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# State Aid and Air Transport in the Shadow of COVID-19

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*As demand for air travel has fallen in response to the Coronavirus Disease-2019 (COVID-19) crisis, the global air transport sector has been severely impacted. This article investigates the extent to which and on what conditions state aid measures are applied to airlines, airports, air navigation service providers and aircraft manufacturers in response to the crisis. In that connection, reflections are offered in this article on the role of the State and the flexibility of EU state aid law in these unprecedented times.*

**Keywords:** State aid, COVID-19, air transport, climate, competition

## 1 INTRODUCTION

The Coronavirus Disease–2019 (COVID–19) crisis is characterized by taking an unimaginable toll on human life and causing economic damage of yet-unknown proportions. The global air transport sector began to be seriously affected as States closed borders and significantly restricted movements of visitors, residents and citizens in response to the outbreak and spread of COVID–19. As a result, demand for air travel has fallen sharply and at an unprecedented rate.<sup>1</sup>

At the time of writing, a great majority of global airlines have ceased operating all but very few repatriation services or have pivoted to cargo-only operations; others have grounded entire fleets. Airports have closed runways to free up space for parked aircraft or shut down indefinitely. Air navigation service providers (ANSPs) continue working to keep the airspace open and safe, albeit with minimum staffing on strict rotations. Manufacturers of aircraft and parts have largely shut-down their production lines.

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<sup>1</sup> Globally, passenger demand fell by 94.3% in Apr. 2020 compared with Apr. 2019; IATA, *Air Passenger Market Analysis* (Apr. 2020), <https://www.iata.org/en/iata-repository/publications/economic-reports/air-passenger-monthly-analysis—apr-20202/> (accessed 5 June 2020).

This article will begin with a general overview of EU state aid law followed by measures related to COVID-19.<sup>2</sup> The article will then investigate legal issues and particularities in the context of state aid measures as applied to the different air transport stakeholders in the present crisis. The focus throughout this work is on the situation in the European Union (EU). The bulk of state aid activity concerns airlines; thus they will feature greatest. The aim is to identify the extent to which, if at all, States will assist stakeholders and on what conditions. The conclusion offers a reflection on the role of the State and flexibility of EU state aid law in a time of unprecedented crisis.

## 2 EU STATE AID LAW

### 2.1 GENERAL

According to Article 107(1) of the Treaty on the Functioning of the European Union (TFEU):

any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.<sup>3</sup>

The Court of Justice of the European Union (CJEU) determined that ‘the concept of “undertaking” covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed’.<sup>4</sup> States ‘act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market’.<sup>5</sup> When the State activity in

<sup>2</sup> See for detailed coverage of EU state aid law, Kely Bacon QC, *European State Aid Law* (3rd ed., OUP 2017); Leigh Hancher, Tom Ottervanger & Piet Slot, *EU State Aids* (5th ed., Sweet & Maxwell 2016).

<sup>3</sup> Treaty on the Functioning of the European Union (TFEU), [2012] OJ C 326/47, 91 (26 Oct. 2012). While Art. 107(1) TFEU does not define ‘aid’, the Court of Justice of the European Union (CJEU) has clarified the notion of ‘aid’, e.g. in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, [2003] ECR I-7747, para. 75. See also European Commission, ‘Commission Notice on the notion of State aid as referred to in Article 107(1) of the TFEU’, [2016] OJ C 262, 1–50 (19 July 2016). See on the evolution of the concept, Juan Jorge Piernas López, *The Concept of State Aid Under EU Law: From Internal Market to Competition and Beyond* (OUP 2015).

<sup>4</sup> Case C-222/04, *Cassa di Risparmio di Firenze and Others*, [2006] ECR I-289, para. 107; See also Case C-41/90, *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, [1991] ECR I-1979, para. 21. While these cases dealt with the concept of ‘undertaking’ in the sphere of EU competition law, the CJEU’s interpretation of the concept also concerns the prohibition laid down in Art. 107(1) TFEU. See Alison Jones, *The Boundaries of an Undertaking in EU Competition Law*, 8(2) Eur. Competition J. 301–331 (2012).

<sup>5</sup> Case C-118/85, *Commission v. Italy*, [1987] ECR 2599, para. 7; Joined Cases C-180/98 to C-184/98, *Pavlov and Others*, [2000] ECR I-6451, para. 75; Case C-49/07, *MOTOE*, [2008] ECR I-4863, para. 22.

question is done in exercise of its public powers, in general it will not fall within the scope of state aid. However, when a State is engaged in an economic activity, this may be severable from its activities as a public authority.

A state-owned airline is an undertaking engaged in economic activity.<sup>6</sup> A State's management and operation of an airport it owns are not connected to the exercise of its powers of public authority; therefore, the provision of airport services to airlines and other service providers constitute economic activity.<sup>7</sup> Thus, each of the 'various activities of an entity must be considered individually' to determine their nature.<sup>8</sup> In general, most activities ANSPs provide are considered to be non-economic in nature.<sup>9</sup> Public funding of non-economic activities generally does not constitute state aid.

Public funding will constitute aid, however, if an undertaking benefits from an unfair advantage; this is assessed by applying the so-called Market Economy Operator (MEO) test.<sup>10</sup> The MEO test assesses 'whether, in similar circumstances, a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to make the investment in question'.<sup>11</sup> Each instance of funding must be assessed separately to determine what drives the State's intervention. Where a State acts for public policy reasons, it does so *qua* public authority and not *qua* economic operator. In such a situation, the MEO test will not normally be applicable.<sup>12</sup> A State's intervention must be in line with 'normal conditions of market economy', which is examined on an *ex ante* basis<sup>13</sup> through a 'global assessment of the effects of the transaction on the undertaking concerned'.<sup>14</sup>

<sup>6</sup> EU state aid rules also apply, procedurally and substantively, to public service obligations (PSOs). Air transport PSOs can only be imposed in accordance with Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 Sept. 2008 on common rules for the operation of air services in the Community, [2008] OJ L 293/3 (31 Oct. 2008).

<sup>7</sup> Case T-128/98, *Aéroports de Paris v. Commission*, [2000] ECR II-3929, paras 108, 125; upheld on appeal in Case C-82/01 P, *Aéroports de Paris v. Commission*, [2002] ECR I-9297, paras 65–57, 77, 81; and Joined Cases T-443/08 and T-455/08, *Freistaat Sachsen, Flughafen Leipzig-Halle et al v. Commission*, [2011] ECR II-1311, paras 93–94; upheld on appeal in Case C-288/11 P, *Mitteldeutsche Flughafen AG and Leipzig-Halle Flughafen GmbH v. Commission*, [2012] ECLI 821.

<sup>8</sup> Case C-113/07 P, *SELEX Sistemi Integrati v. Commission*, [2009] ECR I-2207, para. 14.

<sup>9</sup> Case C-364/92, *SAT/Eurocontrol*, [1994] ECR I-43, para. 30; *SELEX*, *supra* n. 8, para. 71. However, the maintenance on an airport of ground traffic control lighting has been interpreted as an economic activity. See SA.14093, *Charleroi Airport*, [2014] OJ L 137/1 (1 Oct. 2014), paras 390–400; European Commission, *State Aid: Commission Approves Investment for Czech Ostrava Airport*, Press Release IP/14/176 (20 Feb. 2014), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_14\\_176](https://ec.europa.eu/commission/presscorner/detail/en/IP_14_176), accessed 12 May 2020.

<sup>10</sup> See for development by the Union courts of the underlying MEO principle, e.g. Case T-16/6, *Cityflyer Express v. Commission*, [1998] ECLI-78, para. 51.

<sup>11</sup> European Commission, *Commission Notice on the Notion of State Aid as Referred to in Article 107(1) of the TFEU*, [2016] OJ C 262/17, para. 74.

<sup>12</sup> *Ibid.*, paras 76–77.

<sup>13</sup> *Ibid.*, para. 78.

<sup>14</sup> *Ibid.*, para. 79.

