State Aid to Airlines in the Context of Covid-19: Damages, Disturbances, and Equal Treatment

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The aviation industry has been hardly hit by the pandemic, with travel restrictions, health measures, and dramatic drop in demand. A significant amount of state aid was granted to European airlines by Member States in the last year, following guidance on the relaxation of state aid rules. The state aid schemes were authorised by the Commission under both Article 107 (2)(b) TFEU and Article 107 (3)(b) TFEU. Several recent judgments of the General Court upheld the state aid measures for airlines and dismiss allegations on equal treatment and possible negative effects of competition; however, three measures were found to be inadequately justified.

I. Introduction

Nearly 30 years after the liberalisation of air transport, the European Union has succeeded to a great extent in creating an internal market. European air carriers are subject to a uniform regime with regard to their establishment and their operation, while they enjoy absolute freedom to perform intra-EU air transport services. The concept of national air carrier is no longer relevant, since it is replaced by the notion of European air carrier, in the sense of an air carrier with an operating license granted by a Member State under Regulation 1008/2008 on common rules for the operation of air services in the Community. Accordingly, state aid rules in the aviation sector were adjusted to the operation of the internal market and European Commission has been very active in safeguarding a competitive environment.

The pandemic of Covid-19 has brought about an unprecedented crisis in the aviation market. National authorities throughout the world have imposed a variety of restrictions for travelling, from total bans on flights to health conditions on travellers, such as Covid-19 tests and quarantines. In April 2020, air traffic in Europe was up to 88% lower in comparison to January 2020, before the beginning of the crisis. In April 2021, air traffic was still 66% lower in comparison to January 2020. Although we have been living with the pandemic for more than a year, the future of the air transport market is still uncertain, since the exit from the health emergency situation is visible, yet unaccomplished. The forecasts of international aviation organisations are constantly being revised: according to Eurocontrol, in the best case scenario air traffic in Europe will recover to 2019 levels in 2024. According to IATA, world traffic in 2021 will only reach 50.6% of its 2019 levels.

Under these circumstances, and bearing in mind that the crisis has been prolonged beyond any expectation, state financial support to airlines is necessary and inevitable. Member States have stepped in to ensure the viability of their air carries, while the European institutions have taken appropriate action to facilitate national authorities in their effort to mitigate the consequences of the crisis. Nevertheless, the situation has invoked some reflections with regard to the conditions of the support and its possible repercussions for competition.

The present article will examine the state aid measures that have been taken to support airlines in the European Union during the Covid-19 crisis. The article will begin by assessing the current legal framework for state aid. It will then present the state aid cases that have been approved by the European Commission so far, with some remarks on the application of the framework in the aviation sector. The study will conclude with the presentation of ten recent judgments of the General Court on state aid cases concerning airlines and a short final comment.

With regard to the application of the SGEI rules in the current context of the Covid-19 crisis, the European Commission has issued some guidance material relevant...
to the air transport sector, dealing in principle with the assignment of emergency air transport services and the modification of Public Service Obligation contracts. As these measures do not constitute state aid, they will not be particularly addressed.

II. The legal framework for state aid to airlines in the context of Covid-19

A. Article 107 (2) (b) TFEU: State aid as compensation for damage caused by exceptional occurrences

The relevant provisions of the TFEU for state aid in the context of the pandemic are Article 107 (2) (b) and Article 107 (3) (b). In immediate response to the Covid-19 pandemic, the European Commission issued the Temporary Framework for state aid measures to support the economy in the current Covid-19 outbreak, which has already been amended five times.

Article 107 (2) (b) allows state aid for compensation of damage caused by natural disasters or exceptional occurrences. In order to be compatible with the Treaty, the aid should fulfill the criteria of exceptionality, causality, and proportionality: the event causing the damage should be unforeseen, exceptional and with a significant impact, the damage should be in a direct causal link with the exceptional occurrence and the aid should not go beyond the amount of damage actually suffered. Previous experience with the application of this article shows that it has been interpreted restrictively.

Major events disrupting air transport in the past have been recognised as exceptional occurrences in the sense of Article 107 (2) (b). The first such event was the terrorist attacks in 2001, which gave rise to a large number of state aid measures for airlines, as reimbursement for damages and for the coverage of increased insurance costs. It is noteworthy that, in its guidelines addressing the consequences of the 2001 attacks and state aid to airlines, the Commission particularly underlined that both compensation and insurance cover measures should apply to all airlines in a given Member State, in a non-discriminatory and uniform manner. An example of the restrictive approach taken by the Commission, are the facts in case T-268/06, in which the Court partially annulled a decision of the Commission refusing to recognise the damage sustained by Olympic because of the terrorist attacks. The second major event for air transport was the explosion of the Icelandic volcano Eyjafjallajökull in 2010, which, however, only gave rise to one state aid case, namely SA 32163 ‘Remediation of damage to airlines and airports caused by seismic activity in Iceland and the volcanic ash in April 2010’, granted to Slovenian air carriers.

