity.⁴⁸

Most simplistically, state aid emerges as a direct financial advantage given to an undertaking. The Commission and the European Court of Justice (ECJ) have taken a broad view in regard to evaluating state aid. Virtually any type of aid, given to an undertaking in its support can constitute state aid, if the aid cannot be considered as reimbursement for the goods or services provided.⁴⁹ The Commission has listed some typical examples of state aid. These include direct subsidies, tax exemptions, relief from social security contributions, favourable loan guarantees and *inter alia* the provision of business premises under special terms. All of these measures could directly or indirectly confer an advantage for the recipient, making it more competitive in relation to other competitors. Therefore, this first condition is met if the aid is selective by benefiting only a particular undertaking or the production of certain goods.⁵⁰

On the other hand, general measures of economic policy and where all undertakings benefit will not be seen as an advantage to constitute aid. Furthermore, the ECJ has concluded in the *Altmark case*, that compensation provided for undertakings for the discharge of public service obligations will not constitute state aid, if four conditions from the judgement have been fulfilled.⁵¹

⁴⁶ Craig, De Burca. (2020), *supra nota* 5, pp. 1164–1165.

⁴⁷ Commission Notice (EC) No C262/1 of 19 July 2016 on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, p 1–50 19.7.2016.

⁴⁸ Communication from the Commission (EC) No 2014/C 99/03 of 4 April 2014 Guidelines on State aid to airports and airlines, OJ C 99, p 3–34 4.4.2014.

⁴⁹ Commission Notice (EC) No C262/1 of 19 July 2016, *supra nota* 47, pp. 15–17.

⁵⁰ *Ibid.*, pp. 27.

⁵¹ Court decision, 24.07.2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, and Oberbundesanwalt beim Bundesverwaltungsgericht, C-280/00, ECLI:EU:C:2003:415, point 87–92.

Secondly, for a measure to constitute state aid, it must also be provided by a member state or through state resources. This condition enables the catching and prohibition of such aid, given as a result of structural arrangements made by the state. A typical example could be, where the state exercises actual control over a private undertaking through shareholding and management personnel. The ECJ has affirmed this interpretation in its ruling on *Kwekerij Gebroeders Van der Kooy BV v Commission*, where it was established that state aid was granted by the Dutch state. Although Gasuine being a private undertaking, the Dutch state held 50% of its shares and importantly, the Minister of Economic Affairs held control over the policy on tariffs. It was seen by the ECJ that the favourable charges on tariffs, provided by Gasuine for the benefit of certain undertakings was *de facto* as a result of actions taken by the Dutch state.⁵²

The ECJ has also established a strict line in determining actual control. Even if the state exercises dominant influence over the operations of a public undertaking, the state's actual control shall nevertheless not be presumed. It needs to be assessed whether measures provided by a public undertaking are imputable to the state. The ECJ added, that imputability needs to be evaluated on a case-by-case basis, from indicators arising from the circumstances and context in which the measure was granted.⁵³

For the third and fourth condition, competition can be distorted when an undertaking gains an advantage through state aid over its competitors, thus, placing it at a more advantageous position. To determine whether an advantage has been gained, it is relevant to evaluate the position of the undertaking prior and after receiving aid. If its position has improved, then the conditions of Article 107(1) TFEU will have been met.⁵⁴

Finally, there must also be an effect on inter-state trade. Trade is affected when an undertaking gains an advantage over others in the relevant market.⁵⁵ For example, aid given to an airline can have effects across the EU, since the airline will have more resources and thus can charge lower prices for certain fairs. This can result in other airlines operating the same routes to force quite as it is no longer possible to compete with a state aided player. The ECJ has further concluded in

⁵² Court decision, 02.02.1988, *Kwekerij Gebroeders van der Kooy BV and others v Commission of the European Communities*, 1988 -00219, ECLI:EU:C:1988:38, point 32–38.

⁵³ Commission Notice (EC) No C262/1 of 19 July 2016, *supra nota* 47, pp. 9–11.

⁵⁴ *Ibid.*, pp. 15–17.

⁵⁵ *Ibid.*, pp. 40–41.

the *Altmark* judgement, that aid given to an undertaking providing only local transport services can nevertheless affect inter-state trade.⁵⁶ This is because it is now harder for other providers from different member states to penetrate the market and compete with the presented undertaking. The Commission neither has to prove that inter-state trade is *de facto* affected but has to merely show that it might be affected. This was demonstrated in the ECJ's ruling on the *Philip Morris case*, where it was merely showed that inter-state trade might be affected.⁵⁷

3.2. Exemptions

The EU has recognised the need of permitting the channelling of state aid in certain circumstances which constitute towards economic development. For example, state aid can be used as an effective tool to support undertakings in cases of market failure, when an inefficient allocation of resources persists. Depending on the nature of the aid and the unveiling circumstances, there are various types of exemption. Generally, state aid can be granted under the individual exemptions of Article 107(2) and 107(3) TFEU, the block exemption regulation and under *de minimis* aid.⁵⁸

Firstly, considering the automatic exemptions pertained in Article 107(2) TFEU, which lists three types of aid that will be deemed compatible with the internal market. Article 107(2)a TFEU permits aid having a social character, granted to individual consumers without discrimination as to the origin of the goods and services provided.⁵⁹ The provision's nature limits its use, as it prohibits governments from solely backing domestic undertakings. Article 107(2)b TFEU enables the granting of aid intended to make good the damage caused by an exceptional occurrence.⁶⁰ Strict interpretation has construed around this Article in regard to what actually constitutes as such an exception.⁶¹ History has shown that such unforeseeable events, such as the 9/11 terrorist attacks will fulfil this criterion, where *inter alia* airlines were compensated for the temporary closure of airspace. The defining nature of this exemption includes three parts in that

⁵⁶ Case C-280/00, *supra nota* 51, point 87–92.