Finally, and to be distinguished from the above discussion on EU law, the granting of ‘subsidies’ to the fourth group of stakeholders, aircraft manufacturers, is governed by the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures.<sup>15</sup> The long-standing, on-going Boeing–Airbus WTO subsidy disputes are fitting examples.<sup>16</sup>

The European Commission (EC) controls state aid. It has the power to order national courts to enforce state aid law and to require Member States to recover unlawful and incompatible aid.<sup>17</sup> The EC exercised this power many times before with respect to airlines in *Sabena*,<sup>18</sup> *Iberia*,<sup>19</sup> *Aer Lingus*,<sup>20</sup> *TAP Air Portugal*,<sup>21</sup> *Air France*,<sup>22</sup> *Olympic Airways*<sup>23</sup> and *Alitalia*.<sup>24</sup> The EC also ordered state aid granted to airports to be returned, for instance, in *Charleroi*.<sup>25</sup>

European state aid may be justified if the aid is used, for instance, for general economic development<sup>26</sup>; to rescue or restructure an undertaking<sup>27</sup>; to remedy a serious disturbance in the economy of a Member State<sup>28</sup>; or to compensate for damages caused by exceptional occurrences.<sup>29</sup> The EC enforces the general prohibition and grants exceptions on a case-by-case or ‘block’ basis, where necessary.<sup>30</sup> The general rule is that a Member State may only distribute aid if it

<sup>15</sup> In the Agreement, ‘subsidy’ defined in Art. 1 and prohibitions are set out in Art. 4. See *Agreement on Subsidies and Countervailing Measures* (15 Apr. 1994), *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1869 U.N.T.S. 14. [Not reproduced in I.L.M.].

<sup>16</sup> See DSU Panel Report, *European Communities – Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. DS316, (11 Dec. 2019), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds316\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm), accessed 12 May 2020.

<sup>17</sup> Article 108(3) TFEU, *supra* n. 3. See European Commission, *Communication from the Commission: Commission Notice on the Recovery of Unlawful and Incompatible State Aid*, [2019] OJ C247, 1–23 (23 July 2019).

<sup>18</sup> *Sabena*, [1991] OJ L 300/48.

<sup>19</sup> European Commission, *XXII Report on Competition Policy* 269 (1993).

<sup>20</sup> Commission Decision 94/118/EC of 21 Dec. 1993 Concerning Aid to be Provided by the Irish Government to the Aer Lingus Group, OJ L 54, 30–41 (25 Feb. 1994).

<sup>21</sup> Commission Decision 94/698/EC of 6 July 1994 Concerning Increase in Capital, Credit Guarantees and an Exemption in Favour of TAP, OJ L 279, 29–42 (28 Oct. 1994).

<sup>22</sup> Commission Decision 94/653/EC of 27 July 1994 Concerning the Notified Capital Increase of Air France, OJ L 254, 73–89 (30 Sept. 1994).

<sup>23</sup> Commission Decision 94/696/EC of 7 Oct. 1994 on the Aid Granted by Greece to Olympic Airways, OJ L 273, 22–37 (25 Oct. 1994).

<sup>24</sup> Case C26/2008 (ex. NN31/2008), *Prêt de 300 millions d’euros à Alitalia*, [2009] OJ L 52/3 (25 Feb. 2009).

<sup>25</sup> *Charleroi*, [2003] OJ C 18/03 (18 Mar. 2003).

<sup>26</sup> TFEU, *supra* n. 3, Art. 107(3)(c).

<sup>27</sup> European Commission, *Guidelines for State Aid for Rescuing and Restructuring Non-Financial Undertakings in Difficulty*, [2014] OJ C 249/1 (31 July 2014).

<sup>28</sup> TFEU, *supra* n. 3, Art. 107(3)(b).

<sup>29</sup> TFEU, *supra* n. 3, Art. 107(2)(b).

<sup>30</sup> Commission Regulation (EC) No 651/2014 of 17 June 2014 Declaring Certain Categories of Aid Compatible with the Internal Market in Application of Arts 107 and 108 of the Treaty, OJ L 187, 1–78 (26 June 2014).

first notifies the aid to the EC, and the EC approves it.<sup>31</sup> According to the *de minimis* rule, small aid amounts are exempted from the notification requirement.<sup>32</sup> All financial injections Member States provide to a public or private undertakings must be made public.<sup>33</sup>

In EU state aid law, States may define certain economic activities to be carried out as services of general economic interest ('SGEI') in some cases, and provide compensation to the service provider.<sup>34</sup> Public funding to discharge a clearly-defined SGEI will not constitute an advantage for purposes of Article 107(1) of the TFEU if the four *Altmark* criteria are fulfilled. On a case-by-case basis, defining a SGEI obligation and offering compensation may be justified when the recipients of such compensation 'do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them'.<sup>35</sup> In turn, the public support would not qualify as state aid within the scope of Article 107(1) of the TFEU.

EU air transport sectoral rules provide that public authorities may impose public service obligations (PSOs) with respect to certain routes 'to fulfil transport needs which cannot be adequately met by an existing air route or by other means of transport'.<sup>36</sup> Compensation paid to airlines operating such PSO routes may not exceed the amount necessary to cover the net costs to discharge PSO service. If the operating airline's profit on the routes is greater than what is reasonable, doubts may be arise over the compensation and compliance with state aid law. States may also impose PSOs on airports to ensure they remain open to commercial traffic.<sup>37</sup> Subject to state aid and public procurement rules, a State may impose 'urgent PSOs' without public tender.<sup>38</sup>

<sup>31</sup> TFEU, *supra* n. 3, Art. 108(3). In exceptional circumstances post-notification of state aid is allowed under EU law. See European Commission, *Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak*, [2020] C91 I/1 (20 Mar. 2020) as Amended [2020] C112 I/1 (4 Apr. 2020).

<sup>32</sup> Commission Regulation (EU) No 1407/2013 of 18 Dec. 2013 on the application of Arts 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis*, OJ L 352, 1–8 (24 Dec. 2013).

<sup>33</sup> In line with Art. 106 of the TFEU and Directive 2006/111/EC on the Transparency of Financial Relations Between Member States and Public Undertakings as well as on Financial Transparency within Certain Undertakings, [2006] OJ L 318/17 (17 Nov. 2006).

<sup>34</sup> In line with Art. 106(2) of the TFEU and the '*Altmark* criteria' set out in *Altmark*, *supra* n. 3, para. 95. See Decision 2012/21/EC on the application of Art. 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, [2012] OJ L 7, 3–10 (11 Jan. 2012).

<sup>35</sup> *Altmark*, *supra* n. 3, para. 87.

<sup>36</sup> European Commission, *Guidelines on State Aid to Airports and Airlines*, [2014] OJ C 99/3 ('2014 Guidelines'), para. 70 (4 Apr. 2014). See Regulation 1008/2008, *supra* n. 6, Arts 16–18.

<sup>37</sup> 2014 *Guidelines*, *supra* n. 36, para. 72.

<sup>38</sup> Regulation 1008/2008, *supra* n. 6, Arts 16(12) and 17.

Additional state aid rules are laid down in horizontal, sector-specific guidelines. With respect to air transport, the currently in force *2014 Guidelines* address the compatibility of investment and ‘transitional’ operating aid to airports and ‘start-up’ aid to airlines.<sup>39</sup> Investment aid should be used to build airport capacity, whereas operating aid may be used within a ‘transition period’ of up to ten years if the aid will make an improvement to the airport which the market alone cannot deliver.<sup>40</sup> If an airport is facing closure, ‘transitional’ operating aid may be a route to funding its survival. The *2014 Guidelines* set out that aid to ‘start-up’ certain new routes may be provided to airlines for a maximum of three years.<sup>41</sup> This may be useful in the present crisis where an airline withdraws certain routes on which it was the sole operator. The guidelines also clarify the financial relationships between airports and airlines in the contexts of the MEO test and state aid.<sup>42</sup>

## 2.2 MEASURES RELATED TO COVID-19

The EC responded to the COVID-19 outbreak by devising a series of legislative proposals to address economic fallout across a range of sectors, including a fast-track state aid approval process.<sup>43</sup> To enable Member States to support the economy, the EC adopted a new Temporary Framework for State Aid in March 2020.<sup>44</sup> While Member States can notify the EC of aid schemes on the basis of existing avenues e.g. Article 107(3)(c) of the TFEU and the Rescue and Restructuring State aid Guidelines,<sup>45</sup> this new Temporary Framework flexibly allows for ‘limited amounts of aid to undertakings that find themselves facing a sudden shortage or even unavailability of liquidity can be an appropriate, necessary and targeted solution during the current circumstances’.<sup>46</sup> The Framework has been extended to allow Member States to provide aid in the form of subordinated debt, equity injections and hybrid capital injections.

<sup>39</sup> See *2014 Guidelines*, *supra* n. 36.

<sup>40</sup> The maximum aid permissible will depend on the airport’s size in passenger traffic. *2014 Guidelines*, *supra* n. 36, para. 128.

<sup>41</sup> The aid may cover up to 50% of eligible costs. *2014 Guidelines*, *supra* n. 36, para. 150.

<sup>42</sup> *2014 Guidelines*, *supra* n. 36, para. 53.

<sup>43</sup> European Commission, *State Aid Rules and Coronavirus*, [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/covid\\_19.html](https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html) (accessed 5 June 2020).

<sup>44</sup> European Commission, *Communication from the Commission: Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak*, OJ C 91 I/1 (20 Mar. 2020). The Temporary Framework has twice been amended, see [2020] C 112/1 (4 Apr. 2020) and C(2020) 3156 final (8 May 2020).

