

CLEARY GOTTLIB

**The first judgments on Covid-19 State aid decisions:
Ryanair v Commission (17 February 2021)**
Global Competition Law Centre – 118th Virtual Lunch Talk

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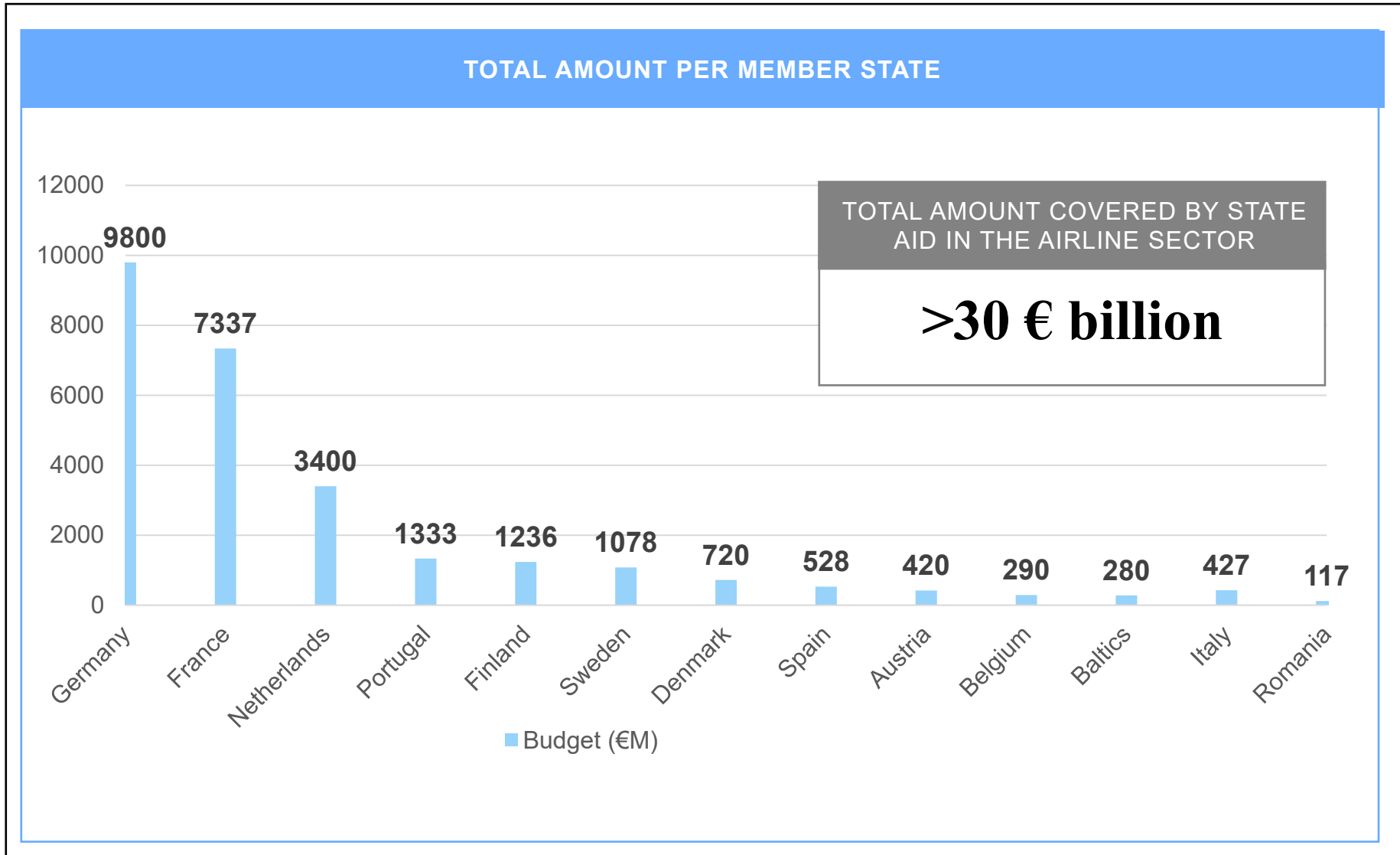