The above-mentioned cases indicate that in similar - yet significantly minor in comparison to the pandemic-circumstances, the need for equal treatment of airlines was emphasised. The current practice seems not to be consistent with this approach, as it will be demonstrated by the analysis that will follow.

The Temporary Framework includes only some brief guidance on the application of Article 107 (2) (b) in the present context, as its main purpose is to address the conditions for the application of Article 107 (3) (b) TFEU. Tourism and transport are particularly referred to as industries hardly hit by the outbreak, for which Article 107 (2) (b) on compensation of undertakings is relevant. However, the Commission explains that the exceptional occurrence in this case is the restrictive measures precluding the beneficiary from operating his economic activity, and not the pandemic in itself. Therefore, there should be a direct causal link between the restrictive measures and the damage they have caused. In this respect, damages caused by flight restrictions, or the exclusion of certain categories of clients may be compensated. The same does not apply to damages caused by general measures, such as social distancing or general sanitary constraints. The Commission further points out that no overcompensation should be made and that the damage should be rigorously quantified. Damage caused by the general decline in demand or customers’ unwillingness to travel cannot be compensated; this clarification is particularly relevant for air transport.
The specifications in the Temporary Framework point to the conclusion that the European Commission has taken a restrictive approach with regard to the application of Article 107 (2) (b) in the context of the pandemic. In this regard, Article 107 (2) (b) appears in general more difficult to apply in comparison to Article 107 (3) (b) and this might explain why Member States are unwilling to use this legal basis in the present crisis, since the vast majority of state aid schemes were not authorised as compensation for damage.

B. Article 107 (3) (b) TFEU: State aid to remedy a serious disturbance in the economy of a member state

According to Article 107 (3) (b), aid to remedy a serious disturbance in the economy of a Member State is compatible with the internal market. Previous application of this particular provision only took place during the post-2008 economic crisis, when the Commission approved a considerable number of state aid measures to support financial institutions under specialised temporary frameworks.

Covid-19 has been early recognised by the Commission as a serious disturbance to the economy, and the conditions for the granting of aid on the basis of Article 107 (3) (b) have been set for the first time in March 2020, when the first edition of the Temporary Framework was published. According to the guidance of the Commission, state aid as a remedy for a serious disturbance in the economy of a Member State is subject to certain strict requirements. First of all, this type of aid does not apply to undertakings, which were facing financial difficulties before December 2019. Member States are allowed without notable restrictions to grant a limited amount of aid, not exceeding EUR 1.8 million per undertaking, in order to assist enterprises that find themselves facing a sudden shortage of liquidity.

Above this threshold, the Commission distinguishes between the different types of state aid: state guarantees on loans, subsidised interest rates for loans (with additional conditions if the guarantees and loans are channelled through credit institutions) and recapitalisation measures. The first two types of aid should not be cumulated in the same loan. With regard to state participation in the undertaking (recapitalisation), the Commission underlines that such measures should only be considered if no other appropriate solution can be found. In any case, the aid should not exceed the minimum amount needed to restore the viability of the beneficiary, the State should receive appropriate remuneration for the investment, as close as possible to market terms, and recapitalisation should be redeemed when the economy stabilises.

In comparison with the framework for the application of Article 107 (3) (b) during the banking crisis of 2008, the approach of the European Commission in the current context of the pandemic has been more flexible than ever, as it comes with no strings attached for the beneficiaries.

To an extent, this may be justified by the large scale of the emergency.

III. Aid granted to airlines in the context of Covid-19

A. Schemes approved by the European Commission

As of 30 April 2021, thirty-four (34) schemes of state aid to airlines were notified to the European Commission under the Covid-19 Temporary Framework and cleared with no objections raised. A distinction of the schemes according to their legal basis shows that 16 of them were based on Article 107 (2) (b) as compensation of damages caused by exceptional occurrences (Table 1) and 18 of them were based on Article 107 (3) (b) as remedy for serious disturbance in the economy (Table 2).

Most of the schemes are directed to particular airlines. Four schemes, namely the aid of France to French air carriers in the form of deferral of taxes (SA 56865), the Swedish scheme for state guarantee for loans (SA 56812), direct grants to Italian carriers (SA 59029), and aid to Danish carriers for wages of technical staff (SA 59370) are intended to cover all national carriers, that is all carriers with an operating license of the Member State involved. Two of these particular schemes were cleared under Article 107 (2) (b) and another two of them under Article 107 (3) (b). Four schemes (SA 59124, SA 58157, SA 57691, and SA 59156) are open to all international airlines, with