<sup>45</sup> Rescue and Restructuring Guidelines, *supra* n. 27.

<sup>46</sup> European Commission, *Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak*, [2020] OJ C91 I/4 (20 Mar. 2020).

Under Article 107(3)(b) of the TFEU, ‘aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State’ may be considered compatible with the internal market. In response to the global financial and economic crisis that began in 2008, the EC adopted its first-ever Temporary Framework for State Aid, which provided detailed guidance on the criteria and compatibility of state aid to banks and non-financial firms in line with the requirements of Article 107(3)(b) of the TFEU.<sup>47</sup> This Temporary Framework was ‘intended to provide Member States with the possibility to adopt additional state aid measures aimed at facilitating companies’ access to finance and at the same time encouraging companies to continue investing in the future during these exceptional circumstances’.<sup>48</sup> The aim was to ‘remedy a serious disturbance’ in the economy.

According to Article 107(2)(b) of the TFEU, ‘aid to make good the damage caused by natural disasters or exceptional occurrences’ is compatible with the internal market. The damage caused by COVID-19 constitutes an exceptional occurrence.<sup>49</sup> According to the EC, ‘[t]he exceptional nature of the COVID-19 outbreak means that such damages could not have been foreseen, are of a significant scale and hence put undertakings in conditions that sharply differ from the market conditions in which they normally operate’.<sup>50</sup> Under this same legal basis, the EC approved state aid to stakeholders in the air transport sector which were impacted following the terrorist attacks of 11 September.<sup>51</sup>

Now again, under Article 107(2)(b) of the TFEU, Member States can compensate undertakings in sectors that have been particularly hit, e.g. air transport, for damages suffered due to and directly caused by the COVID-19 outbreak. Damages are calculated as the difference between estimated traffic (revenue) and costs with no pandemic, and actual traffic (lost revenue) and unavoidable costs, for the duration of the flight restrictions (reference period). Damage compensation measures agreed by States must be notified to the EC

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<sup>47</sup> European Commission, *Temporary Community Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis*, [2009] OJ C 16/1 (22 Jan. 2009).

<sup>48</sup> European Commission, *Temporary Union Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis*, [2011] OJ C 6/5 (11 Jan. 2011).

<sup>49</sup> The Commission concluded accordingly in its Decision of 12 Mar. 2020, SA.56686 (2020/N) – DK Compensation Scheme for Cancellation of Events Related to COVID-19, [https://ec.europa.eu/competition/state\\_aid/cases1/202011/285054\\_2139535\\_70\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases1/202011/285054_2139535_70_2.pdf), accessed 13 Mar. 2020.

<sup>50</sup> European Commission, *Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak*, C(2020) 1863 Final 2 (19 Mar. 2020), [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/sa\\_covid19\\_temporary-framework.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf), accessed 20 Mar. 2020.

<sup>51</sup> Under ex. Art. 87(2)(b) of the Treaty establishing the European Community, [2002] OJ C 325, 67 (24 Dec. 2012). See European Commission, *Communication from the Commission to the European Parliament and the Council: The Repercussions of the Terrorist Attacks in the United States on the Air Transport Industry*, [2001] COM 0574, 1–15 (10 Oct. 2001).

for approval. As these measures do not constitute rescue aid, restructuring aid or temporary restructuring support, the ‘one time, last time’ principle in the Rescue and Restructuring State aid Guidelines will not apply.<sup>52</sup> Instead, compensation will be assessed directly under Article 107(2)(b) of the TFEU. The Temporary Framework clarifies that under Article 107(2)(b) of the TFEU, ‘Member States may compensate under Article 107(2)(b) TFEU the damages directly caused by the COVID-19 outbreak to undertakings that have received aid under the Rescue and Restructuring State aid Guidelines’.<sup>53</sup> Thus, the EC appears to take a flexible approach to state aid in the current crisis.

Although the United States (US) by comparison has no rules on state aid, courts have ruled aid provided by local authorities or US states as unlawful ‘threats to fair competition’.<sup>54</sup> It is commonly known that the US Federal Government grants aid to a wide range of economic sectors, e.g. oil and automobile manufacturing, agriculture and healthcare.

In the next section, the impact and implications of the COVID-19 outbreak on each of the four air transport stakeholders and state aid measures applied at the time of writing will be examined.<sup>55</sup>

### 3 AIRLINES

#### 3.1 INTRODUCTION

On 17 March 2020, the International Air Transport Association (IATA), the world airline trade association, estimated that airlines will need USD 200 billion to ‘survive the virus’.<sup>56</sup> By late April, IATA published that the sector’s estimated loss in revenues is USD 314 billion.<sup>57</sup> Of the four stakeholders discussed in this article, airlines appear to be the hardest hit.

In normal economic times, airlines might have secured finance from private investors or banks subject to the creditworthiness of the applicant. In this time of crisis, investors are exceptionally cautious even towards creditworthy firms

<sup>52</sup> Rescue and Restructuring Guidelines, *supra* n. 27.

<sup>53</sup> Temporary Framework, *supra* n. 46.

<sup>54</sup> See Diane P. Wood, *State Aid Management in the United States*, 12(1) Eur. St. Aid L. 40 (2013).

<sup>55</sup> The author acknowledges that States may have granted loans issued at market rates or other *de minimis* support. As these types of state aid do not require EC notification, they are excluded from the present discussion; see Commission Regulation (EU) No 1407/2013 of 18 Dec. 2013 on the Application of Arts 107 and 108 of the Treaty on the Functioning of the European Union to *de Minimis* Aid, [2013] OJ L 352, 1–8 (24 Dec. 2013).

<sup>56</sup> Christopher Jasper & Siddharth Vikram Philip, *Airlines Need Up to \$200 Billion to Survive Virus*, *IATA Says* (Bloomberg 17 Mar. 2020), <https://www.bloomberg.com/news/articles/2020-03-17/airlines-need-up-to-200-bailout-to-survive-virus-iata-warns>, accessed 20 Mar. 2020.

<sup>57</sup> IATA, *IATA Economics* (1 May 2020), <https://www.iata.org>, accessed 1 May 2020.

owing to an uncertain economic future. For airlines that were already in difficulty before COVID-19, private investor recapitalization is now unthinkable. A state grant, loan or other guarantee may be an airline's only option shy of being (re-)nationalized or going bust. In any case, an airline's success in securing state aid will depend in the first instance on both the ownership of the airline in question and its flag.

Liberalisation of airline markets around the world has prompted a major evolution in the global market for air services.<sup>58</sup> Many of the world's formerly state-owned airlines are now partially or fully privatized, especially in Europe. In 2017, when the global aviation business in many regards was booming, this author argued that 'international civil aviation is shedding its flag-obsession to become more global'.<sup>59</sup> In the present crisis, however, the trend may be towards de-globalization; COVID-19 offers a counterargument in favour of re-nationalization and protectionism.<sup>60</sup> When times are good, fewer airlines in liberalized and deregulated markets will be 'protected at all costs from the risks and opportunities associated with the free market', whilst States may seek to protect some air carriers at any cost in times of crisis.<sup>61</sup>

### 3.2 EUROPEAN AIRLINES

The subsidiary airlines of the Lufthansa Group: Deutsche Lufthansa (Lufthansa), Austrian Airlines, Brussels Airlines and Swiss International Air Lines (Swiss) are owned by the Group's private shareholders.<sup>62</sup> In late April 2020, the Group warned that it would run out of cash within weeks if it does not receive state aid.<sup>63</sup> Lufthansa's subsidiary, Germanwings, has ceased operations. Before it approached the German Government for support, Lufthansa grounded almost all of its aircraft and permanently decommissioned more than forty jets.<sup>64</sup> The German Government already provided another German

<sup>58</sup> See Steven Truxal, *Competition and Regulation in the Airline Industry: Puppets in Chaos* (Routledge 2012).

<sup>59</sup> Steven Truxal, *Economic and Environmental Regulation of International Aviation: From Inter-National to Global Governance*, xviii (Routledge 2017).

<sup>60</sup> See Javier Espinoza, *Vestager Urges Stakebuilding to Block Chinese Takeovers*, Financial Times (12 Apr. 2020), <https://on.ft.com/2XYhB13> (accessed 12 Apr. 2020).

<sup>61</sup> Truxal, *supra* n. 59.

<sup>62</sup> Lufthansa Group, 'Shareholders' Structure as of 09 April 2020 (14. Apr. 2020), <https://investor-relations.lufthansagroup.com/en/news/shareholder-structure/investor-relations-shareholder-news/date/2020/04/14/shareholders-structure-as-of-09-april-2020.html> (accessed 14 Apr. 2020).