The context

THE COMMISSION'S STATE AID TOOLBOX

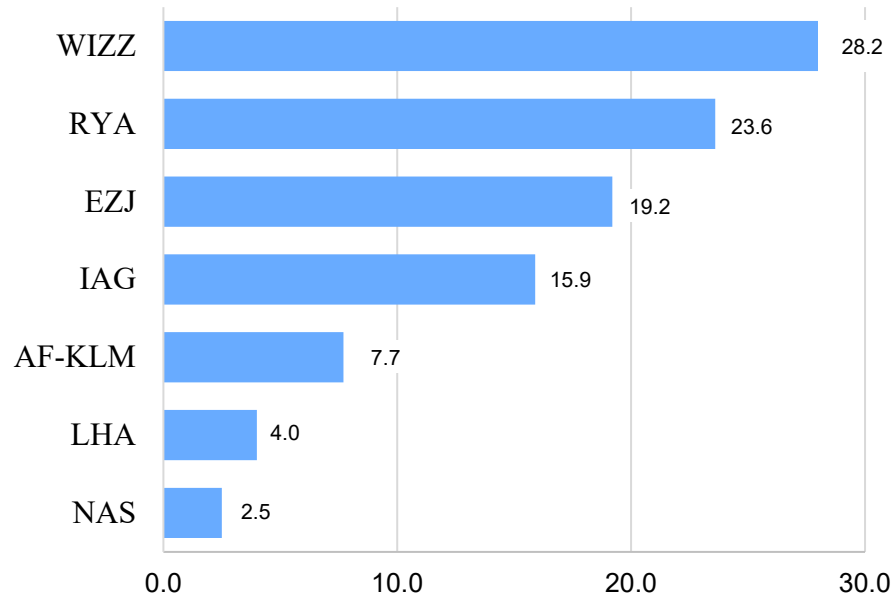
MEASURES THAT DO NOT QUALIFY AS AID	AID MEASURES THAT ARE EXEMPTED FROM PRIOR NOTIFICATION	ARTICLE 107(2)(B) TFEU	ARTICLE 107(3)(B) TFEU	ARTICLE 107(3)(C) TFEU
<ul style="list-style-type: none"> — Measures to the benefit of all undertakings, including: <ul style="list-style-type: none"> • Wage subsidies • Suspension of payments of corporate and value added taxes • Social welfare contributions • Financial support directly to individuals / consumers, e.g., for cancelled services or tickets not reimbursed by the concerned operators 	<ul style="list-style-type: none"> I. General Block Exemption Regulation: <ul style="list-style-type: none"> — Exempts several types of aid measures from prior Commission approval — Cannot cover companies in financial difficulties (certain exceptions, e.g., start-up aid schemes) II. De minimis support: <ul style="list-style-type: none"> • Direct grants €200,000 / 3 years for most sectors • Subsidized loans up to €1 M / 5 years • Subsidized guarantees for loans €1.5 M / 5 years — Can cover companies in financial difficulties pre-COVID 19 	<ul style="list-style-type: none"> — Measures aimed at compensating damage directly caused by the COVID-19 outbreak — Cannot cover more than the direct damage resulting from COVID-19 — Primarily aimed at compensating companies in sectors particularly hit by the outbreak, such as: <ul style="list-style-type: none"> • Transport • Tourism • Culture • Hospitality • Retail • Organizers of cancelled events — Could, in principle, cover companies in financial difficulties pre-COVID 19, but only for difficulties related to or encountered due to the COVID-19 outbreak — Example: Danish scheme for events organizers 	<ul style="list-style-type: none"> — New Temporary Framework in force until June/Sept 30, 2020: <ul style="list-style-type: none"> • Direct grants, repayable advances, tax advantages, of up to €800,000 • Loan guarantees (minimum premiums: 25-200 bps; underlying loans: up to twice the 2019 wage bill or ¼ of 2019 turnover or 12/18 months of liquidity) • Subsidized loans (minimum interest rate: 1-year IBOR + credit margin 25-200 bps; loans: up to twice the 2019 wage bill or ¼ of 2019 turnover or 12/18 months of liquidity) • Short term export credit insurance, R&D, etc. • Recapitalisation (Section 3.11) — Cannot cover companies in financial difficulties pre-COVID 19 — Examples: French, German, Italian & Portuguese schemes 	<ul style="list-style-type: none"> — Rescue or restructuring aid to companies in financial difficulties, including pre-COVID 19 (in line with the 2014 Rescue & Restructuring Guidelines) — Rescue aid to be granted first in principle: <ul style="list-style-type: none"> • Loans / guarantees of up to 6 months — Example: Irish scheme for Brexit

