EU State Aid During Covid-19

Discrimination Between Airlines?

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Master's Thesis in European and International Trade Law

HARN63

Spring 2022

LUND UNIVERSITY

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Abstract

This thesis analyses the state aid given to European airlines during the Covid-19 pandemic and looks into Ryanair's arguments that member states discriminated between airlines, targeting their own national carriers with aid while forsaking budget airlines and non-national airlines. Two research questions were posed, investigating how member states applied the Temporary Framework for state aid set up by the European Commission and whether states discriminated between airlines. Using the legal dogmatic tailored towards EU law and a case study analysis, the first question was answered by studying the European airline industry and types of airlines, discerning the Temporary Framework and its basis on Articles 107(2)(b) and 107(3)(b) TFEU, and looking into member states' application of the Framework on their airlines (amount, reasoning, beneficiaries). The second question was answered by analysing the case of Ryanair and the sixteen cases it filed in the General Court against the Commission. Each finalised case was studied, comparing those lost by Ryanair and those it won. This thesis, agreeing with the Court's judgements, found that states did not discriminate between airlines, since it limited their aid to airlines holding a national operating license (targeting both national and budget airlines). The cases that Ryanair won were decided on the basis that the Commission did not justify its reasons for approving the state aid notifications well. Thus, discrimination between airlines based on their type did not occur thus far but instead limited state resources to businesses operating out of their own state.

Keywords: State Aid, European Commission, Airlines, General Court, European Union, Covid-19, Ryanair, Budget Airlines, National Carrier, Temporary Framework for State Aid.

Foreword

I would like to thank my supervisor, Professor Jörgen Hettne, for his invaluable support and help throughout the writing this thesis. His comments, suggestions, and keen eye helped me transform my writing and this thesis into what it is today.

I dedicate this thesis to my parents, Omar and Aida; my grandmothers, Faida and Wedad; relatives; and close friends, whose encouragement and faith in me helped me throughout my education and various degrees. None of this could have been done without them being constantly by my side, lifting me up when I am down and cheering me on during my accomplishments and success.

Thank you!

Abbreviations

CFR	Charter of Fundamental Rights
DKK	Danish Kronor
DLH	Lufthansa Group
EU	European Union
EUR	Euro
GDP	Gross Domestic Product
GVA	Gross Value Added
IATA	International Air Transport Association
RPKs	Revenue Passenger-Kilometres
SAS	Scandinavian Airlines
SEK	Swedish Kronor
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
US	United States of America
USD	United States Dollar
WSF	German Economic Stabilisation Fund

1. Introduction

1.1. Background

The Covid-19 pandemic has disrupted global airline operations since its start in late 2019. The International Air Transport Association (IATA) measured air traffic volume in 2020 and noted a 69.7% decline in revenue-passenger kilometres (RPKs) compared to 2019, which is considered the sharpest drop in air travel history.[1] After the European Commission recommended restricting non-essential travel into the European Union (EU) on March 16th, 2020,[2] air travel slowed to a halt. Lockdowns, border closures, and a stagnating economy, all induced by the pandemic, have affected ticket sales and travel, leading to airlines suffering losses that cannot be mitigated without governmental support. With governments instituting tough measures to curb the spread of the virus, scheduled flights were grounded affecting airlines' profits and their ability to continue funding their employees, including pilots and flight attendants. As a result, the Commission authorised state aid under Article 107(2)(b) of the Treaty on the Functioning of the EU (TFEU) after deeming the Covid-19 pandemic an exceptional occurrence.[3]

State aid is characterized as an advantage granted by public agencies to enterprises on a selective basis.[4] State aid can be offered in a variety of forms, such as grants, guarantees, or interest and tax reliefs. Subsidies granted to all enterprises are not considered a form of state aid and are thus not prohibited. For a measure to be considered as state aid, it must satisfy four characteristics:

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[1] IATA, "Air Passenger Market Analysis" (*IATA Publications* February 3, 2021) <https://www.iata.org/en/iata-repository/publications/economic-reports/air-passenger-monthly-analysis---december-2020/> accessed 29 March 2022.

[2] Adalbert Jahnz, Ciara Bottomley and Laura Berard, "Coronavirus: Commission Invites Member States to Prolong Restriction on Non-Essential Travel to the EU until 15 May" (*European Commission - Press Corner* April 8, 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_616> accessed 29 March 2022.

[3] Phedon Nicolaides, "Application of Article 107(2)(b) TFEU to Covid-19 Measures: State Aid to Make Good the Damage Caused By an Exceptional Occurrence" (2020) 11 Journal of European Competition Law & Practice 238, 238; -- "Notification Under Article 107(2)(b) TFEU" (*European Commission Publications* March 12, 2020) <https://ec.europa.eu/competition/state_aid/what_is_new/Notification_template_107_2_b_PUBLICATION.pdf> accessed 29 March 2022.