<sup>63</sup> Joe Miller & Tanya Powley, *Lufthansa Warns It Will Run Out of Cash in Weeks*, Financial Times (23 Apr. 2020), <https://on.ft.com/3awPTLp> (accessed 23 Apr. 2020).

<sup>64</sup> Arno Schuetze & Ilona Wissenbach, *Exclusive: Germany in Talks to Inject Billions Into Lufthansa-Sources*, Reuters (2 Apr. 2020), <https://www.reuters.com/article/us-health-coronavirus-germany-lufthansa/exclusive-germany-in-talks-to-inject-billions-into-lufthansa-sources-idUSKBN21K1Q5> (accessed 2 Apr. 2020).

carrier, Condor, with a loan of EUR 550 million, which the EC assessed and approved under Article 107(2)(b) of the TFEU.<sup>65</sup> Condor was due to be taken over by the Polish state-owned flag carrier LOT Polskie Linie Lotnicze (LOT), but LOT pulled out of the deal in April 2020, which perhaps goes some way to give reasoning for the state intervention.<sup>66</sup>

In Germany, a heated debate was sparked when a partial government takeover of Lufthansa was first proposed in April 2020; the airline was fully privatized in 1997.<sup>67</sup> Lufthansa's chief executive officer (CEO) warned that if Germany 'wanted to exert too much influence on operational business tasks, perhaps the Austrian government would demand the same, and then possibly Switzerland, Belgium [...]', admitting it would be 'very difficult to control a corporation like that'.<sup>68</sup> Following a series of difficult negotiations, the German Government and Lufthansa agreed a rescue package worth EUR 9 billion, comprised of EUR 6 billion in recapitalization and a EUR 3 billion loan, in exchange for a 20% German Government stake in the airline, which can be increased to 25% plus one share, plus two seats nominated by Berlin on its supervisory board.<sup>69</sup> In connection with the agreement, the German Minister for Economic Affairs clarified in a statement how the German Government intended to exercise its role on the board in response to a specific question on carbon emission targets. He said that the government 'deliberately refrained from imposing conditions beyond the broader sustainability requirement, because our aim is not to have the state determine the company's day-to-day business strategy'.<sup>70</sup> The German Government approach thus is one of safeguarding, notably from hostile takeover attempts.<sup>71</sup> The EC has approved the state aid following Lufthansa commitments to relinquish eight aircraft and twenty four airport slots at Frankfurt and Munich; shareholders approved the package.<sup>72</sup>

<sup>65</sup> European Commission, *State Aid: Commission Approves €550 Million German State-Guaranteed Loan to Compensate Airline Condor for Damage Caused by Coronavirus Outbreak*, Press Release IP/20/752 (27 Apr. 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_752](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_752) (accessed 28 Apr. 2020).

<sup>66</sup> James Shotter & Guy Chazan, *Poland's Lot Airline Pulls Out of Condor Deal*, Financial Times (16 Apr. 2020), <https://on.ft.com/3d3sVgz> (accessed 17 Apr. 2020).

<sup>67</sup> Felix Wadewitz, *Staatsbeteiligung: Die fliegende Deutschland AG*, Tagespiegel (16 Apr. 2020), <https://background.tagesspiegel.de/mobilitaet-transport/staatsbeteiligung-die-fliegende-deutschland-ag> (accessed 20 Apr. 2020).

<sup>68</sup> Joe Miller, *Lufthansa Considers Filing for Creditor Protection as Aid Talks Stall*, Financial Times (28 Apr. 2020), <https://on.ft.com/2W44IFz> (accessed 30 Apr. 2020).

<sup>69</sup> *Lufthansa in 'Advanced Talks' Over Coronavirus Bailout*, Deutsche Welle (21 May 2020), <https://p.dw.com/p/3cZow> (accessed 21 May 2020).

<sup>70</sup> Joe Miller, *German Government Agrees €9bn Bailout for Lufthansa* (25 May 2020), <https://on.ft.com/2zth5hC> (accessed 25 May 2020).

<sup>71</sup> *Ibid.*

<sup>72</sup> Sam Morgan, *Lufthansa Board Gives Green Light to €9bn Bailout* (2 June 2020), <https://www.euractiv.com/section/aviation/news/lufthansa-board-gives-green-light-to-e9bn-bailout/> (accessed 5 June 2020); see Decision of 25 June 2020, SA.57153 (2020/N) - Aid to Lufthansa, [https://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_57153](https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_57153) and European Commission, *State aid: Commission approves €6 billion German measure to recapitalise Lufthansa*, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_1179](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1179) (accessed 26 June 2020).

The Lufthansa Group also approached Austria, Belgium and Switzerland for state aid.<sup>73</sup> A bailout agreed between the Austrian Government and Austrian Airlines for approximately EUR 600 million for Austrian Airlines would not allow dividends to be paid to investors for one year, would limit manager bonuses and would not allow redundancies. The Austrian Government's priority is to keep Austrian Airlines as an independent company based in Austria within the Lufthansa Group,<sup>74</sup> and the government support comes with conditions relating to climate targets.<sup>75</sup> The Federal Council of Switzerland offered Swiss and its subsidiary Edelweiss support in the form of a CHF 1.5 billion (EUR 1.4 billion) loan that is 85% government-backed; the aid has been approved by the Swiss Parliament.<sup>76</sup> Brussels Airlines has sought EUR 200 million from the government of Belgium.<sup>77</sup> While Lufthansa has 'no intention of abandoning Brussels Airlines whatever the Belgian government's decision' regarding the application for state aid, '[t]he question is a sensitive one in Belgium, where memories of Sabena remain unhealed'.<sup>78</sup> A rescue package reportedly of EUR 290 million is on the table.<sup>79</sup>

Norwegian Air Shuttle has grounded most of its fleet.<sup>80</sup> It should be added that the low-cost carrier had financial challenges before the COVID-19 crisis. Four of Norwegian's subsidiary staffing companies based in Denmark and Sweden declared bankruptcy in April 2020.<sup>81</sup> The Government of Norway granted Norwegian a NOK 3 billion (EUR 275 million) loan guarantee. As a condition of the loan, the

<sup>73</sup> See Teodor Stefan, *Lufthansa Retires Six A380s, Seven a340-600s, Five 747-400s and 11 A320s, Terminates Germanwings*, Aeronews (7 Apr. 2020), <https://aeronewsglobal.com/lufthansa-retires-six-a380s-seven-a340-600s-five-747-400s-and-11-a320s-terminates-germanwings/> (accessed 10 Apr. 2020).

<sup>74</sup> *AUA braucht womöglich 800 Mio. Euro*, ORF (8 Apr. 2020), <https://orf.at/stories/3161134/> (accessed 10 Apr. 2020).

<sup>75</sup> Sam Morgan, *Austrian Airlines Bailout to be Linked to Climate Targets*, Euractiv (17 Apr. 2020), <https://www.euractiv.com/section/aviation/news/austrian-airlines-bailout-to-be-linked-to-climate-targets/> (accessed 20 Apr. 2020). At the time of writing, this potential Art. 107(2)(b) state aid had not yet been approved by the EC. In exchange for the aid, the airline will be expected to reduce its CO<sub>2</sub> emissions by 2030 compared with 2005 baseline levels. See Martin Tietz, *Austrian Airlines Receives State Aid*, Aeronautics (9 June 2020), <https://aeronauticsonline.com/austrian-airlines-receives-state-aid/> (accessed 3 July 2020).

<sup>76</sup> Ian Taylor, *Swiss Air Lines secures €1.4bn State Aid Package*, Travel Weekly (1 May 2020), <https://www.travelweekly.co.uk/articles/369835/swiss-air-lines-secures-14bn-state-aid-package> (accessed 2 May 2020).

<sup>77</sup> Maïthé Chini, *Brussels Airlines Asks for €200 Million Government Support*, The Brussels Times (18 Mar. 2020). At the time of writing, this potential Art. 107(2)(b) state aid had not yet been approved by the EC.

<sup>78</sup> Alan Hope, *Prime Minister Imposes Conditions on State Aid for Brussels Airlines* The Brussels Times (3 May 2020), <https://www.brusselstimes.com/all-news/business/109303/prime-minister-imposes-conditions-on-state-aid-for-brussels-airlines/> (accessed 5 May 2020).

<sup>79</sup> *Ibid.*

<sup>80</sup> Richard Milne, *Norwegian Says Aircraft Likely to Remain Grounded Until 2021*, Financial Times (27 Apr. 2020), <https://on.ft.com/2SbI5ID>.