14 Francisco Costa-Cabral, Leigh Hancher, Giorgio Monti and Alexandre Ruiz Fease, ‘EU Competition Law and COVID-19’, (2020) TILEC Discussion Paper, DP 2020-007. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561438, 5.
15 Phedon Nicolaides, ‘Application of Article 107(2)(b) TFEU to Covid-19 Measures: State Aid to Make Good the Damage Caused by an Exceptional Occurrence’ (2020), 11 Journal of European Competition Law & Practice 238.
16 Ramona Ianus and Massimo Francesco Orzan, ‘Aid Subject to a Discretionary Assessment under Article 107(3) TFEU’, in Herwig C.H. Hofmann and Claire Micheau (eds), State Aid Law of the European Union (1st edn Oxford University Press 2016) 240, Francisco Costa-Cabral, Leigh Hancher, Giorgio Monti and Alexandre Ruiz Fease (n 14) 7.
17 Temporary Framework (n 7) 8.
18 Francisco Costa-Cabral, Leigh Hancher, Giorgio Monti and Alexandre Ruiz Fease (n 14) 7.
Table 1: State aid to airlines under Article 107 (2) (b) TFEU

| Beneficiary | Country      | Amount (million EUR) | Type of aid                          | Case  |
|-------------|--------------|----------------------|--------------------------------------|-------|
| TAP Portugal| Portugal     | 452                  | State loan (damage 03–06/20)         | 62304 |
| Finnair     | Finland      | 350                  | Hybrid loan                          | 60113 |
| French carriers | France | 200                  | Deferral payment of taxes            | 56765 |
| Alitalia    | Italy        | 199,45               | Direct grant (damage 03–06/20)       | 58114 |
| Austrian Airlines | Austria | 150                  | State loan, direct grant             | 57539 |
| SAS         | Denmark      | 137                  | State guarantee on a revolving credit facility | 56795 |
| SAS         | Sweden       | 137                  | State guarantee on a revolving credit facility | 57061 |
| Italian carriers | Italy | 130                  | Direct grant (damage 1/3–15/06)    | 59029 |
| Aegean Airlines | Greece | 120                  | Direct grant (damage 03–06/20)     | 59462 |
| Alitalia    | Italy        | 73                   | Direct grant (damage 06–10/20)      | 59188 |
| Blue Air    | Romania      | 63                   | Public guarantee, loan guarantee     | 57026 |
| Corsair     | France       | 30,2                 | Tax credit                           | 58125 |
| Alitalia    | Italy        | 24,7                 | Direct grant (damage 11–12/20)      | 61676 |
| Tarom       | Romania      | 19,3                 | Loan guarantee (damage 03–06/20)    | 56810 |
| SATA Air Azores | Portugal | 12                   | Direct grant (damage 03–06/20)     | 61771 |
| Croatia Airlines | Croatia | 11,7                  | Direct grant                        | 55373 |

Table 2: State aid to airlines under Article 107 (3) (b) TFEU

| Beneficiary      | Country            | Amount (million EUR) | Type of aid                                           | Case  |
|------------------|--------------------|----------------------|-------------------------------------------------------|-------|
| Lufthansa        | Germany            | 6.000                | Equity participation, silent participation, loan guarantee | 57153 |
| Air France       | France             | 7.000                | State guarantee on loans, subordinated state loan      | 57082 |
| Air France       | France             | 4.000                | Recapitalisation                                      | 59913 |
| KLM              | Netherlands        | 3.400                | State loan guarantee, state loan                       | 57116 |
| SAS              | Denmark-Sweden     | 1.000                | Recapitalisation                                      | 57543 |
| LOT polish       | Poland             | 650                  | Subsidised loan, recapitalisation                      | 59158 |
| Finnair          | Finland            | 540                  | State loan guarantee                                  | 56809 |
| Swedish carriers | Sweden             | 455                  | State guarantee on loans                              | 56812 |
| Brussels airlines| Belgium            | 290                  | State loan, recapitalisation                          | 57544 |
| Finnair          | Finland            | 286                  | Recapitalisation                                     | 57410 |
| Air Baltic       | Latvia             | 250                  | Recapitalisation                                      | 56943 |
| Nordica          | Estonia            | 30                   | Share capital increase, subsidised interest loan       | 57586 |
| Various enterprises | Hungary | 21,76                | Tax allowance                                         | 57767 |
| All interested airlines | Denmark | 20                   | Direct grant to cover airport charges                 | 58157 |
| All interested airlines | Cyprus | 6,3                  | Direct grant to airlines resuming connectivity        | 57691 |
| Danish carriers  | Denmark            | 6                    | Direct grant-wages of technical staff                  | 59370 |
| All interested airlines | Slovenia | 5                    | Direct grant (up to EUR 800.000 per airline)          | 59124 |
| Airlines Sibiu airport | Romania | 1,7                  | Direct grant to airlines resuming connectivity        | 59156 |

The tables include state aid granted to air carriers with an operating license of the European Union in the context of Covid-19 up to 30 April 2021. Data have been collected by the author from the website of the European Commission.

The objective to restore connectivity in particular airports. All of them were authorised under Article 107 (3) (b).

The tables do not include a 1.25 billion EUR German scheme to recapitalise TUI group, the German tour operator, which also owns five European airlines (TUI Airways, TUI fly, TUI fly Belgium, TUI fly Netherlands and TUI fly Nordic). The measure-SA 59812- was approved under Article 107 (3) (b) TFEU.