[4] -- "State Aid Overview" (*Competition Policy*) <https://ec.europa.eu/competition-policy/state-aid/state-aid-overview_en> accessed 29 March 2022.

it is an intervention by the state or through state assets, the undertaking receives the aid on a selective basis, competition becomes distorted or would be distorted, and it will affect trade between member states.[5] While most state aid requires authorization from the Commission, there are three exceptions: the aid is covered by a Block Exemption, de minimis aid (does not exceed 200,000 Euro per firm), and aid awarded under an aid scheme approved by the Commission.[6] While state aid is usually prohibited under Article 107(1), exceptional circumstances or natural disasters allow the Commission to authorise state aid towards affected industries or undertakings. Given the prevailing situation with the pandemic, the Commission adopted the Temporary Framework for State Aid on the 19th of March 2020, applied under Article 107(2) and Article 107(3).[7] The Temporary Framework granted member states full flexibility when it comes to granting state aid, specifically under Article 107(3)(b), while Article 107(2)(b) would not allow the provided aid to exceed the measurable extent of damages.

With the Commission permitting member states to provide undertakings with state aid in various forms to survive the pandemic, most member states provided their national airlines with aid given the slowing sales. However, national carriers are direct competitors of budget airlines (split into low-cost and ultra low-cost carriers depending on their prices and overall costs). As such, Ryanair DAC, an ultra low-cost airline based in Ireland, filed sixteen lawsuits against the Commission's approvals of state aid to airlines on the grounds that the Commission did not conduct a thorough investigation for the state aid notified by states and that states discriminated between airlines, specifically prioritising national carriers (or flagships) over other EU carriers.[8]

1.2. Purpose and Research Question

Given the lawsuits filed by Ryanair DAC against the Commission and its allegations of discrimination, the purpose of this thesis is to determine whether states discriminated between national carriers and budget airlines under the Temporary Framework for State Aid during the Covid-19 pandemic. This thesis will compare the cases filed and the different outcomes of the

[5] Ibid.
[6] Ibid.
[7] Nicolaides, "Application of Article 107(2)(b) TFEU to Covid-19 Measures," p 239.
[8] Foo Yun Chee, "Ryanair's Fight Against Airline State Aid Faces Court Rulings" (*Reuters* February 16, 2021). <https://www.reuters.com/article/us-health-coronavirus-airlines-eu-idUSKBN2AG18U> accessed 30 March 2022.

cases to determine whether discrimination occurred. Thus, with such a purpose, this thesis will answer the following research questions:

1. How was the Temporary Framework applied by member states in order to support their airline companies?
2. Did member states discriminate between European airline companies by favouring their national carriers over other kinds of airlines?

In order to approach these research questions, this thesis will summarise Ryanair's arguments before the General Court, assess their validity, and analyse why Ryanair has been successful in some cases but not in other cases.

1.3. Delimitations

This thesis focuses on scheduled flights of airlines and the effects the Covid-19 pandemic had on scheduled airlines. Thus, the thesis focuses on the state aid provided by EU member states to scheduled airlines and does not tackle the state aid provided to charter carriers, cargo carriers and shipping companies, or other non-scheduled types of airlines. For example, the German government requested the Commission's approval for state aid for Condor, a German charter airline. Ryanair challenged the Commission's approval, but this case is not considered. Moreover, state aid has been requested for a multitude of firms across member states; however, this thesis will specifically target only scheduled, commercial airlines. Finally, given time constraints, this thesis analyses decisions issued by the Commission and judgements decided by the General Court, but it does not analyse individual member state's governmental decisions, as the focus is at an EU level, rather than the individual member state's level. Given that there are still some cases and appeals filed by Ryanair in progress, it has been necessary to limit this study to cases or appeals that have already been finalised, but not cases still in progress. Therefore, any judgement issued after May 1st is not studied in the context of this thesis in order to allow for proper time for analysis.