⁵⁷ Court decision, 17.11.1987, *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission of the European Communities*, 1987 -04487, ECLI:EU:C:1987:490.

⁵⁸ Craig., De Burca. (2020), *supra nota* 5, pp. 1163–1176.

⁵⁹ *Ibid.*, pp. 1170.

⁶⁰ Nicolaidis, P. (2020). Application of Article 107(2)(b) TFEU to Covid-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence. *Journal of European Competition Law & Practice*, 11, 238–243.

⁶¹ Craig., De Burca. (2020), *supra nota* 5, pp. 1170.

the event must be: 1.) unforeseeable or hard to predict, 2.) substantial scale and wide economic consequences, 3.) event must strongly depart from normal conditions where the market operates.⁶²

Article 107(2)c TFEU has noted the special position of Germany whilst being divided and therefore allows the granting of aid to make good the disadvantage caused as a result of the division.⁶³

Secondly, under Article 107(3) TFEU state aid may be deemed compatible with the internal market after the Commission's discretionary judgement. Article 107(3)a TFEU may allow the granting of aid to promote economic development in regions where the standard of living is abnormally low or where serious under-employment entails. It may also permit aid given to regions listed in Article 349 TFEU which have gained special status. However, it must be noted that in order for this Article to apply the depression must be severe, which is judged in an EU context. This means that even if such under-employment is severe within a given member state, it may nevertheless not be severe in an EU level and thus state aid cannot be granted.⁶⁴ Under Article 107(3)b TFEU aid given to contribute towards the fulfilment of a common EU project or to remedy a serious disturbance in the economy of a member state may be deemed compatible by the Commission. Both of these provisions have a narrow applicability standard, which is fairly strictly followed by the Commission. Generally, a common EU project within the meaning of this Article will be something that is cohesively supported and thrived by a number of member states, such as environmental protection.⁶⁵ Furthermore, in regard to remedying a serious disturbance in the economy, this provision is hard to apply as it requires wide-spread impact, where such an impact has nationwide effects. The Commission has opted its support for using this provision to help member states in *inter alia* times of financial crises or other such large-scaled crises.⁶⁶

Article 107(3)c TFEU may enable the granting of aid to develop certain economic activities or regions, given that the aid does not adversely distort trading conditions and competition contrary

⁶² Oinonen. (2020), *supra nota* 19, pp. 594–609.

⁶³ *Ibid.*, pp. 594–609.

⁶⁴ Schütze. (2015), *supra nota* 45, pp. 12–33.

⁶⁵ Craig., De Burca. (2020), *supra nota* 5, pp. 1172–1173.

⁶⁶ Oinonen. (2020), *supra nota* 19, pp. 594–609.

to the common interest.⁶⁷ The provision can be used to *inter alia* provide start-up aid for airlines in order to connect remote regions. Essentially, the Commission will evaluate whether the positive implications of the aid towards fulfilling common objectives outweigh the negative consequences in determining compatibility.⁶⁸ The assessment criteria for compatibility have been identified in the Communication on State Aid Modernisation (SAM) through several cumulative conditions. As determined, the Commission holds exclusive discretionary powers in relation to state aid and therefore these guidelines are used for direction to ensure consistent judgement in respect of legal certainty. State aid will be compatible pursuant to Article 107(3) TFEU when the measure: 1.) contributes to a well-defined objective of common interest, 2.) there is a need for state intervention, 3.) aid must be an appropriate policy instrument, 4.) aid must have incentive effect, 5.) is proportional, 6.) avoids undue negative effects on competition and trade between member states, 7.) must be transparent. Furthermore, since aid within the meaning of Article 107(3)c TFEU allows the distribution of aid to regions less disadvantaged than those under Article 107(3)a TFEU, the Commission has seen fit to only qualify a small part of the region for the receipt of aid. The Commission and the ECJ have also stressed the fact that in order to obtain aid the aid must form a part of a well-defined regional policy of the state for the purposes of developing an entire region and not merely any single undertaking therein.⁶⁹

Articles 107(3)d and 107(3)e TFEU can be used to grant state aid. Article 107(3)d TFEU may deem compatible such aid for the purposes of cultural and heritage conservation. Article 107(3)e TFEU may deem other categories of aid compatible pursuant to an individual decision made by the European Council (the Council) on a proposal from the Commission.⁷⁰

Lastly, *de minimis* aid refers to such small amounts of aid which can be determined compatible as *per se* with the internal market. Different *de minimis* rules apply depending on the industry sector concerned, however, the general rule pertains that direct aid not exceeding €200 000 per undertaking and loan guarantees not exceeding €1.5 million, given during a period of three fiscal years will be considered as compatible with the internal market.⁷¹

⁶⁷ Craig, De Burca. (2020), *supra nota* 5, pp. 1173.