The tables also do not mention aid to Spanish air carriers, which has not been individually authorised by the Commission. A major EUR 10 billion state aid fund was approved in Spain in July 2020 in order to provide debt and capital support to companies affected by the coronavirus outbreak (SA 57659). According to reports in literature and in press, IAG airlines Iberia and Vueling have benefited from this scheme.\(^{19}\)

Two more airlines, namely TAP in Portugal (SA 58463) and Corsair in France (SA 57369), have received EUR 1.2 billion and EUR 106 million respectively as restructuring aid according to Article 107 (3) (c) TFEU and the

\(^{19}\) Emmanuel Combe and Didier Bréchemier, ‘Before Covid-19, air transportation in Europe: an already fragile sector’ (2020), Fondation pour l’innovation politique https://www.fondapol.org/en/study/before-covid-19-air-transportation-in-europe-an-already-fragile-sector-2/ 22, Inti Landauro ‘IAG’s Spanish airlines secure $1.1 billion of state-backed loans’, Reuters (1 May 2020) www.reuters.com/article/us-health-coronavirus-ia g-debt-idUSKBN22D56D.
To fly. Flights or on the ability of certain categories of passengers to travel restrictions or express ban on flights or the movement of certain persons, but there is a recommendation by government authorities against non-essential travel.

Having regard to the above-mentioned brief considerations, it is evident that the establishment of a causal link between government measures and airline damages, as well as the quantification of such damage, involves significant difficulties.

With regard to the schemes approved under Article 107 (3) (b), which allows for a more flexible approach, it is apparent from the Temporary Framework, but mostly from the particular cases that have been approved to date, that an unprecedented relaxation of the European state aid rules is encountered. According to the guidance of the Commission, recapitalisation and state involvement in the enterprises should be the ultimate resort, when all other measures have failed. In the aviation sector, there have been numerous such cases during the last year. Moreover, it is apparent that not all airlines have received an uneven share of state aid in comparison with its size. According to the European Commission, the contribution of air transport to the European GDP has been 2.1%. According to Eurostat data, the direct contribution of air transport in terms of GVA and employment is less than 1%. Approved schemes of state aid to airlines and airports in the context of Covid-19, based on the amounts mentioned in a factsheet of the Commission, make up for 4.95% of total state aid expenditure. Table 3 demonstrates the percentage of contribution of air transport to the total economic activity and the percentage of approved state aid in the air transport sector. Total state aid to airlines amounts approximately to EUR 30.8 billion, while state aid to airports is about EUR 538 million.

### B. Remarks on the application of the temporary framework to airlines

The conclusion that the legal basis of Article 107 (3) (b) is preferred over Article 107 (2) (b) is verified by the state aid schemes granted to airlines. Nevertheless, a large number of schemes is also authorised under Article 107 (2) (b) as compensation for damage. As previously discussed, according to the Temporary Framework the application of the latter Article entails the obligation of the parties (Member States and airlines) to present sufficient proof that there is a direct causal link between the particular damage and government restrictions on the execution of flights or on the ability of certain categories of passengers to fly.

With regard to the restriction of flights, the reaction of European countries to the outbreak of Covid-19 has been nothing but uniform, since in the first months of the pandemic (March to June 2020), Member States proceeded individually to the direct prohibition of flights from certain areas. After a recommendation adopted by the Council in October 2020 calling for a common approach to travel restrictions, travel bans between EU countries seem to have been reduced, but Member States were still free to adopt other measures for individual travellers (self-quarantine and negative PCR test). The second wave of the pandemic in autumn 2020 brought about another toughening of restrictive measures.

The exclusion of certain categories of passengers resulting to the damage of air carriers will probably be particularly relevant for third country routes, since third country nationals are actually prohibited to enter the European Union for non-essential reasons since March 2020, following another Council Recommendation on the matter. Nonetheless, some Member States have been maintaining the prohibition of travelling for non-essential reasons for EU nationals as well, which means that damage caused to air carriers from this sort of restriction can be compensated. Furthermore, it is unclear whether a fall in demand could be compensated, when there is no express ban on flights or the movement of certain persons, but there is a recommendation by government authorities against non-essential travel.

### Table 3: EU Air transport: Percentage (%) of contribution to total economic activity and state aid received

| Indicator/year | 2017 | 2018 | 2020-2021 |
|---------------|------|------|-----------|
| Gross value added | 0.313 | 0.338 | -         |
| Persons employed | 0.156 | 0.157 | -         |
| Approved state aid | - | - | 4.95      |

**Source:** Eurostat database (https://ec.europa.eu/eurostat/data/database) for air transport indicators (2017–2018); author’s calculations (airlines and airports) from European Commission (2021), Coronavirus Outbreak—List of Member State Measures approved under Articles 107(2)(b), 107(3)(b) and 107(3)(c) TFEU and under the State Aid Temporary Framework, available at: https://ec.europa.eu/competition/policy/state-aid/coronavirus/temporary-framework_en.