1.4. Materials and Methodology

This thesis employs the following legal methodological devices: the legal dogmatic method and the EU legal method, which includes a case study analysis. The legal dogmatic approach provides answers to the research questions posed by looking into the sources of the law, including agreements, conventions, and regulations. This method is further defined as research that provides a systematic explanation of the concepts, rules, and principles overseeing a specific legal field or establishment, while also analysing the gaps in the prevailing law.[9] The researcher places themselves inside the legal system, implementing an internal perspective, to study the system from the inside and its branching effects, rather than examining it from the outside at a superficial level. The EU legal method, considered in the context of the legal dogmatic approach, analyses key sections within the EU's law and its effects on member states' national legislation. Thus, this thesis employs both the legal dogmatic and EU legal methods to analyse relevant sources within EU law, including its treaties, regulations, directives, and other relevant material that shapes EU law. The legal dogmatic method results in three main goals, or aims: description, prescription, and justification. First, the method has to describe the legal system in place and its laws in an objective and neutral manner, to relay onto the reader how the law is laid out. Second, the method's prescriptive approach allows researchers to study how the legal doctrine and activity fit within the legal system. Finally, the method acts as a way to justify the existing system with its own coherence and the interaction of its laws.[10] Utilising this method when studying the EU's legal system helps break down EU laws into simplified language, plainly describing the system in place, and determines which results fit within the system.

Given that this thesis looks into the case of Ryanair and its multiple lawsuits against the Commission and its decisions to approve the state aid notified by member states, a case study analysis takes place, where this approach will be applied on a particular case in-depth and analyse it within its current setting.[11] The case study analysis, incorporated within the EU and legal dogmatic methods, allows this thesis to explore the case of Ryanair during the Covid-19 pandemic and the factors that influenced its decisions behind the lawsuits filed. Moreover, this explanatory approach clarifies the causal links and the different results that will result from the Court's different rulings on Ryanair's cases.[12] Hence, the materials used in this thesis range from case law, European Commission documents, judgements passed by the General Court and Court of Justice, other legal

[9] Jan Smits, "What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research" in Rob van Gestel, Hans Micklitz and Edward L Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017), p 5.
[10] Ibid, p 8-12.
[11] Lisa Webley, "Stumbling Blocks in Empirical Legal Research: Case Study Research" [2016] Law and Method.
[12] Ibid.

sources and arguments used in cases, and legal scholarship (which includes journal articles and books). In order to present relevant facts, European news articles and international press releases, and statistics relevant to the amount of aid distributed, the effects of Covid-19 on airlines and flights, and general economic effects of Covid-19 on the European economy are also used. In this thesis, nine of Ryanair's settled cases are analysed, and seven of those cases have been appealed to the Court of Justice. However, those appeals have not been settled yet, and as a result, are not analysed in this thesis.

1.5. Structure

The analysis of this thesis will be divided into five chapters. The first chapter of the analysis will begin by defining the airline industry, the distinct types of flights, and how the industry is divided across the EU, along with the airports they operate throughout. The second chapter tackles the Temporary Framework set forth by the European Commission, Articles 107(2) and 107(3) and their basis throughout the Framework, and the historical usage of Article 107(2) by the Commission in its decisions. The third chapter discusses which airlines received state aid, the amount that they received, the type of aid awarded, and the basis behind the aid granted to them. The fourth chapter moves on to analyse the cases filed by Ryanair against the Commission's decisions and delves deeper into the arguments presented by Ryanair, including discrimination, fairness, and the different resource allocation among airlines, while analysing each finalised case individually. The concluding chapter of this thesis presents an overall analysis of material presented, cases studied, and data included, providing an answer to the research questions presented previously. To conclude, this thesis presents possible recommendations for the Commission and states when reviewing state aid applications in an attempt to prevent firms from suing the Commission over possibilities of discrimination or violations of EU legal principles in the event of a future economic or health crisis.

2. The European Airline Industry

2.1. Introduction

Airlines across the EU differ based on their type and services offered. Broadly speaking, countries typically have their own national carriers, or flagship/legacy airlines, where they operate on a global scale. These carriers have been established for many years or decades, and operate vast fleets and types of airplanes. Budget airlines include both low-cost and ultra low-cost carriers and typically run on a smaller scale, offering cheaper ticket prices given the removal of additional services such as checked baggage and meals. They offer short-haul and regional flights instead of long-haul, international flights. Most EU member states have their own airlines, ranging from having one carrier to multiple ones. Moreover, some member states' national carriers went bankrupt and exited the market; indeed, Lithuania, Slovakia, and Slovenia no longer have their own national carriers. Hungary, however, has its own budget airline, Wizz Air, which became its *de facto* national carrier.[13]

A further characterisation of airlines is the type of services they offer, which ranges between scheduled airlines, charter airlines, and cargo airlines. In the EU there are more than 110 scheduled airlines ranging from national carriers to budget airlines. Scheduled airlines offer flights on a pre-scheduled basis throughout most airports, with flights operating between hubs and spoke airports. Charter airlines function on a smaller scale since individuals or businesses rent out the entire plane for their own trip and select from which airports the flight will travel through, working on a for hire basis, instead of scheduled timetables. Finally, cargo airlines offer shipping services between airports, countries, or regions. These planes do not carry passengers and run according to the needs of the companies requiring shipping services.[14]

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[13] Adrienn Sain (tr), "Váradi: Wizz Air Is Hungary's De Facto National Airline" (*Daily News Hungary* July 19, 2017) <https://dailynewshungary.com/varadi-wizz-air-is-hungarys-de-facto-national-airline/> accessed 2 April 2022.