OVERVIEW OF DECISIONAL COVID-19 PRACTICE IN THE AIRLINE INDUSTRY



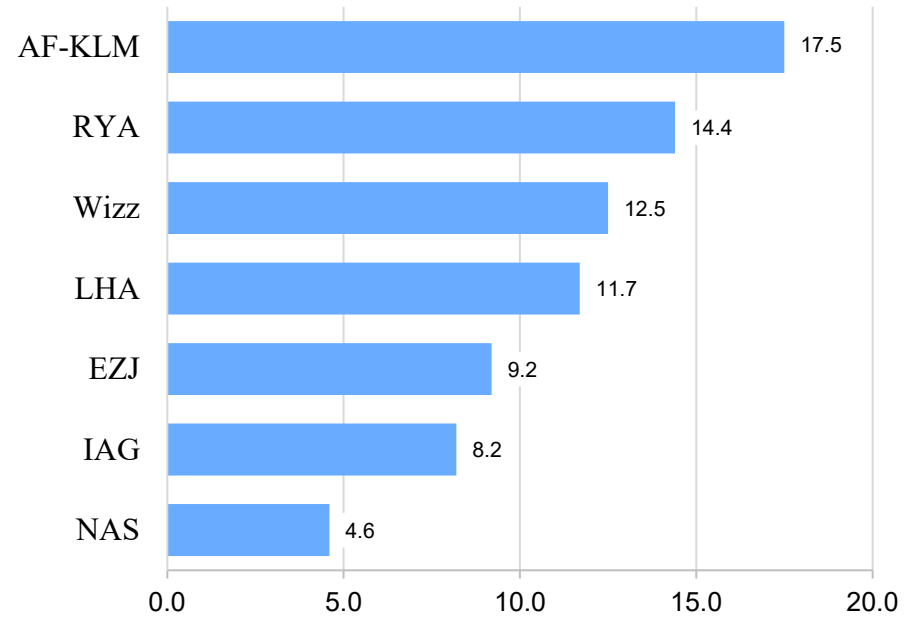
IMPACT OF AID ON COMPETITION- AN ILLUSTRATION

Months to cash burned (zero capex) – April 2020



Source: Exane BNP Paribas estimates

Months to July 2020 liquidity burnt (on full grounding)








Source: Exane BNP Paribas estimates

AID MEASURES AIMED AT FLAGSHIP CARRIERS DURING COVID-19 (1/3)

Beneficiary	Aid Instrument	Scheme / Individual aid	Legal Basis	Appeal
	Tax deferment	French Scheme – €200 M	Article 107(2)(b) TFEU	✓
	Guarantee	Swedish Scheme – €455 M	Article 107(3)(b) TFEU	✓
	Guarantee	Danish Individual Aid – €137 M Swedish Individual Aid – €137 M	Article 107(2)(b) TFEU	✓ ✓
	Subsidized loan	German Individual Aid – €550 M	Article 107(2)(b) TFEU	✓
	Guarantee, shareholder loan	French Individual Aid – €7 B	Article 107(3)(b) TFEU	✗
	Guarantee Recapitalization Direct Grant	Finish Individual Aid – €600 M Finish Individual Aid – €286 M Finish Individual Aid - €350 M	Article 107(3)(b) TFEU Article 107(2)(b) TFEU	✓ ✓
	Rescue loan	Portuguese Individual Aid – €1.2 B	Article 107(3)(c) TFEU	✓
	Recapitalization	German Individual Aid – €6 B	Article 107(3)(b) TFEU	✓
	Recapitalization	Latvian Individual Aid – €250 M	Article 107(3)(b) TFEU	✓
	Rescue loan Loan guarantee	Romanian Individual aid – €36 M Romanian Individual aid – €19 M	Article 107(3)(c) TFEU Article 107(2)(b) TFEU	✓ ✗

AID MEASURES AIMED AT FLAGSHIP CARRIERS DURING COVID-19(2/3)







Beneficiary	Aid Instrument	Scheme / Individual aid	Legal Basis	Appeal
	Subordinated loan	Austrian Individual Aid - €150 M	Article 107(2)(b) TFEU	✓
	State guarantee, subordinated loan	Dutch Individual aid – €3.4 B	Article 107(3)(b) TFEU	✓
	Recapitalisation, subsidised interest loan	Estonian Individual aid – €30 M	Article 107(3)(b) TFEU	✓
	Recapitalisation	Danish Individual Aid – €583 M Swedish Individual Aid – €486 M	Article 107(3)(b) TFEU	✗ ✗
	Rescue aid	Portugal Individual aid – €133 M	Article 107(3)(c) TFEU	✗
	Public guarantee, rescue aid	Romanian Individual aid – €62 M	Article 107(2)(b) TFEU (€28 M) Article 107(3)(c) TFEU (€34 M)	✓
	Subsidized loan, hybrid capital instrument	Belgian Individual Aid – €287 M / 3 M	Article 107(3)(b) TFEU	✓
	Direct grant	Italian Individual Aid €199 M €73 M €24.7 M	Article 107(2)(b) TFEU	✗ ✗ ✗