20 Commission’s website, https://ec.europa.eu/transport/modes/air_en.
21 Commission, ‘Coronavirus Outbreak—List of Member State Measures approved under Articles 107(2)(b), 107(3)(b) and 107(3)(c) TFEU and under the State Aid Temporary Framework’, (Brussels, 19 July 2021)https://ec.europa.eu/competition/policy/state-aid/coronavirus/temporary-framework_en.
benefitted from state aid in the same way; whether this fact can be attributed to their own unwillingness to be supported or to political decisions in Member States is a matter that cannot be easily answered.

It is acknowledged that large legacy carriers will be unable to survive without massive public support, and the aid is justified on economic as well as social grounds; some airlines are ‘too big to fail’. However, differentiated state aid will jeopardise competition to the detriment of small players and customers. Several commentators have underlined the possible negative effect of state aid on competition, while others also point out the danger that Member States might benefit from the present occasion to support airlines that were already problematic, such as Alitalia. The need for preservation of business dynamics and the level playing field is also highlighted by OECD. Additionally, it is in general admitted that richer Member States will benefit disproportionately from the current relaxation of state aid rules, therefore the Commission should ensure that state aid in awarded in a manner that minimises distortions of competition.

Ryanair has been consistently challenging state aid to rival air carriers and has filed around 16 related actions for annulment before the ECJ. The first decisions of the General Court were delivered from February to July 2021 and they will be discussed in the following section.

The aid schemes to support Lufthansa and Air France have attracted considerable attention, because of their amount and their conditions. Air France in particular is the only airline to have received state aid with the condition of achieving certain environmental goals. Some environmental conditions are also attached to the aid in favour of Austrian Airlines, but in no other case. It is argued that Covid-19 presents a unique opportunity to promote the environmental agenda of European Union and even to rethink the structure of European aviation market as a whole, with the objective of it becoming more efficient and rational. Moreover, the support granted to air transport should also take account of other non-economic considerations, such as social cohesion, connectivity and most importantly, the rights of the passengers.

### IV. The position of the General Court

#### A. Decisions regarding measures based on article 107 (2) (b) TFEU

Five recent judgments of the General Court examine state aid measures to airlines based on Article 107 (2) (b) TFEU, as compensation for damage caused by exceptional occurrences. In brief, the schemes that have been addressed were the following:

- A French scheme concerning the deferral of certain aeronautical taxes (civil aviation tax and solidarity tax on airline tickets) granted to air carriers with a French operating license (case T-259/20)
- A Danish scheme with regard to a revolving credit facility in favour of SAS Scandinavian Airlines (case T-378/20)
- An (identical to the aforementioned) Swedish scheme involving a revolving credit facility in favour of SAS Scandinavian Airlines (case T-379/20)
- State aid from Germany to Condor Flugdienst in the form of state guarantee on loans (case T-665/20)
- State aid from Austria to Austrian Airlines in the form of a state subordinated loan convertible into a grant (case T-677/20)

In all cases, the main arguments of the applicant were the infringement of the principle of equal treatment, error of assessment relating to the proportionality of the aid, the infringement of the freedom to provide services, violation of procedural rights of the applicant, and the inadequate statement of reasons on behalf of the Commission.

With the exception of the judgment in case T-665/20 concerning state aid to Condor, all applications for annulment were dismissed. Evaluating the alleged infringement

25 Emmanuel Combe and Didier Bréchemier (n 19).
26 Steven Truxal, ‘State Aid and Air Transport in the Shadow of COVID-19’ (2020) 45 Air and Space Law Special issue 61.
27 Francisco Munari (n 28) 341–347.
28 OECD, ‘COVID-19 and the aviation industry: Impact and policy responses’ (2020) https://read.oecd-ilibrary.org/view/?ref=137_137248-fybibtbu89&title=COVID-19-and-the-aviation-industry.
29 Alfonso Lamadrid de Pablo and José Luis Buendía, ‘A Moment of Truth for the EU: A Proposal for a State Aid Solidarity Fund’ (2020), 11 Journal of European Competition Law & Practice 1.
30 Steven Truxal (n 26) 70.
31 Francisco Munari (n 28) 341–347.
32 Kati Cseres and Agustin Reyna, ‘EU State Aid Law and Consumer Protection: An Unsettled Relationship in Times of Crisis’ (2021) Journal of European Competition Law & Practice, Ipb037, https://doi.org/10.1093/jeclap/lpab037.
33 Emmanuel Combe and Didier Bréchemier, (n 19) 24.
34 Case T-259/20 Ryanair DAC v European Commission, EU:T:2021:92.
35 Case T-378/20 Ryanair DAC v European Commission, EU:T:2021:194.
36 Case T-379/20 Ryanair DAC v European Commission, EU:T:2021:195.
37 Case T-665/20 Ryanair DAC v European Commission, EU:T:2021:344.
38 Case T-677/20 Ryanair DAC and Laudamotion v European Commission, ECLI:EU:T:2021:465.
of the principle of non-discrimination in the cases involving individual aid, the Court observed that by definition, individual aid benefits only one company, and it is not possible to call into question the compatibility of any individual aid with the internal market, since individual aid is allowed by European law.  