<sup>81</sup> Alexander Necklen & Emil Søndergård Ingvorsen, *Fire datterselskaber under Norwegian er begæret konkurs*, Danmarks Radio (20 Apr. 2020), <https://www.Drdk/nyheder/penge/fire-datterselskaber-under-norwegian-er-begaeret-konkurs> (accessed 22 Apr. 2020).

airline was required to increase its equity, which it achieved largely through investment by two of the world's largest aircraft lessors: Ireland's AerCap (15.9%) and BOC Aviation (12.7%), majority owned by the Bank of China (BOC).<sup>82</sup> The European Free Trade Association (EFTA) Surveillance Authority approved the aid.<sup>83</sup>

In the United Kingdom (UK), the Chancellor said the Government would consider providing state aid to companies on a case-by-case basis and 'only if all commercial avenues have been explored, including raising capital from existing investors'. With that said, EasyJet secured a GBP 600 million (EUR 672 million) government loan, which the EC approved under Article 107(2)(b) of the TFEU.<sup>84</sup> The CEO of the International Consolidated Airlines Group (IAG) is confident that British Airways, and sister airlines Iberia and Vueling 'would not need State aid to weather the current storm'.<sup>85</sup> Nonetheless, Iberia and Vueling have secured EUR 1 billion in state-backed loans from the Spanish Government.<sup>86</sup> Virgin Atlantic, which is part-owned by Delta Airlines (49%), asked for GBP 500 million (EUR 560 million) in state aid comprised of a loan and credit guarantee.<sup>87</sup>

Air France, the French flag carrier, and Koninklijke Luchtvaart Maatschappij (KLM), the Dutch flag carrier, are subsidiaries of the Air France-KLM Group. The Group is owned by the French State (14.3%), the Dutch State (14%), two airlines (Delta and China Southern), the Group's employees and other investors.<sup>88</sup> Subject to EC approval, KLM will receive EUR 3.4 billion in state aid in the form of loans; in turn, the airline is required to reduce night flights at Amsterdam Schiphol Airport (AMS) by 20% and to cut employee salaries.<sup>89</sup> The Dutch Finance

<sup>82</sup> Richard Milne, *Leasing Groups Take Big Stakes in Norwegian*, Financial Times (20 May 2020), <https://on.ft.com/36dPqgE>.

<sup>83</sup> EFTA Surveillance Authority, *Decision 029/20/COL of 30 March 2020 on COVID-19 Guarantee Scheme for Airlines* (30 Mar. 2020), <http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=5316> (accessed 12 Apr. 2020).

<sup>84</sup> Gwyn Topham, *EasyJet Secures £600m Coronavirus Loan from UK Treasury and Bank*, The Guardian (6 Apr. 2020), <https://www.theguardian.com/business/2020/apr/06/easyjet-secures-600m-coronavirus-loan-from-uk-treasury-and-bank> (accessed 12 Apr. 2020).

<sup>85</sup> Iain Martin, *British Airways Expected to Suspend 36,000 Staff After Coronavirus Grounds Flights*, Forbes (2 Apr. 2020), <https://www.forbes.com/sites/iainmartin/2020/04/02/british-airways-expected-to-suspend-36000-staff-after-coronavirus-grounds-flights/#2a751334f1e4> (accessed 12 Apr. 2020).

<sup>86</sup> Jacqueline Poh & Siddharth Vikram Phillip, *IAG's Spanish Airlines Tap \$1.1 Billion State-Backed Loan*, Bloomberg (1 May 2020), <https://www.bloomberg.com/news/articles/2020-05-01/iag-s-iberia-and-vueling-sign-1-1-billion-syndicated-loan> (accessed 15 May 2020). At the time of writing, this state aid had not yet been approved by the EC.

<sup>87</sup> Ian Taylor, *Coronavirus: Virgin Atlantic Seeks £500m Bailout*, Travel Weekly (3 Apr. 2020), <https://www.travelweekly.co.uk/articles/366691/coronavirus-virgin-atlantic-seeks-500m-bailout> (accessed 29 Apr. 2020).

<sup>88</sup> Air France – KLM Group, *Shareholding Structure*, (28 Feb. 2020), <https://www.airfranceklm.com/en/finance/financial-information/capital-structure> (accessed 2 May 2020).

<sup>89</sup> This is according to Dutch Finance and Infrastructure Ministers; Janene Pieters, *KLM to get €3.4 billion coronavirus support package; 20% of Schiphol night flights cut*, NL Times (26 June 2020), <https://nltimes.nl/>

Minister said that the Group CEO's bonus payments 'in these times of crisis are unwise and incompatible with support funded by taxpayers' money'.<sup>90</sup> This echoes the constraints on businesses receiving state aid put forward by the EC, such as paying bonuses, dividends, or taking excessive risks.<sup>91</sup>

In March 2020, the EC approved France's deferral of certain air taxes until 2021 and offer to airlines of up to twenty-four months to pay the taxes under Article 107(2)(b) of the TFEU.<sup>92</sup> It is unclear whether this deferral is intended to apply to all airlines operating in France. The French government pledged support for companies hit by the pandemic, 'with options including stakes, recapitalization or even renationalization. ... [and that it] wanted to preserve the airline "at any cost" and would provide it with the "massive support" it would need'.<sup>93</sup> France has the highest number of PSO routes of any EU Member State.<sup>94</sup>

France will provide Air France EUR 7 billion in state-backed loans, comprised of EUR 3 billion in loans and 90% guarantee on an additional EUR 4 billion in bank loans, on two conditions: (1) 'Air France must become the most environmentally friendly airline on the planet' and (2) the loans are 'intended solely for the needs of the subsidiary Air France'.<sup>95</sup> The EC approved the loan under Article 107(3)(b) of the TFEU to 'remedy a serious disturbance' in the French economy.<sup>96</sup> The guarantee is in line with the Temporary Framework conditions as Air France was not in difficulty on or before 31 December 2019.

Firstly, Community carriers like Air France are entitled to operate intra-Community air services.<sup>97</sup> To 'become the most environmentally friendly airline',

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2020/06/26/klm-get-eu34-billion-coronavirus-support-package-20-schiphol-night-flights-cut (accessed 3 July 2020).

<sup>90</sup> *Air France-KLM CEO Bonus Incompatible with State Aid – Dutch Finance Minister*, Reuters (23 Apr. 2020), <https://www.reuters.com/article/health-coronavirus-airfranceklm-hoekstra/air-france-klm-ceo-bonus-incompatible-with-state-aid-dutch-finance-minister-idUSL5N2CB298> (accessed 29 Apr. 2020).

<sup>91</sup> Javier Espinoza, *EU Bars Bailed-Out Companies from Paying Dividends and Bonuses*, Financial Times (15 Apr. 2020), <https://on.ft.com/34X8teh> (accessed 15 Apr. 2020). At the time of writing, this potential Art. 107(2)(b) state aid had not yet been approved by the EC.

<sup>92</sup> European Commission, *State Aid: Commission Approves French Scheme Deferring Payment by Airlines of Certain Taxes to Mitigate Economic Impact of Coronavirus Outbreak*, Press Release IP/20/514 (31 Mar. 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_514](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_514) (accessed 1 Apr. 2020).

<sup>93</sup> Helen Massy-Beresford, *Air France-KLM in Talks with French, Dutch Governments on State Aid*, Aviation Week (9 Apr. 2020), <https://aviationweek.com/air-transport/airlines-lessons/air-france-klm-talks-french-dutch-governments-state-aid> (accessed 12 Apr. 2020).

<sup>94</sup> France has 37 of 176 PSO routes as at 18 Sept. 2019, which answers to 21%. See European Commission, *PSO Inventory Table* (18 Sept. 2019), [https://ec.europa.eu/transport/sites/transport/files/pso\\_inventory\\_table.pdf](https://ec.europa.eu/transport/sites/transport/files/pso_inventory_table.pdf) (accessed 14 May 2020). The PSO principles and procedures are set out in Regulation 1008/2008, *supra* n. 6, Arts 16–18.

<sup>95</sup> Massy-Beresford, *supra* n. 93.

<sup>96</sup> European Commission, *State Aid: Commission Approves French Plans to Provide €7 Billion in Urgent Liquidity Support to Air France*, Press Release IP/20/796 (4 May 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_796](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_796) (accessed 14 May 2020).

<sup>97</sup> Regulation 1008/2008, *supra* n. 6, Art. 15(1).

the French government has indicated it will require Air France to cancel a number of domestic routes. It is questionable whether, with reference to the common rules, France will in fact subject Air France's domestic operations to special permits or authorizations in future.<sup>98</sup>

Secondly, in the second condition it is clearly stipulated that the aid is solely for 'the needs' of Air France. In its appraisal of aid granted following the events of 11 September 2001, to compensate for the extra cost of insurance premiums, the EC considered at that time whether the public intervention applied 'uniformly without restriction to all companies in a given Member State'.<sup>99</sup> The EC gave 'priority to those least likely to distort competition between Community airlines, i.e. measures applicable to all Community undertakings on a uniform basis'.<sup>100</sup>

This time around, in approving the aid to Air France, the EC did not give the same consideration to a uniform application to *all* companies. This could explain why the CEO of Ryanair, which has bases in Bordeaux, Marseille and Toulouse, has publicly voiced strong criticism of the EC's decision. Nevertheless, the facts prompting the state aid in 2001 were different from the COVID-19 situation, the aid for which was approved to remedy 'direct damage caused by exceptional circumstances' under what is now Article 107(2)(b) of the TFEU. This may explain why the EC took a different approach when approving the Air France aid.