AID MEASURES AIMED AT FLAGSHIP CARRIERS DURING COVID-19(3/3)

Beneficiary	Aid Instrument	Scheme / Individual aid	Legal Basis	Appeal
 	Recapitalisation Fund	Spanish Aid Scheme € 475 M Air Europa € 53 M Plus Ultra	Article 107(3)(b) TFEU	
	Direct Grant	Italian Aid Scheme - €130 M	Article 107(2)(b) TFEU	
	Direct Grant	Croatian Individual Aid - €11.7 M	Article 107(2)(b) TFEU	
	Loan / Repayable advances / Tax Credit	French Individual Aid - €30.2 M French Individual Aid - €106.7 M	Article 107(2)(b) TFEU Article 107(3)(c) TFEU	 
	Equity instruments Loan/ Repayable advances	Polish Individual Aid - €650 M	Article 107(3)(b) TFEU	
	Direct Grant	Greek Individual Aid - €120 M	Article 107(2)(b) TFEU	
	Recapitalisation	German Individual Aid - €1.25 B	Article 107(3)(b) TFEU	


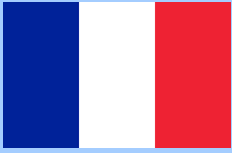
POSSIBLE ALTERNATIVE MEASURES NOT RESERVED TO FLAGSHIP CARRIERS

NON-DISCRIMINATORY ELIGIBILITY CRITERIA	IMPLEMENTABLE MEASURES
Proportional to: <ul style="list-style-type: none"> • Market shares • Connectivity • Load factor • Passengers transported 	<ul style="list-style-type: none"> - Suspension or deferral of ATC charges (€8 Bn collected by Eurocontrol – in April, MS agreed a €1.1 B deferral package) - Suspension or deferral of airport taxes - Subsidising airports and letting them allocate the aid among airlines - Suspension or deferral of governmental taxes on air travel - Subsidising PSO routes - Subsidising employment

Member State	Aid Instrument	Scheme	Legal Basis	Beneficiary / Eligibility criteria
	Direct Grant	Romanian scheme - €1 M	Article 107(3)(b) TFEU	Airlines starting or resuming operations at Oradea airport
	Direct Grant	Danish sheme - €24 M	Article 107(3)(b) TFEU	Danish airports and airlines that land in and depart from Denmark
	Direct Grant	Cyprus Scheme - €6.3 M	Article 107(3)(b) TFEU	All airlines that land at/take off in Cyprus – c. 60 airlines will benefit from the measure
	Wage subsidy	Hungarian scheme - €23.5 M	Article 107(3)(b) TFEU	Employers active in the aviation industry in Hungary
	Direct Grant	Slovenian Scheme - €5 M	Article 107(3)(b) TFEU	All airlines operating routes to/from Slovenia; Amount ~ of passengers and flights
	Subsidized short-term loans	Covid Corporate Financing Facility (CCFF)		All undertakings making a material contribution to economic activity in the UK (e.g. £600m to Ryanair)

The T-238/20 and T-259/20 cases

CASES T-238/20 (SWEDISH SCHEME) AND T-259/20 (FRENCH SCHEME)

	Swedish Scheme 	French Scheme 
Aid amount	€455 M	€200 M
Legal basis	Article 107(3)(b) TFEU	Article 107(2)(b) TFEU
Eligibility criteria	Airlines holding a Swedish license before January 1, 2020	Airlines holding a French license
Ryanair's pleas	<ul style="list-style-type: none"> I. Violation of the prohibition of nationality-based discrimination and of the free provision of services principle and related provisions of the TFEU II. Violation of the Commission's obligation to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition (<i>i.e.</i>, the "balancing test") III. Failure to open the formal investigation procedure despite "serious difficulties" IV. Failure to state reasons. 	<ul style="list-style-type: none"> I. Violation of the prohibition of nationality-based discrimination and of the free provision of services principle and related provisions of the TFEU II. Manifest error of assessment in the review of the proportionality of the aid to the damage caused by the COVID-19 crisis III. Failure to open the formal investigation procedure despite "serious difficulties" IV. Failure to state reasons.
Procedure	Expedited	Expedited