39 The Court also observed that there is no requirement for the Member States to compensate the damage of every single victim. Therefore, the Court found that, although granting state aid to individual airlines is in principle discriminatory, the difference in treatment was in this case justified by a legitimate objective and it was necessary, appropriate and proportionate for achieving that objective, especially bearing in mind the importance and the market share of the particular airlines (SAS and Austrian) in their respective countries. Particularly with regard to the general scheme favouring French air carriers, the position of the Court was that the measure was appropriate, since it is normal for the Member State to seek a stable presence of the beneficiaries in its territory, in order to ultimately receive the taxes and monitor the financial situation of the airlines.  

Regarding the restriction of the freedom to provide services, the Court ruled that there is no such infringement, since there is a specialised regime for the free provision of services in air transport and Article 56 TFEU does not apply. In any case, Ryanair failed to show how this aid would discourage it from providing services in the respective markets.  

The Court also found that the plea on violation of procedural rights is subsidiary in nature and lacked any independent content, since all the substantial arguments of the applicant had been examined in the judgments. It should be noted that in the case of Austrian Airlines, the first argument of the applicant was the Commission’s failure to review the aid to Lufthansa, which belongs to the same group. The Court examined the decision of the Commission in detail and concluded that the Commission had sufficiently explained how the aid schemes were separated and how specific mechanisms had been established to ensure that the airlines would not benefit from each other’s support.  

Regarding the argument on the duty to state reasons, the Court observed that in these particular cases, where the decision is taken in a short period of time, the Commission must simply set out the reasons for which the aid is compatible with the internal market. In any case, this should be made in a clear and unequivocal fashion that enables the persons concerned and the competent court to understand its reasoning. Taking into account all the argumentation that preceded, in cases T-259/20, T-378/20, T-379/20, and T-677/20, the Court found that the reasoning of the Commission was adequate. Nevertheless, in the case of the aid to Condor (T-665/20), the decision of the Commission was annulled on grounds of infringement of the duty to state reasons, which was the only plea examined by the Court. Condor had received rescue and restructuring aid in 2019, after the collapse of its parent company Thomas Cook. In March 2020, Condor found itself in insolvency proceedings, which were about to end in April. The additional costs for the extension of insolvency proceedings were added to the compensation. After deciding in the affirmative on the admissibility of the application, since Ryanair is a competitor of the beneficiary, the Court reminded that, as an exception to the general rule that state aid is incompatible with the internal market, Article 107 (2) (b) must be interpreted narrowly. There should be a direct link between the occurrence that has been determined as giving rise to the damage and the damage. In that case, the Commission had stated that ‘the cancellation or rescheduling of flights due to travel restrictions’ was the exceptional occurrence. However, the Commission had failed to explain how this occurrence had caused the additional costs for the extension of the airline’s insolvency proceedings. The argument that the pandemic has caused the withdrawal of a potential investor was rejected by the Court, since it could not see how the cancellations and rescheduling of flights had caused the failure of the sale, and additionally, the termination of insolvency proceedings appeared to be independent from the sale.  

The Court proceeded to the annulment of the Commission’s decision and suspended the results of its judgment until a new decision was adopted by the Commission, within 2 months.

B. Decisions regarding measures based on article 107 (3) (b) TFEU

Four recent judgments of the General Court evaluate state aid measures adopted under Article 107 (3) (b) TFEU, as remedies for a serious disturbance in the economy of a Member State, after actions for annulment on behalf of Ryanair. Two of the decisions involve aid to individual airlines (Finnair and KLM), while the other two decisions...
examine more general national schemes. The contested measures could be summarised as follows:

- A Swedish scheme granting state guarantee on loans to airlines holding a Swedish operating license, with the exception of air carriers that only perform charter flights (case T-238/20).  
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- A state guarantee on loan granted to Finnair by Finland, designed to help the airline obtain a loan from a pension fund (case T-388/20).  
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- A major Spanish scheme offering financing in the form of financial instruments and securities, available to undertakings of strategic and systemic importance established in Spain (case T-628/20).  
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- State aid to KLM from the Netherlands, consisting of a state guarantee for a loan granted by financial undertakings, as well as an additional state loan (case T-643/20).  
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In the first three of the aforementioned cases, the Court proceeded to the evaluation of the applicant’s substantial arguments and dismissed the actions. However, in the case of KLM the decision of the Commission was annulled on grounds of a breach of the duty to state reasons.