⁶⁸ Communication from the Commission (EC) No 2014/C 99/03 of 4 April 2014, *supra nota* 48, pp. 3–34.

⁶⁹ *Ibid.*, pp. 3–34.

⁷⁰ Craig, De Burca. (2020), *supra nota* 5, pp. 1176.

⁷¹ *State Aid: Commission adopts revised exemption for small aid amounts (de minimis Regulation)* (2013). European Commission. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1293, 01 March 2021.

The block exemption regulation refers to certain categories of aid that will be compatible with the internal market without having to notify the measure, given that certain conditions of the regulation are met. The Commission has used its market experience to consistently extend the list of exempted aid in order to facilitate public investment for the creation of jobs and growth whilst protecting competition. Importantly, the block exemptions enable quick reactions to be made by the member states in terms of new investments by also increasing legal certainty through the simplification of the state aid procedure. Generally, in order for the aid to fall within the ambit of the block exemptions, the aid needs to result in new activities that would not have otherwise taken place and to economic development without unduly distorting competition.⁷²

3.3. Temporary Framework

The Framework is a temporary legislative instrument designed to support the economies of the member states in the context of the coronavirus outbreak. It enlarges the toolbox available to the member states beyond the state aid rules normally applicable. Extraordinary times call for extraordinary measures and thus flexibility in state aid control in order to enable targeted support for undertakings suffering as a result of the pandemic.⁷³ The purpose of the Framework is to mainly provide support to those undertakings that were in a healthy state prior to the pandemic. Therefore, undertakings that were already in difficulty before the outbreak are not eligible for support under the Framework, with the exception of certain micro- and small undertakings. On the other hand, companies already in difficulty can apply for aid through the normally applicable rules, particularly, Article 107(3)c TFEU which the Commission has confirmed can be used in the context of Covid-19.⁷⁴

The Framework was initially adopted on 19 March 2020 and has been subsequently amended five times as deemed necessary by the Commission to enlarge the possibilities for supporting undertakings. The latest amendment increased the support ceilings for limited aid and for the covering of a company's uncovered fixed costs. The Commission found that the prolonged crises

⁷² *State aid: Commission exempts more aid measures from prior notification* (2014). European Commission. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/IP_14_587, 01 March 2021.

⁷³ Ferri, D. (2020). The Role of EU State Aid Law as a "Risk Management Tool" in the COVID-19 Crisis. *European Journal of Risk Regulation*, 12, 176–195.

⁷⁴ Kubera, P. (2021). The State Aid Instruments in Response to the COVID-19 Crisis. *The Journal of Organizational Management Studies*, Vol. 2021, 1–11.

calls for amendment and therefore increased the price ceilings and prolonged the applicability of the Framework until 31 December 2021.⁷⁵

Before moving on to discuss the temporary support measures in more detail, the Framework clarifies that some support measures will fall outside the scope of state aid control. These are: 1.) support measures that apply to all undertakings, such as general wage subsidies, suspension of payments of corporate and value added taxes or social contributions applicable to all undertakings. These measures will not constitute state aid because they are not selective in nature. Secondly: 2.) financial support granted directly to consumers for reimbursement purposes will not constitute state aid as these measures will not confer an advantage upon undertakings.⁷⁶ However, in case of measures which constitute state aid within the meaning of Article 107(1) TFEU, the Commission has been clear in its communication through the Framework in regard to the applicability of these provisions. It has stated that the Covid-19 pandemic is an exceptional occurrence which allows the utilisation of Article 107(2)b TFEU for compensating undertakings for the damage directly suffered as a result of the pandemic. These measures will automatically be justified, given that they do not go beyond of what has been suffered in damages.⁷⁷ To increase the array of possibilities beyond to only compensation, the Commission has communicated that Article 107(3)b TFEU can also be used in the context of the pandemic. In fact, the Framework is adopted on the basis of Article 107(3)b TFEU which allows member states to address more generally the economic downturn caused by the outbreak.⁷⁸ The Commission has spoken by determining that the member states can seek to remedy a serious disturbance in their economies in accordance with Article 107(3)b TFEU since the pandemic affects all member states who are suffering with nationwide effects.⁷⁹

Therefore, limited aid in the form of direct grants, tax and payment advantages or repayable advances, guarantees, loans and equity will be justified as compatible, given that: 1.) the overall amount of aid will not exceed €1.8 million per undertaking, 2.) aid is granted on the basis of a scheme with an estimated budget, 3.) the undertaking is not in difficulty prior to the pandemic (on 31 December 2019), 4.) aid is granted no later than 31 December 2021. Special rules prevail in case of undertakings active in the fishery, agriculture and aquaculture sectors. member states

⁷⁵ Communication from the Commission (EC) No C(2021) 564 of 28 January 2021, *supra nota* 7.

⁷⁶ Kubera. (2021), *supra nota* 74, pp. 1–11.

⁷⁷ Nicolaidis. (2020), *supra nota* 60, pp. 238–243.

⁷⁸ Kubera. (2021), *supra nota* 74, pp. 7.