[14] SF Staff, "What's the Difference Between Passenger & Cargo Aircraft?" (*Simple Flying* August 6, 2020) <https://simpleflying.com/passenger-cargo-aircraft-difference/> accessed 2 April 2022.

2.2. National Carriers

2.2.1. Introduction

National carriers, also known as flagship or legacy airlines, are considered the country's official large-scale, internationally operating airline. National carriers are revenue-driven, aiming at charging higher prices while offering free services, operating longer flights, and maintaining a high load factor, or an increased number of passengers.[15] A country has one national carrier, with the addition of one or multiple budget airlines. National carriers typically operate throughout most main airports and state capitals, while enjoying privileges and preferential rights from the government for its international operations due to its national identity and carrying the country’s flag.[16] Historically, flag carriers were owned and governed by the state, but due to their high operating costs, flag carriers were eventually privatised. However, across the EU, many flag carriers remain state-owned, or partially state-owned, where the state is a minority shareholder. Such fully or partially state-owned legacy carriers include, inter alia, Air France-KLM, Scandinavian Airlines, LOT Polish Airlines, TAP Air Portugal, and Air Malta.[17]

2.2.2. Operations of European National Carriers

The EU’s national carriers operate flights between all EU member states, as well as other regions and continents based on demand. As such, national carriers operate flights between major airports throughout the EU, such as Paris Charles de Gaulle Airport and Frankfurt Airport. Article 100(2) of the TFEU states the objective of establishing a single European air transport market and guarantee its proper operation, as well as extend it to third countries when possible. This objective

[15] Mahlon Straszheim, “The Determination of Airline Fares and Load Factors: Some Oligopoly Models” (1974) 8 Journal of Transport Economics and Policy 260, p 270-271.

[16] Hugh Morris and Oliver Smith, “With Another National Airline on the Brink, Are We Seeing the Slow Death of the Flag Carrier?” (*The Telegraph* September 26, 2019) <https://www.telegraph.co.uk/travel/travel-truths/flag-carriers-death-of-legacy-airlines-air-france/> accessed 2 April 2022.

[17] -- “Air Malta” (*CAPA - Centre for Aviation*) <https://centreforaviation.com/data/profiles/airlines/air-malta-km> accessed 3 April 2022; Sergio Goncalves and Catarina Demony, “Portugal Seals Final Deal with TAP's Private Shareholders” (*Reuters* July 3, 2020) <https://www.reuters.com/article/us-health-coronavirus-portugal-tap-final-idUSKBN2433D1> accessed 3 April 2022; Reuters Staff, “Dutch Government Says Accepts Dilution of Air France-KLM Stake” (*Reuters* April 6, 2021) <https://www.reuters.com/article/health-coronavirus-air-france-klm-nether-idUSL1N2LZ0EP> accessed 3 April 2022; -- “LOT Polish Airlines S.A.” (*CAPA - Centre for Aviation*) <https://centreforaviation.com/data/profiles/airline-groups/lot-polish-airlines-sa> accessed 3 April 2022; -- “SAS Group” (*CAPA - Centre for Aviation*) <https://centreforaviation.com/data/profiles/airline-groups/sas-group> accessed 3 April 2022.

should be achieved by decisions approved by the European Parliament and Council.[18] Thus, Regulation (EC) No 1008/2008 of the European Parliament and Council on the common rules for the operation of air services in the Community (L 293/3) removed any remaining commercial limitations on European airlines operating within the Union, which helped create the single aviation market throughout the EU.[19] With such provisions in place, complemented by further provisions issued by EU bodies, the single European aviation market ensures a level playing field for all European airlines and a high level of protection for airline passengers. To ensure a level playing field, the EU's legislation on competition and state aid was applied to the aviation industry, especially since many airlines are state-owned. Moreover, Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports ensures that airlines across the EU are granted fair access to airports and their services.[20]

In contrast to budget airlines, national carriers offer multiple services, amenities, and add-ons to the flight ticket, leading to a higher price. In addition, national carriers typically employ the hub-and-spoke model, where larger flights operate between airport hubs and then passengers are transited to their desired final destination (or spoke) on smaller flights. This method increases airplane utilisation, where more seats are filled on hub flights.[21] However, such a method increases the travel time on passengers, coupled with more expensive tickets due to increased costs since hubs charge more than spoke airports in terms of parking and handling fees, given the higher flight traffic and size of such airports.[22] Nevertheless, passengers on national carriers tend to be treated to in-flight services, including entertainment, meals and refreshments, duty-free shopping, free checked baggage, and bigger seats.