As an aside, the Air France aid would arguably satisfy the first element in the Article 107(3)(b) derogation, 'to promote the execution of an important project of common European interest'.<sup>101</sup> Environmental protection is one such project. If the aid has an incentive effect, that is it 'induces the beneficiary to change its behaviour to increase the level of environmental protection [...], a change in behaviour which it would not undertake without the aid', the EC would also have approved it.<sup>102</sup>

Airline holding company SAS Group owns Scandinavian Airlines (SAS) and Scandinavian Airlines Ireland. SAS Group is owned by Sweden (14.82%), Denmark (14.24%), a research foundation and private investors. In light of damage caused by the COVID-19 crisis, Denmark provided SAS with a EUR 137 million state guarantee in the form of a revolving credit facility.<sup>103</sup> Sweden granted the

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<sup>98</sup> Regulation 1008/2008, *supra* n. 6, Art. 15(2).

<sup>99</sup> European Commission, *Communication from the Commission to the European Parliament and the Council: The repercussions of the terrorist attacks in the United States on the air transport industry*, [2001] COM 574 final (10 Oct. 2001), para. 38.

<sup>100</sup> *Ibid.*, para. 28.

<sup>101</sup> TFEU, *supra* n. 3, Art. 107(3)(b).

<sup>102</sup> European Commission, *Communication from the Commission: Guidelines on State Aid for Environmental Protection and Energy 2014–2020*, [2014] OJ C 200, 1–55, para. 49.

<sup>103</sup> European Commission, *State Aid: Commission Approves Danish Public Guarantee of up to €137 Million to Compensate Airline SAS for Damage Caused by Coronavirus Outbreak*, Press Release IP/20/667 (15 Apr. 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_667](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_667) (accessed 15 Apr. 2020).

Group a loan of EUR 140 million, which came from a EUR 445 million guarantee scheme that was made available to all airlines holding a Swedish commercial aviation licence as at 1 January 2020.<sup>104</sup> While the EC approved the Danish scheme under the Article 107(2)(b) of the TFEU legal basis, the Swedish scheme was approved, like the French scheme discussed earlier, under Article 107 (3)(b) of the TFEU.<sup>105</sup> Norway pledged EUR 130 million as part of the loan guarantee discussed earlier.<sup>106</sup>

The Italian Government is reportedly in the process of a EUR 3 billion re-nationalization of Alitalia.<sup>107</sup> In February 2020, the EC launched an in-depth investigation into an unapproved EUR 400 million loan Alitalia received earlier from the Italian Government.<sup>108</sup>

### 3.3 OTHER AIRLINES

In the US, under the Coronavirus Aid, Relief, and Economy Security (CARES) Act, USD 50 billion is earmarked for the aviation sector.<sup>109</sup> US airlines, all of which are private, will receive USD 25 billion in grants and USD 29 billion in loan guarantees in exchange for minimum staffing requirements. Cargo airlines will receive USD 4 billion in grants.<sup>110</sup> This state aid approach is seemingly pragmatic when compared with the generalist EU approach, on the basis that US carriers may be advantaged by such sizeable support in addition to wage support schemes and tax relief.<sup>111</sup> In exchange for state aid support under CARES, airlines are obligated to issue warrants to the US Government for the purchase of airlines' common

<sup>104</sup> See European Commission, *State Aid: Commission Approves €445 Million Swedish Guarantee Scheme to Support Airlines Affected by the Coronavirus Outbreak*, Press Release IP/20/647 (11 Apr. 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_647](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_647) (accessed 15 Apr. 2020).

<sup>105</sup> This seems to be an appropriate legal basis as Sweden intends that the aid should remedy the 'serious disturbance' in the Swedish economy caused by COVID-19.

<sup>106</sup> EFTA Surveillance Authority, *supra* n. 83.

<sup>107</sup> Giulio Piovaccari & Francesca Landini, *Italy To Take Full Control of Alitalia as Virus Hits Sale Plan – Report*, Reuters (15 Mar. 2020), <https://www.reuters.com/article/us-italy-alitalia/italy-to-take-full-control-of-alitalia-as-virus-hits-sale-plan-report-idUSKBN2120PH> (accessed 22 Apr. 2020).

<sup>108</sup> European Commission, *State Aid: Commission Opens In-Depth Investigation Into €400 Million Italian Government Loan to Alitalia*, Press Release IP/20/347 (28 Feb. 2020), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_349](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_349) (accessed 22 Apr. 2020).

<sup>109</sup> S. 3548 – CARES Act, 116th Congress 2d Session (2019–2020).

<sup>110</sup> Sean Broderick, *DOT Clarifies Some Airline, Contractor Requirements For Grants, Loans*, Aviation Week (31 Mar. 2020), <https://aviationweek.com/air-transport/safety-ops-regulation/dot-clarifies-some-air-line-contractor-requirements-grants-loans> (accessed 12 Apr. 2020).

<sup>111</sup> Rob Lawson, Inês Afonso Mousinho & Sophie Dorion, *Covid-19: Will Covid-19 Prove to Be a Great Disruptor to Progress of the EU State Aid policy?*, Clyde & Co Insight (28 Apr. 2020), <https://www.clydeco.com/insight/article/covid-19-will-covid-19-prove-to-be-a-great-disruptor-to-progress-of-the-eu> (accessed 2 May 2020).

stock. This raises important questions on remuneration for taxpayer investment and the role of the State in airlines' future strategies.

Australia's second-largest airline, Virgin Australia, entered voluntary administration.<sup>112</sup> Virgin Australia held a little over 30% of the domestic market and was the biggest competitor to flag carrier Qantas Airways. The airline is owned by Chinese investors (40%), Etihad (20%), Singapore Airlines (20%) and the Virgin Group (10%). The Australian government did not approve a requested bailout of AUD 1.4 billion (EUR 810 million).<sup>113</sup> The reasoning for Australia's decision seemed to be that Australia is the 'wrong' State to offer aid. The airline is not Australian-owned but rather in part state-owned via Etihad, which is owned by Abu Dhabi government and Singapore Airlines, which is majority owned by the government of Singapore. Singapore Airlines will receive a USD 13 billion lifeline from its Government.<sup>114</sup> So, a State will be inclined to extend its hand to an airline it owns, if the law permits, though as this example shows, only if the airline flies that State's flag. Unsupported by its foreign shareholders, Virgin Australia's flag did not invite a 'local' rescue.

The Gulf carriers, which for years have been the focus of state aid allegations, have also indicated they are seriously affected by the COVID-19 crisis. At the time of writing, Etihad and Emirates are only operating limited one-way flights out of the United Arab Emirates (UAE).<sup>115</sup> while Qatar Airways is operating selected repatriation flights. The UAE Government announced that it will 'grant unspecified financial aid to Emirates, and that the government is committed to providing the full support by injecting fresh capital'.<sup>116</sup> Qatar Airways has said it will need state aid as cash runs out<sup>117</sup> and that it is planning to defer salary payments for certain staff.<sup>118</sup>

<sup>112</sup> *Virgin Australia Slumps Into Administration*, BBC News (21 Apr. 2020), <https://www.bbc.com/news/world-australia-52363428> (accessed 22 Apr. 2020).

<sup>113</sup> Jamie Smyth, *Coronavirus Pushes Virgin Australia into Administration*, Financial Times (21 Apr. 2020), <https://on.ft.com/2xMOKBV> (accessed 22 Apr. 2020).

<sup>114</sup> *Singapore Airlines Gets \$13bn Lifeline as Airlines Beg for Help*, Al Jazeera (27 Mar. 2020), <https://www.aljazeera.com/ajimpact/singapore-airlines-13bn-lifeline-airlines-beg-200327052053429.html> (accessed 12 Apr. 2020).

<sup>115</sup> Emirates, *Emirates Operates Limited One-Way Passenger Flights from Dubai* (23 Apr. 2020), <https://www.emirates.com/hr/english/help/travel-updates/#3524> (accessed 29 Apr. 2020).

<sup>116</sup> Layan Odeh, *Dubai Moves to Shield Prized Emirates Airline From Virus Fallout*, Bloomberg (31 Mar. 2020), <https://www.bloomberg.com/news/articles/2020-03-31/emirates-to-get-equity-infusion-from-dubai-after-grounding-fleet> (accessed 12 Apr. 2020).