⁷⁹ *Ibid.*, pp. 1–11.

will also have an opportunity to cumulate any type of temporary aid measure with *de minimis* aid or with aid under the block exemptions to increase the support ceiling.⁸⁰

In the Framework, the Commission sets out the compatibility conditions for each type of support measure. Generally, the aid needs to be limited in its duration and its magnitude, in order to ensure proportionality.⁸¹ It is difficult to note whether the Framework is actually proportionate as the Commission has only *ex ante* evaluated the proportionality based on its market experience with *inter alia* the financial crises.⁸² However, with support measures under 107(3)b TFEU the Commission holds discretionary influence and will require from the member states demonstration in regard to the appropriateness, necessity and proportionality of the aid. Overall, the Framework has been an important lifeline for both undertakings and the states. Undertakings have gained the desperately needed financials in order to meet with their liquidity shortages, while states have gained legal certainty in terms of what is permitted and thus how to design individual support measures and support through schemes.⁸³ Ultimately, it is the undertakings that enable a fast recovery process to avail after the crises, although it must be noted that support should be given in the most proportional, equal and effective ways in order to preserve the level playing field after the crises.

⁸⁰ Communication from the Commission (EC) No C(2021) 564 of 28 January 2021, *supra nota* 7.

⁸¹ *Ibid.*

⁸² Ferri. (2020), *supra nota* 73.

⁸³ *Ibid.*, pp. 1–20.

4. RULES OF PROCEDURE

Generally, all measures of state aid must be notified to the Commission so that their compatibility with the internal market can be evaluated. The notification obligation concerns new aid, aid that has been amended and existing aid. There are different types of notification procedures depending on individual circumstances of the case and nature of the aid. Some forms of state aid are exempted from the notification obligation. Namely, aid granted in accordance with the block exemption regulation and *de minimis* aid do not need to be notified to the Commission, although aid falling within the block exemptions must be informed to the Commission. However, the Commission will not conduct any compatibility evaluations of block exempted aid.⁸⁴

The notification procedure is regulated in Article 108 TFEU. Every decision and procedural conduct executed by the Commission is applicable for judicial review to the European General Court (the General Court) and ultimately to the ECJ.⁸⁵

4.1. Preliminary investigation

The first stage of the notification procedure is the Commission's preliminary investigation under Article 108(3) TFEU.⁸⁶ Each notified measure by a member state will initiate the preliminary phase. The purpose of this phase is to conduct a fast and simple compatibility evaluation in order to determine what needs to be done next in case of each notified aid. Preliminary is meant to be preliminary, and the Commission must come into determination within two months after receiving completed notification. Generally, the Commission may in its findings determine that the notified measure does not constitute state aid and therefore the measure can be implemented. It can also determine that the aid results in negative effects, but the measure can nevertheless be

⁸⁴ Craig., De Burca. (2020), *supra nota* 5, pp. 1177–1184.

⁸⁵ *Ibid.*, pp. 1177–1184.

⁸⁶ *Ibid.*, pp. 1177–1184.

deemed compatible as negative effects are outweighed by the positive implications resulting from the aid. Lastly, the Commission may determine that there are severe risks of competition distortion, and therefore the notified measure must be investigated in more detail, whereby the Commission will initiate its in-depth evaluation before making any final decisions. If the Commission has failed to come into conclusions within the two-month period, the member state can generally carry through with the intended measure. It must be noted that during the entirety of the investigation procedure, the member state in question is bound by the *stand-still obligation*, meaning that it cannot take steps to implement the measure before the Commission has made its decision.⁸⁷

4.2. Formal investigation

The formal investigation procedure under Article 108(2) TFEU will be initiated in case there are doubts about the compatibility of new aid or where existing aid has been deemed incompatible in the current situation and the member state responsible refuses to abide with the Commission's linear. Whilst initiating the formal investigation, the Commission must inform the responsible member state and state the factual and legal basis for the investigation. Additionally, the Commission will outline its doubts in regard to the compatibility of the aid with state aid rules. The Commission's decision will then be published on the Official Journal and the parties concerned can submit their comments on the situation. Generally, the parties concerned include the member state granting the aid, the beneficiary, competitors, trade associations and those whose interests are affected by the aid.⁸⁸

There is no time limit as to when the Commission must come into conclusions, rather the lengthiness of procedure is largely dependent on the level of cooperation between the Commission and the member state concerned. The Commission must be provided with up-to-date, correct and reliable information in order to be able to make correct decisions in respect of legal certainty. The provision of this information is largely dependent on the member state's willingness to cooperate. Under formal investigation, the Commission can generally come within three conclusions. It can deem that there is no state aid within the meaning of Article 107(1) and the measure can be implemented. The Commission can also provide a conditional decision,

⁸⁷ *Ibid.*, pp. 1177–1184.