KEY PRECEDENTS

*“In that regard, it is clear from the general scheme of the Treaty that the procedure under Article 88 EC [now Article 108 TFEU] **must never produce a result which is contrary to the specific provisions of the Treaty** [...].*

*Similarly, State aid, certain of the conditions of which **contravene the general principles of Community law, such as the principle of equal treatment**, cannot be declared by the Commission to be compatible with the common market. [...].”*

[Nuova Agricast v Ministero delle Attivita Productive, Case C-390/06, §§50-51](#)

*“That freedom [to provide services] **precludes the application of any national legislation** which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State, **irrespective** of whether there is discrimination on the grounds of nationality or residence [...].”*

[Stylianakis, Case C-92/01, §25](#)

*“The legislation of a first Member State, such as that at issue in the main proceedings, which requires an **air carrier holding an operating licence issued by a second Member State** to obtain an authorisation to enter its airspace in respect of flights from a third country, although such an authorisation is not required for **air carriers holding an operating licence issued by the first Member State**, establishes a distinguishing criterion which **leads to the same result as a criterion based on nationality.**”*

[International Jet Management GmbH, Case C-628/11, §65](#)

*“The General Court concluded that **the Commission is under an obligation, when examining the impact of State aid, to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition**, as the Commission itself pointed out in its XIVth Report on Competition Policy [...]*

*While that statement was made in the context of a case relating to Article 107(3)(c) TFEU, it is clear that the need for such a ‘weighing’ of the expected positive effects in terms of realisation of the objectives set out in Article 107(3)(a) to (e) TFEU against the negative effects of aid in terms of distortion of competition and the effect on trade between Member States is **no more than an expression of the principle of proportionality** and the principle that the exemptions set out in Article 107(3) TFEU must be interpreted strictly.”*

[HH Ferries e.a. v Commission, Case T-68/15, §§210-211](#)

ART. 18 TFEU + ART. 107(2)(B) AND (3)(B) TFEU

*“Even if, as the applicant submits, that **difference in treatment may amount to discrimination within the meaning of the first paragraph of Article 18 TFEU**, it should be made clear that, under that provision, any discrimination on grounds of nationality is prohibited within the scope of application of the Treaties ‘without prejudice to any special provisions contained therein’. Therefore, it is **important to ascertain whether that difference in treatment is permitted under Article 107(3)(b) TFEU**, which is the legal basis for the contested decision. That examination requires, first, that the objective of the aid scheme at issue satisfies the requirements of that provision and, secondly, that the conditions for granting the aid do not go beyond what is necessary to achieve that objective.”*

(Judgment Swedish Scheme, T-238/20, para. 31; Judgment French Scheme, T-259/20, para. 32).

*“[...] bearing in mind the fact that that scheme takes the form of State guarantees [...], it is normal for the Member State concerned to seek to ensure that the airlines eligible for the guarantee have **a stable presence, in order for them to be present on Swedish territory to honour the loans granted**, so that the State guarantee is used as little as possible. The criterion of holding a Swedish licence, in so far as it requires the principal place of business of the airlines to be on Swedish territory, ensures at least the **administrative and financial stability of the presence** of those airlines, so that the **authorities of the Member State granting the aid may control the manner in which that aid is used** by the recipients, which would not have been the case if the Kingdom of Sweden had adopted another criterion allowing the eligibility of other airlines operating on Swedish territory as **mere service providers, like the applicant, which service provision, by definition, could cease at very short notice, if not immediately.**”*

(Judgment Swedish Scheme, T-238/20, para. 40; Judgment French Scheme, T-259/20, para. 37).

*“[...] it should not be forgotten that Article 2(26) of Regulation No 1008/2008 contains other details, in particular in relation to the fact that **continued airworthiness management must be carried out from the location of the principal place of business** [...]. That consideration is supported by Article 5 (on the financial conditions for granting an operating licence), Article 7 (on proof of good repute) and Article 8 (on the validity of an operating licence) of Regulation No 1008/2008. Those provisions create **reciprocal regulatory obligations** between airlines holding a Swedish licence and the Swedish authorities, and thus a **specific, stable link** between them that adequately satisfies the conditions laid down in Article 107(3)(b) TFEU, [...]”*

*“airlines operating under a licence issued by a Member State other than itself, [...] are **not subject to financial and reputational monitoring** by the Swedish authorities within the meaning of Regulation No 1008/2008 and, in their situation, that reciprocal stable link between it and the airlines holding an operating licence which it issued is **absent.**”*

(Judgment Swedish Scheme, T-238/20, paras. 42-43; Judgment French Scheme, T-259/20, para. 39-40).