More specifically, allegations on infringement of the principle of non-discrimination, freedom to provide services, inadequate reasoning, and infringement of procedural rights were rejected with arguments similar to the ones discussed in the previous section. In the judgment on the Swedish scheme favouring Swedish carriers, the Court found that the measure was appropriate, because it is normal for the Swedish authorities to require a stable presence of the airlines in Sweden, in order to ensure that the loans are honoured and monitor the airlines’ financial situation.  
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In the case of Finnair, although the measure concerned an individual airline, it was also deemed appropriate to remedy the serious disturbance in the Finnish economy, because of the importance of Finnair for this economy.  
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The applicant also claimed that the Commission had failed to weigh the adverse effects of state aid on trading conditions and competition.  
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The Court interestingly replied that, once a measure is found to be necessary, appropriate and proportionate to remedy a serious disturbance to the economy of a Member State, it is also in the interest of the European Union as a whole. Thus, the Commission is not required to assess its effects on trading conditions and the maintenance of undistorted competition, nor such an obligation can be derived from the Temporary Framework.

Despite the above, in the case of state aid to KLM, the Court took the view that the Commission had failed to take account of the previously approved aid to Air France. Air France and KLM belong to the same holding company (Air France-KLM), which, as the Court observed, carries out important activities for the group. The Commission had failed to explain how it was established that KLM was the only beneficiary of the aid and that it would not benefit from the aid to Air France. The Court concluded that available information on the nature of the relation between the airlines was inadequate, thus not permitting it to evaluate the aid. For reasons of legal certainty, the results of the judgment were suspended pending the adoption of a new decision by the Commission. A new decision of the Commission approving the aid to KLM was indeed taken in July 2021.  
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Although it is a case of rescue and restructuring aid, it is worth noting that the decision approving state aid to TAP Portugal was also annulled on grounds of insufficient reasoning, in particular because of the failure of the Commission to evaluate the specific conditions of restructuring aid for undertakings belonging to a group.  
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The Commission has eventually decided to open an in-depth investigation in this case.  
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C. Comment

In the cases that have been decided so far, the Court has had the opportunity to assess a variety of state aid schemes to airlines. The majority of applications for annulment against the approving decisions of the European Commission have been rejected, except for two cases in which the decisions were annulled because of a violation of the obligation to state reasons. As an initial conclusion, it appears that challenging the aid approved in the extreme circumstances of Covid-19 is significantly difficult.

With the exception of case T-259/20 (French scheme on deferral of taxes), the rest of the evaluated measures involve state guarantees on loans and state loans. It will be interesting to see the reply of the Court with regard

45 Case T-238/20 Ryanair DAC v European Commission, EU:T:2021:91.
46 Case T-388/20 Ryanair DAC v European Commission EU:T:2021:196.
47 Case T-628/20 Ryanair DAC v European Commission EU:T:2021:285.
48 Case T-643/20 Ryanair DAC v European Commission EU:T:2021:286.
49 Ryanair DAC v European Commission (n 45) 40–44.
50 Ryanair DAC v European Commission (n 46) 42–63.
51 This argument had also been briefly discussed in cases Ryanair DAC v European Commission (SAS, Denmark, n 35) 50–52 and Ryanair DAC v European Commission (SAS, Sweden n 36) 62–65.
52 Commission, ‘State aid: Commission re-approves Dutch €3.4 billion liquidity support to KLM, MEX/21/3785 (Brussels, 19 July 2021).
53 Case T-465/20 Ryanair DAC v European Commission, EU:T:2021:284.
54 Commission, ‘State aid: Commission approves €1.2 billion rescue loan; opens investigation into €3.2 billion Portuguese further restructuring aid in favour of TAP, IP/21/3741, (Brussels, 16 July 2021).
to more drastic measures, such as the subsequent recapitalisation of Finnair and SAS and the significant aids to Lufthansa and Air France. It is worth to mention that the European Commission has finally opposed Italian plans to renationalise Alitalia and has suggested the creation of a new airline instead.55

The measures that have been assessed to date were based both on Article 107 (2) (b) as ‘compensation for damage caused by exceptional occurrence’ and Article 107 (3) (b) TFEU as ‘remedy for a serious disturbance in the economy of a member state’.

Regarding the reasoning used by the Court in the judgments, it appears that the arguments are quite convincing in the cases in which the aid was based on Article 107 (3) (b). Covid-19 definitely can be categorised as a serious disturbance to the economy of a Member State. The effect of the pandemic on air transport, as well as its eventual duration, is such that State intervention seems inevitable in order to ensure the viability of air carriers. The arguments on equal treatment seem well established: individual aid cannot but benefit only one recipient and it seems rational to prioritise air carriers resident in a Member State, or even major individual airlines, in order to maintain connectivity and stabilise the economy of the particular Member State. However, it cannot be disregarded that the approach of the European institutions is not consistent to their previous practice during crises, which was more eager to ensure that state resources were carefully spent and that competitors were treated in an equal manner.

The same arguments are also valid for the cases that involve state aid as compensation for damage caused by exceptional occurrence, since there is no requirement under European law to compensate every single victim of a disaster. However, one cannot but observe that all air carriers operating in a certain Member State have suffered severe injury because of travel restrictions. The exclusion of some victims from the opportunity to be compensated does not appear reasonable and may distort competition.