⁸⁸ *Ibid.*, pp. 1177–1184.

where certain aspects of the notified measure must be modified before implementation or finally, the Commission can produce a fully negative decision, whereby the proposed aid cannot be implemented. Additionally, the case will close if the member state decides to withdraw its notification. In all instances the member state must abide with the *stand-still obligation*. Any aid given without Commission's authorisation is considered as unlawful aid which must be recovered. Furthermore, if the Commission finds that implemented aid is being used in contrary to its intended purpose, it can open a formal investigation to rectify the situation.⁸⁹

4.3. Monitoring existing state aid

The Commission has an interest to monitor existing aid in order to evaluate whether measures adopted in the past can still be deemed compatible with the internal market during present circumstances. The Commission can find that the previously compatible measure is no longer in line with EU state aid rules and can therefore demand changes from the responsible member state to bring the measure back to compatibility. Such existing aid within the meaning of Article 108(1) of the TFEU can include *inter alia* aid which has been granted before the entry into force of the Treaty, aid which has been notified in accordance with Article 108(3), but where the Commission has not made a determination within the prescribed time or aid which is no longer recoverable due to the expiration of the recovery time limit. The responsible member state will have an opportunity to comment on the situation under Article 108(1) for a period of one month.⁹⁰

If the Commission comes into a negative conclusion in the context of aid that has already been granted, it will open a recovery case against the responsible member state. The member state will be obliged to recover all of the granted aid from the beneficiary with interest in order to restore the level playing field at the market. Granted aid must be recovered within the limitation period which is ten years from the date when the Commission issued its decision. If the responsible member state will not abide with the Commission's decision, the Commission can forward the case to the ECJ for enforcement.⁹¹

⁸⁹ *Competition: State Aid Procedures* (2015). European Commission. Retrieved from https://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html, 12 March 2021.

⁹⁰ Craig., De Burca. (2020), *supra nota* 5, pp. 1177–1184.

⁹¹ *Competition: State Aid Procedures* (2015). European Commission, *supra nota* 89.

5. ISSUES WITH THE CURRENT REGIME

There is no doubt that the Framework has been appropriate in addressing the needs of EU businesses by enabling the assignment of state aid.⁹² However, there are limitations to the current system, which may result in unnecessarily large market distortions⁹³ and other negative domino effects.⁹⁴ These effects will mainly stem from the current system of assigning state aid at the national level which in turn allows the facilitation of inaccessible national state aid schemes. Therefore, airlines can only hope that they will be supported by their residual member states or else they will be left with no government support and will have to raise funds to cover liquidity shortages at the market level.

5.1. State aid at the national level

The amounts of government aid assigned to EU airlines has varied to a great degree. The tendency seems to indicate that some airlines have received a substantial amount of support, while others have received none or significantly less aid. Furthermore, data has suggested that larger member states provide more aid to undertakings relative to the smaller states.⁹⁵ Currently, the largest state aid package for the benefit of an EU based airline has been granted to the Lufthansa Group with €9 billion. This aid measure consists of various support instruments including *inter alia* repayable loans and state equity investment in the form of recapitalisation.⁹⁶

In order to ensure proportionality and minimal distortions of competition, the Framework only allows the provision of aid for a limited time and thus obligates the Lufthansa Group to *inter alia*

⁹² Ferri. (2020), *supra nota* 73, pp. 176–195.

⁹³ Schito (2021), *supra nota* 17, pp. 277–306.

⁹⁴ Motta., Peitz. (2020), *supra nota* 6.

⁹⁵ Nicolaides, P. (2021). *A First Evaluation of Covid-19 State Aid*. Retrieved from <https://www.lexxion.eu/en/stateaidpost/a-first-evaluation-of-covid-19-state-aid/>, 07 May 2021.

⁹⁶ *State aid: Commission approves €6 billion German measure to recapitalise Lufthansa* (2020). European Commission. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1179, 12 April 2021.

buy back the state's equity in the undertaking at a price which is comparable to normal market prices. The Framework also has other appropriate provisions which are designed to mitigate negative market distortions, such as point 72 which obligates the member states to impose additional measures upon an undertaking in case of recapitalisation measures of over €250 million.⁹⁷ Point 72 also applies to the present aid package and has resulted in the giving up of slots by Lufthansa at certain congested airports where it holds dominance. The opening up of new slots will enable the development of new competition at these airports.⁹⁸

Point 72 of the Framework has also been an effective mitigator of possible market distortions in case of other recapitalisation measures, as in the case of Finnair. Finnair was *de facto* able to avoid additional measures within the meaning of the Framework by designing its recapitalisation measure on a *pro rata* basis, whereby the state's true equity on the airline did not grow. The Finnish state solely subscribed to the new shares on the same conditions as other shareholders of the company. As the Commission has determined, measures which take place closely to normal market conditions are often least distortive of competition. Point 72 functions as an effective incentive for the member states to design less distortive aid measure, as otherwise undertakings will have to face the additional measures.⁹⁹

However, it is questionable whether the aid ceilings and conditions of the Framework are enough to preserve the level playing field, the internal market, consumer welfare and efficiency. The differences in the amount of support received is still significant, which can be demonstrated by data on the percentage of aid received relative to the beneficiary airline's 2019 annual revenue. For example, the Lufthansa Group has received 24.7% of their 2019 annual revenue in state aid¹⁰⁰, while Ryanair has only received 8.4% of their 2019 annual revenue in state aid.¹⁰¹ Furthermore, in regard to all sectors of the economy, aid measures have ranged from €10 million

⁹⁷ Communication from the Commission (EC) No C(2021) 564 of 28 January 2021, *supra nota* 7.