PROPORTIONALITY

*“Although it is true, in theory, as the applicant claims, that **the presence of the principal place of business of an airline in the territory of a given Member State is not necessarily the same as a strong commercial presence** in that territory, it appears, first, that **it does equate to the place where administrative and financial decisions are taken**, which is particularly important in the present case in order to ensure that Sweden's connectivity is not interrupted from one day to the next, and, secondly, that **the eligible airlines overall contribute most to Sweden's regular air service**, both as regards freight and passenger transport...”*

(Judgment Swedish Scheme, T-238/20, para. 45).

*“...the grant of public funds in the context of Article 107(3)(b) TFEU implies that the aid provided by the Member State concerned [...] may remedy the disturbance in its economy, which involves taking into account the overall situation of the airlines capable of enabling the restoration of that economy and, in particular, contribute to Sweden's connectivity, which gives **relevance to the criterion of a stable link** with the territory of that Member State. Bearing in mind that the **resources which may be allocated by the Member State concerned are finite and must therefore address priorities**, it cannot be forgotten that that Member State had to take into consideration airlines which, although **smaller than the applicant, and therefore transport less passengers and have a smaller turnover, focused on domestic services in the Swedish territory**, which was an even more vital issue given the specific features of the Swedish territory and the exceptional period characterised by the pandemic.”*

(Judgment Swedish Scheme, T-238/20, para. 50; Judgment French Scheme, T-259/20, para. 43).

*“[...] the applicant bases part of its arguments on the assumption that there is an alternative aid scheme based on the airlines' **respective market shares**. At the hearing, it also set out **other possible criteria, like the number of passengers carried or the routes**.”*

*“However, according to the case-law, it is not for **the Commission to make a decision in the abstract on every alternative measure conceivable** since, although the Member State concerned must set out in detail the reasons for adopting the aid scheme at issue, in particular in relation to the eligibility criteria used, it is **not required to prove, positively, that no other conceivable measure, which by definition would be hypothetical, could better achieve the intended objective**. Although that Member State is not under any such obligation, the applicant is not entitled to ask the Court to require the Commission to take the place of the national authorities in that task of normative prospecting in order to examine every alternative measure possible (see, to that effect, judgment of 6 May 2019, Scor v Commission, T-135/17, not published, EU:T:2019:287, paragraph 94 and the case-law cited).”*

(Judgment Swedish Scheme, T-238/20, paras. 52-53; Judgment French Scheme, T-259/20, para. 45-46).

“RELATIVE AFFECTATION” TEST

“As the Commission observes in its statement in defence, in 2019 Air France operated 98.83% of its flights in France, from France and to France, Transavia.com 97.05%, while it was 100% for Hop !, Aigle Azur, Air Corsica, Corsair, XL Airways France, and so forth. Conversely, flights in France, going to France and coming from France, accounted for a much smaller share of the business of the other companies, namely, for example, 22.99% for easyJet, 8.3% for the applicant, 18.93% for Vueling airlines, and so forth.”

*“Those figures establish that the **eligible airlines are proportionately much more severely affected than the applicant**, which, according to the latest figures provided, generated only 8.3% of its business in France, going to France and coming from France, against 100% for some of the eligible companies.”*

(Judgment French Scheme, T-259/20, paras. 43-44).

BALANCING TEST

*“It must therefore be held that **Article 107(3)(b) TFEU does not require the Commission to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition**, contrary to what is laid down in Article 107(3)(c) TFEU, but **only to ascertain whether the aid measure at issue is necessary, appropriate and proportionate** in order to remedy the serious disturbance in the economy of the Member State concerned. Accordingly, the Court rejects the applicant’s argument that the obligation to conduct the balancing test results from the exceptional nature of compatible aid, including aid declared compatible under Article 107(3)(b) TFEU. For the same reasons, it is **not justified in relying on the judgment of 19 September 2018, HH Ferries and Others v Commission (T-68/15, EU:T:2018:563, paragraphs 210 to 214)**, in so far as, in that decision, **the General Court did not take into account the consequences of the difference in the wording between Article 107(3)(b) and Article 107(3)(c) TFEU, highlighted by the Court of Justice in the judgment of 22 September 2020, Austria v Commission (C-594/18 P, EU:C:2020:742, paragraphs 20 and 39).**”*

(Judgment Swedish Scheme, T-238/20, para. 69).



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