<sup>117</sup> Alexander Cornwell, *Exclusive: Qatar Airways Says It Will Need State Support as Cash Runs Out*, Reuters (29 Mar. 2020), <https://www.reuters.com/article/us-health-coronavirus-qatar-airways-excl/exclusive-qatar-airways-says-it-will-need-state-support-as-cash-runs-out-idUSKBN21G0E3> (accessed 12 Apr. 2020).

<sup>118</sup> Agencies & Stella Zhai, *Qatar Airways Defers Employee Wages*, The Standard (27 Apr. 2020), <https://www.thestandard.com.hk/section-news/fc/1/218495/Qatar-Airways-defers-employee-wages> (accessed 29 Apr. 2020).

#### 4 AIRPORTS, ANSPs, MANUFACTURERS

Airports and ANSPs around the world have requested that States include them in COVID-19 recovery plans. As the demand for air travel has declined, so too has the airport business in terms of landing fees, terminal use charges and retail. Some airports have closed, while others continue collecting revenue through increased cargo operations and aircraft storage.

Airports Council International (ACI) published a policy brief on the world airports' recovery from COVID-19.<sup>119</sup> Forecasting a loss of EUR 14 billion, European airports are likely availing of the general package of macroeconomic state aid under the Temporary Framework and Article 107(3)(b) of the TFEU, e.g. wage subsidies, suspension of payments of corporate and value added taxes or social welfare contributions. One specific notification relating to airports was from Belgium for a scheme allowing Walloon airports to defer payment of concession fees, which was approved under Article 107(3)(b) of the TFEU.<sup>120</sup>

In Europe, 82.4% of airports are fully or partially state-owned.<sup>121</sup> As discussed earlier, the economic and non-economic activities of state-owned airports may be separated, such that keeping an airport open for essential travel, repatriation and cargo flights in the current crisis would likely be deemed an exercise of its public powers. The funding of such activity would not constitute state aid. States might even require airports to remain open to commercial traffic via PSOs.<sup>122</sup> Still, airports are losing revenue from airport charges and retail concession fees, which they usually collect in the pursuance of an economic activity. Subject to the MEO test, public support for this aspect of an airport operation may qualify as state aid. The aid may be permissible if granted in accordance with the *2014 Guidelines* or Article 107(2)(b) of the TFEU, as mentioned earlier.

Although the overall number of passenger flights has declined, the airspace remains largely operational. The majority of the world's ANSPs are state-owned. For those ANSPs which have been privatized, States have retained majority ownership for reasons of safety and national security.<sup>123</sup> Most activities ANSPs provide

<sup>119</sup> ACI, *ACI World Policy Brief Lays Out Road Map for Industry Recovery from COVID-19* (17 Apr. 2020), <https://aci.aero/news/2020/04/17/aci-world-policy-brief-lays-out-road-map-for-industry-recovery-from-covid-19/> (accessed 22 Apr. 2020).

<sup>120</sup> European Commission, *State Aid: Commission Approves Belgian Scheme Deferring Payment by Walloon Airports of Concession Fees to Mitigate Economic Impact of Coronavirus Outbreak*, Press Release IP/20/645 (11 Apr. 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_645](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_645) (accessed 12 May 2020).

<sup>121</sup> ACI, *The Ownership of European Airports 2016*, <https://www.aci-europe.org/downloads/resources/The%20Ownership%20of%20Europes%20Airports%202016.pdf> (accessed 22 Apr. 2020).

<sup>122</sup> The duties of States vis-à-vis providing airports and ANSPs are set out in International Civil Aviation Organization (ICAO), Doc. 7300, *Convention on International Civil Aviation 1944*, Art. 28.

<sup>123</sup> See Lucy Budd, *Airline Deregulation*, in *The Routledge Handbook of Transport Economics* 141–154 (Jonathan Cowie & Stephen Ison eds, Routledge 2017).

are considered to be non-economic in nature, and therefore public support to fund such activities generally will not constitute state aid.<sup>124</sup>

In connection with providing air navigation services in the Single European Sky (SES), some financial risks are shared between ANSPs and airspace users. The ‘performance and charging scheme’<sup>125</sup> aims to provide for a traffic risk sharing mechanism between ANSPs and airports, with the aim of incentivising the provision of services.<sup>126</sup> If the scheme continues to apply post-COVID, it is expected that ANSPs will be less affected than airspace users as most of the decline in traffic will be borne by airlines.<sup>127</sup>

Member States of the European Organization for the Safety of Air Navigation (Eurocontrol) agreed to help airlines in Europe by deferring payments of air traffic control fees of EUR 1.13 billion. While EU competition rules apply in principle to international organizations, the CJEU has held that Eurocontrol is not an ‘undertaking’ as it does not perform economic activities.<sup>128</sup> Instead, it provides assistance to Member States in carrying out its tasks of maintaining and developing air space management. This activity is not separable from its exercise of public powers done to achieve public objectives: safety.

According to the International Coordinating Council of Aerospace Industries Associations (ICCAIA), ‘[t]he entire aerospace sector, from manufacturers to small businesses within the supply chain, face extraordinary circumstances that will have a major and widespread impact on the global economy’.<sup>129</sup> Indeed, with most aircraft grounded until further notice, airlines are unlikely to require additional capacity from new aircraft anytime soon. The world’s two largest aircraft manufacturers, Boeing and Airbus, are acutely impacted owing to factory closures and demand-side economics. Businesses in the manufacturing supply chains are also affected, and bankruptcies pose a risk to aircraft manufacturers. Aircraft parts and components are produced around the world. If an original equipment

<sup>124</sup> *SAT/Eurocontrol*, *supra* n. 9, para. 30; *SELEX*, *supra* n. 8, para. 71.

<sup>125</sup> The performance scheme and charging scheme are referred to, respectively, in Art. 11, Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 Mar. 2004 laying down the framework for the creation of the single European sky, [2004] OJ L 96/1 (31 Mar. 2004); and in Art. 15, Regulation (EC) No 550/2004 of the European Parliament and of the Council of 10 Mar. 2004 on the provision of air navigation services in the single European sky, [2004] OJ L 96/10 (31 Mar. 2004).

<sup>126</sup> Commission Implementing Regulation (EU) 2019/317 of 11 Feb. 2019 laying down a performance and charging scheme in the single European sky and repealing Implementing Regulations (EU) No 390/2013 and (EU) No 391/2013, [2019] OJ L 56/1 (25 Feb. 2019), Art. 27.

<sup>127</sup> It is unclear whether the third reference period (RP3) of performance targets, which was due to run from 2020–2024, will be suspended or revised in light of the COVID-19 crisis.

<sup>128</sup> *SAT/Eurocontrol*, *supra* n. 9.

<sup>129</sup> ICCAIA, *In Coordinating Council of Aerospace Industries Associations Urges Governments Worldwide to Ensure Resilience of Global Aerospace Industry* (26 Mar. 2020), <https://iccaia.org/2020/03/international-coordinating-council-of-aerospace-industries-associations-urges-governments-worldwide-to-ensure-resilience-of-global-aerospace-industry/> (accessed 22 Apr. 2020).

manufacturer (OEM) fails, for instance, Airbus and Boeing production lines will be halted.

In April 2020, aircraft lessors rescinded orders for new Boeing 737 MAX aircraft worth USD 17.8 billion at list prices.<sup>130</sup> The manufacturer has reportedly offered deep discounts to other customers to avoid cancellation of orders.<sup>131</sup> Overall production at Airbus is down by a third.<sup>132</sup>

Are Boeing and Airbus likely to receive state subsidies to compensate damages caused by the COVID-19 crisis? The response from Washington is that Boeing should approach private investors before government support will be considered. With that said, the US government has reportedly developed a USD 17 billion package for businesses like Boeing that are deemed to be ‘critical to maintaining national security’.<sup>133</sup>

In the context of public support for Airbus, the COVID-19 crisis has re-energized an already on-going discussion within the EU on building a ‘New Industrial Strategy’ as Europe ‘embarks on its transition towards climate neutrality and digital leadership in an ever-changing and ever more unpredictable world’.<sup>134</sup> Through such a strategy, Europe will aim to reinforce its industrial and strategic autonomy to ensure that it is less dependent in future on the global market within areas of strategic importance. Arguably, an airline manufacturer like Airbus could fall within the scope of such a policy, which could open a new avenue of support from the EU budget.<sup>135</sup>

With that said, even when airline traffic picks up and airports return to more normal operations, they may be unlikely to place new orders with manufactures of aircraft and other aerospace equipment. In the absence of new state or private support, it is possible that manufacturers will continue to operate at a loss or be a risk of collapse well into any period of meaningful recovery experienced by other stakeholders in the global air transport sector. The Aerospace and Defence Industries Association of Europe (ASD), has warned that the ‘impact [of

<sup>130</sup> David Fickling, *Coronavirus Has Popped the Boeing and Airbus Bubble*, Bloomberg (25 Apr. 2020), <https://www.bloomberg.com/opinion/articles/2020-04-25/coronavirus-pops-boeing-airbus-aviation-growth-bubble> (accessed 26 Apr. 2020).