⁹⁸ *State Aid SA.57153 (2020/N) – Germany – COVID-19 - Aid to Lufthansa* (2020). European Commission. Retrieved from https://ec.europa.eu/competition/state_aid/cases1/202044/286587_2201652_220_2.pdf, 12 April 2021.

⁹⁹ *State Aid SA.57410 (2020/N) – Finland COVID-19: Recapitalisation of Finnair* (2020). European Commission. Retrieved from https://ec.europa.eu/competition/state_aid/cases1/202036/286428_2186248_143_2.pdf, 12 April 2021.

¹⁰⁰ *Annual Report 2019* (2020). Lufthansa Group. Retrieved from <https://investor-relations.lufthansagroup.com/fileadmin/downloads/en/financial-reports/annual-reports/LH-AR-2019-e.pdf>, 12 April 2021.

¹⁰¹ *Annual Report 2019* (2019). Ryanair Holdings. Retrieved from <https://investor.ryanair.com/wp-content/uploads/2019/07/Ryanair-2019-Annual-Report.pdf>, 12 April 2021.

to €500 billion.¹⁰² Differences also exist when the amount of aid is referenced with the percentage of the national economy, whereby states are granting aid ranging from 1% to 16%.¹⁰³ Thus, there is substantial variation in state aid intensity between the member states in regard to state aid granted as a percentage of the state's Gross Domestic Product (GDP). Moreover, it has been found that aid granted is not necessarily proportionate in regard to its negative economic effects caused by Covid-19.¹⁰⁴

The Framework and the current system of assigning state aid at the national level does not address this issue concerning significant imbalances. Ultimately, these imbalances are significant at the time when the Covid-19 crises passes, and demand starts to normalise in the airline industry. Although it is difficult to say for certain, it is nevertheless predicted that demand in the air travel market will normalise fairly quickly.¹⁰⁵ Therefore, the airlines who have received more state aid could aggressively pursue for expansion at new markets due to their strengthened financial position in relation to other competitors. This can domino into the relegation of equally efficient undertakings into niche markets or force those players into exit altogether, as it is no longer possible to compete with a state aided competitor.¹⁰⁶

Thus, consumer welfare is decreased by the elimination of the variety of products and the likelihood of higher prices, while efficiency is affected by the removal of efficient competitors and a higher degree of concentration at the market. This may also have an impact on the development and quality of the goods and services offered by airlines.¹⁰⁷ Additionally, states with enough resources and subjective interest may want to protect their domestic undertaking against these significant aid packages by offering more or similar amounts of aid to their national airlines, resulting in inefficient subsidy races.¹⁰⁸ For instance, it is difficult to find rationale as to why the Italian government keeps on supporting their national airline, Alitalia, which was already in difficulty long before the Covid-19 outbreak. Finally, the imbalances may result in the fragmentation of the internal market, whereby airlines from other regions will thrive with the

¹⁰² Nicolaidis. (2021), *supra nota* 95.

¹⁰³ *Ibid.*

¹⁰⁴ Van Hove, J. (2020). *Impact of state aid on competition and competitiveness during the COVID-19 pandemic: an early assessment*. (Study for the Committee on Economic and Monetary Affairs) European Parliament, Luxembourg.

¹⁰⁵ *Overview of the State aid rules and public service obligations rules applicable to the air transport sector during the COVID-19 outbreak* (2020). European Commission, *supra nota* 19.

¹⁰⁶ Motta., Peitz. (2020), *supra nota* 6.

¹⁰⁷ Jones., Sufrin., Dunne. (2019), *supra nota* 4, pp. 28–31.

¹⁰⁸ Schito (2021), *supra nota* 17, pp. 277–306.

expense of those that are unable to provide such support *inter alia* due to prioritising of budget to other areas.¹⁰⁹

5.2. Prioritisation at the national level

During the pandemic it has been common among the member states to design national state aid schemes or support measures only available to the state's national airlines.¹¹⁰ This highlights the issues with impartiality and unequal access to state support for some equally efficient airlines, but who nevertheless receive limited amounts or no aid due to their place of establishment. Thus, a state aid regime applicable during crises should not be such a fragmented system, especially at industry sectors where firms compete almost entirely with other firms from different member states, hence, intra-Union trade is intense¹¹¹ and whereby the crises is of such a nature, which undermines even the healthiest of undertakings. This means that virtually all undertakings are in need of additional support in order to avoid a bankruptcy, as the raising of new loan capital at the markets becomes almost impossible, especially when considering the state of the airline industry. In fact, one of the most common forms of state aid has been the granting of loan guarantees, which are *inter alia* granted for the purposes of enabling the beneficiary to gain access to capital markets, as without guarantee it is too risky for a financial institution to grant finances.

In both case C-238/20 and case C-259/20, *Ryanair v Commission* concerning state aid decisions SA.56812 and SA.56765 on a €455 million Swedish loan guarantee scheme and a French tax deferral scheme for the benefit of airlines. The General Court has noted that *de facto* airlines which operate air travel services to and from these two states, but which operate under another state's air transport license are placed at a disadvantaged position, because those operators are not eligible for aid. This is because both of these schemes are only eligible for national airlines, thus, airlines which have their principal place of business in Sweden or France.¹¹²

The application of the nationality criteria was mainly seen as appropriate and proportionate by the General Court in case of the Swedish loan guarantee scheme, as it was seen as necessary to

¹⁰⁹ Motta., Peitz. (2020), *supra nota* 6.