Moreover, the criterion specified in the Temporary Framework, that the damage to be compensated should have been caused by specific restrictions and not in general by the decline in demand, seems not to be strictly followed: For example, in the case involving state aid to SAS, the Court found that Sweden was right to estimate the damage by referring to the general fall in air traffic compared to 2019.56 Nevertheless, in the case of Condor57, the Court seems to return to its previous position on the restrictive interpretation of Article 107 (2) (b). The Court could not find a direct causal link between travel restrictions and the extension of insolvency proceedings and consequently annulled the decision of the Commission.

Regarding the duty to state reasons, the Court in the two cases that the applications for annulment were successful, emphasised the obligation of the Commission to set out the decisive facts and the legal considerations in the context of its decision. In the case of Condor, it appears that all relevant facts were mentioned and evaluated in the judgment. In this respect, the Commission is expected to have difficulties in establishing the causal link required by the Court. In contrast, in the case of KLM, the Court has underlined the need to demonstrate the distinct character of state aid to airlines belonging to the same group. As indicated by the subsequent judgment in the case of Austrian Airlines58, such a distinction is feasible, and it appears that the Commission, in cooperation with the interested parties, will be able to establish mechanisms for the separation of the aid schemes.

In any case, the legal implications of state aid to airlines in the context of Covid-19 are expected to continue to trouble the European institutions. As rightfully observed59, European state aid law has evolved in better times that the ones we are encountering. The General Court itself admits that previous case law, practices and guidance of the Commission do not apply in the present context- this position is especially apparent in case T-388/20 regarding state aid to Finnair.60 Ryanair on its side has declared that the judgments dismissing its actions set back air transport market 30 years and it has already filed appeals before the CJEU.61

V. Conclusion

The pandemic has brought about an unprecedented crisis in air transport and the support to air carriers is inevitable. The European Commission has relaxed the

55 Foo Yun Chee ‘EU’s Vestager says solution over Alitalia replacement’, Reuters (30 April 2020) https://www.reuters.com/business/aerospace-defense/eus-vestager-says-solution-over-alitalia-replacement-possible-2021-04-30/.

56 Ryanair DAC v European Commission (n 36) 41–49.
57 Ryanair DAC v European Commission (n 47).
58 Ryanair DAC and Laudamotion v European Commission (n 38).
59 Steven Truxal (n 26) 80.
60 Ryanair DAC v European Commission (n 46) 62, 70–71, 92.
61 Ryanair ‘Ryanair To Appeal EU Court Rulings On Air France And SAS State Aid’ (17 February 2021) https://corporate.ryanair.com/news/ryanair-to-appeal-eu-court-rulings-on-air-france-and-sas-state-aid/; ‘Ryanair To Appeal EU Court Rulings On Finnair And SAS State Aid’ (17 April 2021) https://corporate.ryanair.com/news/ryanair-to-appeal-eu-court-rulings-on-finnair-and-sas-state-aid/.
rules on state aid, to the benefit of air carriers. The aid can take the form of compensation for damage caused by the pandemic or of more general measures approved as remedy for a serious disturbance in the economy. The Commission has been praised for its flexibility, although certain reservations have been raised with regard to the effect that this novel relaxation of the rules will have on competition and the preservation of a level-playing field. The allocation of state aid will play a major role for the survival of airlines, as Covid-19 is predicted to set off a significant restructuring movement in European air transport, in which large low-cost airlines are expected to grow by takeover of small players, but major airlines will have to rethink their strategy, particularly with regard to medium-haul flights.62

Member States have stepped in to assist certain carriers with a considerable amount of financial support. The former ‘national’ air carriers or air carriers partially state owned, seem to have been preferred. Member States have almost equally used both options for state aid granted to them, namely Article 107(2) (b) TFEU and Article 107(3) (b) TFEU. The support was mainly directed to individual airlines, with the exception of a few schemes available for all national carriers or all operating carriers in a certain Member State. All state aid cases to airlines have been approved by the Commission. The decisions of the Commission approving state aid to airlines in the context of Covid-19 have been challenged before the European Court of Justice. Seven recent decisions of the General Court found that the measures were compatible with European law, rejecting the arguments on infringement of the principle of equal treatment and on the need to assess the effects of state aid on competition. However, two decisions of the Commission were annulled on grounds of a breach of the duty to state reasons. The European Court of Justice has recognised the unprecedented exceptional character of the present crisis, but it remains alert on the conditions of legitimate allocation of state aid and the application of general principles of European law.

At this point, the Commission is only conducting an initial assessment of the measures. Therefore, the correct application of state aid rules and relative guidance by Member States will be further assessed with accuracy in the future. As with most state aid cases in air transport, the final settlement of disputes arising from support to certain air carriers might take years. Apart from the application of state aid rules, the greatest challenge of all is to predict whether the European air transport market will be the same once this crisis has come to an end.

https://doi.org/10.1093/jeclap/lpab071

62 Emmanuel Combe and Didier Bréchemier, ‘After Covid-19, air transportation in Europe: time for decision-making’ (2020), Fondation pour l’innovation politique https://www.fondapol.org/en/study/after-covid-19-air-transportation-in-europe-time-for-decision-making-2/.