<sup>131</sup> Peggy Hollinger, *How Coronavirus Brought Aerospace Down to Earth*, Financial Times (20 Apr. 2020), <https://on.ft.com/2XQ1FO6> (accessed 22 Apr. 2020).

<sup>132</sup> Peggy Hollinger, *Airbus Cuts Aircraft Production by a Third*, Financial Times (8 Apr. 2020), <https://on.ft.com/2zBRra5> (accessed 22 Apr. 2020).

<sup>133</sup> Aaron Gregg, Jeff Stein & Josh Dawsey, *Senate Aid Package Quietly Carves Out Billions Intended for Boeing, Officials Say*, The Washington Post (25 Mar. 2020), <https://www.washingtonpost.com/business/2020/03/25/boeing-bailout-coronavirus/> (accessed 25 Mar. 2020).

<sup>134</sup> European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – A New Industrial Strategy for Europe*, COM(2020) 102 final, 1 (10 Mar. 2020), [https://ec.europa.eu/info/sites/info/files/communication-eu-industrial-strategy-march-2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication-eu-industrial-strategy-march-2020_en.pdf) (accessed 20 Mar. 2020).

<sup>135</sup> With due respect to the WTO rules on state subsidies, *supra* n. 15.

COVID-19] is particularly devastating for Europe's civil aerospace industry which may face an existential threat'.<sup>136</sup>

## 5 CONCLUSION

In these unprecedented times, the world seems in so many ways to have been turned on its head. A return to the *status quo* is not envisaged. The COVID-19 crisis has sparked a reflection in society on pre-crisis travel behaviours, including travel by air. In the immediate term, the impact of 'stay at home' will likely be felt by the air transport sector even after borders re-open and flights resume. The reduction in flights has decreased levels of noise and environmental pollution. It is foreseeable that this will contribute to a change in public attitudes in the medium term towards air travel, particularly with respect to 'cheap flights' and so-called 'binge travelling'. We can expect that some airlines may fail and that a combination of lower demand and high debt will mean leaner airline and airport operations in future.

The global economic fallout of the COVID-19 crisis is enormous. In turn, state aid is growing in significance globally. The state aid initiatives discussed in this article have been designed to absorb the economic shock in the air transport sector and beyond, and at the same time limit the impact on States. While the underlying state aid criteria remain, the rules have been loosened *temporarily* in light of COVID-19. The Temporary Framework allows Member States to use the full flexibility of state aid law to act quickly when time is of the essence, such as in the present crisis. Member States have provided unprecedented levels of public support to some stakeholders in the air transport sector. That support comes with a price tag in the form of novel conditions. A few months ago it would have been unthinkable to suggest that a blocking minority in Lufthansa might one day be an option held by the German Government, or that the French Government might require Air France to cease its domestic operations as a climate measure. Indeed, we are living in a changed world.

With a view to maintaining a level playing field within the internal market, European state aid rules have evolved and modernized in 'better' times before COVID-19. Now, the crisis exposes an imbalance in public support offered by the different States. Take for instance the incredible volume of state aid provided by Germany and France. This is mirrored specifically in public support schemes for air transport: state recapitalization of privatized carrier Lufthansa; and state-backed loans for already state-owned Air France.

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<sup>136</sup> ASD, *COVID-19 Updates & Resources* (4 May 2020), <https://www.asd-europe.org/covid-19-updates-resources> (accessed 15 May 2020).

Rightly, on one hand this raises concern over unfair competition between European airlines and the impact this will have on the internal market and consumer welfare. On the other hand, States' involvement in large carriers could send signals to the market about their viability and thus defend temporary State aid measures that aim to remedy market disturbances. But it also risks, rather ironically, opening the door to future challenge by non-EU carriers, which have for years stood accused of accepting state aids and harming EU carriers and consumers in the internal market.<sup>137</sup>

As we have seen, some Member States, notably France, have seized the opportunity to promote the green agenda with climate targets attached as conditions to state aid, whereby accelerating green innovation in air transport. If airlines do not become 'greener', they could risk being replaced by other forms of transport on short haul markets. States may choose to invest in high-speed rail links, for instance. This is a policy choice; legally, it seems possible. A State may decide to favour certain sectors, say rail over air transport, which in EU state aid law 'would be justified in the case of services of general economic interest, [but] less so to stimulate economic activity in general, possibly to the detriment of productions in other Member States'.<sup>138</sup> It is worth bearing in mind that another leading Member State, Germany, specifically decided on a different approach to France; green conditions are not attached to the Lufthansa aid. This does not necessarily mean that the German government does not support the green agenda including in air transport. One may speculate that given Lufthansa unlike Air France is fully privatized, the German Government's room for policy manoeuvring is limited. Thus, it could not dictate concrete policies as conditions to the Lufthansa aid, even if it may have had the same considerations as the French Government.

As an alternative or in addition to public support, States could relax consumer protection rules that require airlines to refund passengers for flights cancelled owing to COVID-19 restrictions.<sup>139</sup> The EC has recommended that flight vouchers be made an attractive option for consumers.<sup>140</sup> At the same time, the EC confirmed that EU air passenger rights in this regard remain unchanged. Passengers

<sup>137</sup> See for a more thorough discussion, Truxal, *supra* n. 59, at 103–119.

<sup>138</sup> Sandra Santamato & Nicola Pesaresi, *Compensation for Services of General Economic Interest: Some Thoughts on the Altmark Ruling*, 1 Competition Pol'y Newsl. 20 (Spring 2004), [https://ec.europa.eu/competition/publications/cpn/2004\\_1\\_17.pdf](https://ec.europa.eu/competition/publications/cpn/2004_1_17.pdf) (accessed 15 May 2020).

<sup>139</sup> Article 8(1)(a), Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 Feb. 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long flight delay of flights, [2004] OJ L 46, 1–8, (17 Feb. 2004). See also Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 Nov. 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L 326, 1 (11 Dec 2015).

<sup>140</sup> Lufthansa for one has introduced an incentive credit of EUR 50 on top of the unused ticket value to passengers who accept a voucher in lieu of cash. See Lufthansa, *Flight Voucher*, <https://lufthansa.flightvoucher.com> (accessed 1 June 2020).

must be able to choose to receive a refund.<sup>141</sup> It is understood, however, that there is wide Member State support for relaxing the current rules so as to ease the burden on the sector.

While its effects may be felt for a long time after, the COVID-19 crisis one day will end as will the temporary measures. In her tweets, the Competition Commissioner writes that approved aid is important for jobs and connectivity though it also ‘comes with strings attached to protect the level playing field’. Furthermore, the Commissioner has clearly stated that, once the crisis is over, the EC will ‘make sure that taxpayers are sufficiently remunerated for their investment, and companies that receive capital support are subject to controls and governance provisions that limit possible distortions to competition in the Single Market’<sup>142</sup>. If an undertaking is still in difficulty or the government stakes in them are too high, the EC may require restructuring plans to be drawn up and submitted for approval. Conditions will likely continue to be attached to future recapitalizations, such as giving up aircraft and airport slots as in the case of Lufthansa.

The COVID-19 crisis may have prompted many changes to the world as we know it, including in the field of air transport. Europe’s commitment to a liberal market economy will, however, continue to set the boundaries of its state aid regime. The Commissioner’s message is clear: a profound change to the general EU state aid rules is not expected when they are due to resume in 2021.

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<sup>141</sup> See European Commission, *Interpretative Guidelines on EU Air Passenger Rights Regulations in the Context of the Developing Situation with COVID-19*, [2020] OJ C 89I, 1 (18 Mar. 2020); European Commission, *Commission Recommendation of 13.5.2020 on Vouchers Offered to Passengers and Travellers as an Alternative to Reimbursement for Cancelled Package Travel and Transport Services in the Context of the COVID-19 Pandemic*, C(2020) 3125 final (13 May 2020).

<sup>142</sup> These are the words of Margrethe Vestager, Executive Vice-President of the EC for a Europe Fit for the Digital Age and Competition Commissioner; see European Commission, *Coronavirus: Commission Statement on Consulting Member States on Proposal to Further Expand State Aid Temporary Framework to Recapitalisation Measures* (9 Apr. 2020), [https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_20\\_610](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_610) (accessed 12 Apr. 2020).