¹¹⁰ *State Aid SA.56812 (2020/N) – Sweden COVID-19: Loan guarantee scheme to airlines* (2020). European Commission. Retrieved from https://ec.europa.eu/competition/state_aid/cases1/202016/285407_2147916_112_2.pdf, 07 May 2021.

¹¹¹ Motta., Peitz. (2020), *supra nota* 6.

¹¹² Court decision, 17.02.2021, *Ryanair DAC v. European Commission*, T-238/20, ECLI:EU:T:2021:91, point 30.

ensure the purpose of the aid scheme in securing the connectivity of Sweden. The Court deemed that it was in the interests of the state to provide aid only to those airlines who could guarantee a stable presence in Sweden to ensure its connectivity.¹¹³

This could *de facto* only be achieved by providing aid to airlines with their principal place of business in Sweden, as it is hard for an airline to switch their principal place of business elsewhere due to the magnitude of obligations. On the other hand, the provision of services may cease to exist immediately if decided by an airline. Therefore, if aid was provided to airlines established elsewhere for the purposes of connecting Sweden, there would nevertheless be no guarantees as to its stable presence.¹¹⁴ Furthermore, the Court noted that the resources of the member states are not unlimited and therefore it is proportionate that the selection of beneficiaries is prioritised to include only those airlines who have suffered the most as a result of the pandemic and who are most important to the functioning of the region, namely to its connectivity. In case of the Swedish scheme, the most important airlines for the purposes of the scheme were also Swedish operators when taking into account: international air travel, regional air travel, cargo and *inter alia* medical transport.¹¹⁵

In case of the French tax deferral scheme, similar reasoning was applied by the Court in determining that France had a reasonable interest to ensure the stable presence of the beneficiary airlines at the French region and therefore, to apply nationality criteria upon the scheme. The Court seems to indicate that the only way to ensure the stable presence of an operator is the factor of the principal place of business, as this place is difficult to change by an operator. The criteria were seen as necessary in order to ensure the minimal losing of tax revenue on the medium term by the stable presence of the beneficiaries on the French territory. Furthermore, since the resources of the state are not unlimited, it was proportionate to reserve the benefit of the aid to those operators who have suffered the most due to the French measures to contain the pandemic.¹¹⁶

Importantly, the court found that both of the schemes and more specifically the nationality criteria did not constitute discriminatory conduct within the meaning of Article 18 TFEU.

¹¹³ *Ibid.*, point 40–44.

¹¹⁴ *Ibid.*, point 42–45.

¹¹⁵ *Ibid.*, point 50.

¹¹⁶ Court decision, 17.02.2021, Ryanair DAC v. European Commission, T-259/20, ECLI:EU:T:2021:92, point 37–41.

Although Article 18 TFEU prohibits any kind of discrimination on the bases of nationality, it comes without prejudice to any special provision within the Treaty. Therefore, the discriminatory nature of the schemes had to be evaluated on the basis of the Articles under which the respective schemes were exempted from the prohibition of Article 107(1) TFEU.¹¹⁷ Pursuant to Article 108(3) TFEU the Swedish scheme was notified under Article 107(3)b TFEU, and since the measure was justified to remedy a serious disturbance in the Swedish economy and it fulfilled the conditions of Section 3.12 of the Framework concerning loan guarantees, it had to be considered that there was no discrimination within the meaning of Article 18 TFEU.¹¹⁸ On the other hand, the French scheme was notified under Article 107(2)b TFEU to make good the damage caused by an exceptional occurrence, so the discriminatory nature of the scheme had to be evaluated under this Article. Since the usability of Article 107(2)b TFEU in the context of the pandemic was deemed compatible by the Commission, there was only left to prove the casual link between the damage suffered by the airline and the pandemic. The Court found that the measures imposed by France to contain Covid-19 had caused damage to the airlines in the form of ceased demand, whereby the conditions of Article 107(2)b TFEU had been met. Therefore, no discriminatory conduct occurred on behalf of the French state.¹¹⁹

These cases can function as an illustration of the mere importance of the principal place of business of an airline, as due to the granting of state aid at the national level their survival during an exceptional occurrence may depend on it. Due to the absence of unlimited amount of resources of the states and prioritisation, some EU airlines may be left with nothing, if their respective member states are not able or willing to provide for support.

¹¹⁷ *Ibid.*, point 32.

¹¹⁸ Court decision, 17.02.2021, Ryanair DAC v. European Commission, T-238/20, *supra nota* 112, point 31–51.

¹¹⁹ Court decision, 17.02.2021, Ryanair DAC v. European Commission, T-259/20, *supra nota* 116, point 32–44.

6. CONCLUSION

This thesis has provided an overview of some of the most important objectives of competition policy and has explored the legal regime governing state aid during the Covid-19 outbreak. The research aim of the thesis is to find concrete proposals for reform and to contribute towards replacing the current method of assigning state aid to EU airlines during times of crises. The thesis concludes that the current system of assigning state aid to airlines at the national level results in significant imbalances in the distribution of state aid, which has the likelihood of causing unnecessary market distortions, consumer harm, inefficiency and fragmentation of the internal market. Thus, the current regime can be considered as not being impartial, since the assignment of aid is largely dependent on the individual characteristics or the subjective interests of the member states.¹²⁰ This can lead to the exclusion from the market of some equally efficient and healthy EU operators as a result of not having their principal place of business at a member state that is willing to provide backing.

The current regime includes the strong involvement of the Commission as the member states will generally have to notify their proposed aid measures before their implementation in accordance with Article 108(3) TFEU.¹²¹ This is of course if the proposed measure does not fall into the ambit of *de minimis* aid or cannot be exempted under the Block Exemption Regulation. During the Covid-19 outbreak the need for aid has intensified and the Framework had to be adopted in order to allow the necessary relaxation of EU state aid rules for a limited time and thus to ensure the longevity of important undertakings.¹²² The aim of the Commission is to provide the necessary relaxation to the rules with minimal distortions of competition, which is why the Framework is equipped with appropriate criteria and *inter alia* aid ceilings for each type of aid measure.¹²³

¹²⁰ Abate., Christidis., Purwanto. (2020), *supra nota* 15.

¹²¹ Craig., De Burca. (2020), *supra nota* 5, pp. 1177–1179.

¹²² Communication from the Commission (EC) No C(2021) 564 of 28 January 2021, *supra nota* 7.

¹²³ *Ibid.*

The Commission has deemed the threat of certain recapitalisation measures to competition, whereby states engage in supporting undertakings through equity investment. Therefore, the Framework includes several compatibility conditions that have to be met before such measures can be implemented in order to mitigate possible market distortions as largely as possible.¹²⁴ Some appropriate conditions include those pertained in Section 3.11.6 of the Framework, which *inter alia* require the posing of additional measures in case a recapitalisation measure exceeds €250 million.¹²⁵ These conditions also incentivise airlines and the member states to design recapitalisation measures closely to normal market conditions, as otherwise the company will be subject to additional burden. Similar mitigating conditions to preserve the competitive environment have been set for every aid measure permitted within the meaning of the Framework, including for the most common measures in direct grants, loans and loan guarantees. All of these conditions are designed to deem the proposed measure as necessary, appropriate and proportionate to address the needs of undertakings in the context of the pandemic.¹²⁶

However, these conditions to preserve the competitive landscape are not enough as the current regime still *per se* leads to large imbalances¹²⁷ and to the possible exclusion of airlines from aid. More unity and action are called for at the supranational level, which is why the thesis proposes for reform an elaborated version of the EU-wide state aid fund initially proposed by Motta and Peitz at the beginning of the pandemic.¹²⁸ The unifying nature of assigning aid is crucial at an industry sector where the market of operators is almost entirely European and thus EU airlines from different member states largely compete with one another over the same segments of consumers.¹²⁹ Therefore, the imbalances in the provision of aid will especially be felt at such an industry where those operators who have received support are in direct competition with those who have not. As a result, aid should be assigned more duly based on merit and through a scheme at the EU level. This means that aid would be provided through EU funds and would be available to all EU airlines based on commonly agreed criteria which are equal, hence, eliminating imbalances.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ Motta., Peitz. (2020), *supra nota* 6.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

The thesis proposes that similarly to the current Framework, the forth coming system criteria would only enable the assignment of aid to those airlines which were healthy prior to the exceptional occurrence. In this manner it is possible to mitigate the provision of aid to inefficient undertakings. On the other hand, undertakings already in difficulty could apply for aid through the normal regime and in accordance with the rescuing and restructuring guidelines. It should also be kept in mind that airlines are subject to high running costs and thus new market participants may be struggling at the beginning of their business life after large investments. Therefore, in the light of fairness these newcomers should not be excluded from aid, if they contribute towards enhancing consumer welfare and dynamic efficiency. Point 72 of the Framework could be well utilised in case of an EU-wide umbrella scheme, as it could function as an accelerator of public policy implications. For instance, airlines receiving aid could be made subject to requirements which will enhance the common objectives of the Union, such as environmental protection. Such conditionals could be imposed on the receipt of aid, whereby airlines would have to *inter alia* update their fleet of aircraft to meet with higher environmental demands or to engage in other strategic solutions to meet with the objectives. Lastly, it would be important that the amount of aid would not solely be fixed on the number of passengers carried but rather be based on the material contribution and connectivity of the airline towards the EU. This would enable the provision of aid, not only to passenger airlines, but also to regional and cargo operators. Moreover, larger measures should be treated differently¹³⁰ in relation to smaller measures.¹³¹

Based on the review of the Swedish and French state aid schemes, it becomes evident that more accessible national aid schemes, such as the UK's CCFE would not function as a better alternative to the current system. As the General Court determined that the resources of the member states are not unlimited¹³², which means that a form of prioritisation must occur. Thus, in this scenario it is likely that only the very large operators and the most important players in terms of connectivity would fall within the ambit of the national scheme, hence, excluding semi-large operators such as Ryanair. This means that the issue of imbalances would still pertain, which ultimately leads to similar unnecessary market distortions as the current system.

¹³⁰ Nicolaidis. (2021), *supra nota* 95.

¹³¹ Van Hove. (2020), *supra nota* 104.

¹³² Court decision, 17.02.2021, Ryanair DAC v. European Commission, T-238/20, *supra nota* 112, point 50.

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