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[18] Consolidated Version of the Treaty of the Functioning of the European Union [2012] OJ C326/47, Art 100.

[19] European Parliament and Council Regulation (EC) No 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community [2008] OJ L293/3.

[20] Ariane Debyser, "Air Transport: Market Rules: Fact Sheets on the European Union: European Parliament" (*Fact Sheets on the European Union | European Parliament* March 2022) <https://www.europarl.europa.eu/factsheets/en/sheet/131/air-transport-market-rules> accessed 4 April 2022; Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports [1993] OJ L14/1.

[21] Elvis Picardo, "An Economic Analysis of the Low-Cost Airline Industry" (*Investopedia* February 8, 2022) <https://www.investopedia.com/articles/investing/022916/economic-analysis-lowcost-airline-industry-luvdal.asp> accessed 4 April 2022.

[22] Gerald Cook and Jeremy Goodwin, "Airline Networks: A Comparison of Hub-and-Spoke and Point-to-Point Systems" (2008) 17 Journal of Aviation/Aerospace Education & Research 51, p 54.

2.3. Budget Airlines

2.3.1. Introduction

Budget airlines aim to minimise costs as much as possible by offering low prices while charging for additional services, such as luggage or meals. As a result, budget airlines are referred to as cost driven. Budget airlines aim at maintaining a low number of employees with lower salaries, low fuel costs, and operating shorter flights based on a point-to-point network. Through a point-to-point network, flights are scheduled between the origin and destination without having to stop at hubs, which in turn decreases the costs related to transiting over hubs, such as parking fees and taxes. Such a network also results in smaller flights, which translates to lower operating costs such as fuel and raw materials, smaller planes, and fewer operating employees.

While three EU member states do not have a national carrier, most member states have one or more budget airline operating under the state's license. Ryanair, which this thesis' case study is based upon, is the largest European budget airline, based in Ireland. Ryanair has become Europe's largest low-cost airline with over 150 million passengers annually.[23] Other significant budget airlines that operate across the EU include EasyJet Europe based in Austria, Eurowings in Germany, and Wizz Air in Hungary. Other smaller low-cost carriers fly regionally and may not cover the entirety of the EU, such as flying between a state's different airports, regardless of size.

2.3.2. Operations of Budget Airlines: Ryanair DAC

As stated before, budget airlines are able to offer lower flight tickets by eliminating the services offered by national carriers within the ticket. As such, budget airlines charge for every service that national carriers offer: baggage, meals, refreshments, and seat selection. Ryanair originally started by following the operational business model of the United States' (US) Southwest Airlines: offering cheap flight tickets to price-sensitive customers. Ryanair started with short-haul flights within Europe and expanded to offering short, international flights, including to close destinations in Africa and the Middle East. Following the point-to-point system, Ryanair flies to smaller airports (spokes) instead of hubs, reducing the amount of taxes they have to pay airports and

[23] -- "Ryanair Heads Europe's Top 20 Airline Groups by Pax 2019" (*CAPA - Centre for Aviation* January 23, 2020) <https://centreforaviation.com/analysis/reports/ryanair-heads-europes-top-20-airline-groups-by-pax-2019-510111> accessed 5 April 2022.

acquiring subsidies from local governments to attract more visitors. In addition, the smaller airports translate to shorter waiting times at airports, which means that more travellers would travel through the airport, and Ryanair achieves a higher utilisation rate of their fleets.[24]

Ryanair sells its flights directly to its customers, rather than resorting to paying travel agencies to promote their flights. With shorter, smaller flights, Ryanair reduces the amount of employees operating flights, in addition to using third party contractors instead of full-time salaried employees.[25] Ryanair also uses labour contracts under Irish law to avoid having to comply with other European countries' rules on wages and benefits. Finally, Ryanair uses the same type of plane for its entire fleet, which allows it to standardise maintenance and any repairs required, reduce training needed, and allocate staff freely across flights given the standard training provided.[26] Ryanair's strategy also aims at shutting unnecessary customer service segments, such as lost baggage, further decreasing its employee count. By not offering free checked-in baggage, Ryanair is able to further minimise its costs by closing its lost baggage claims desk.

2.4. Summary and Conclusion

This chapter differentiated between states' national carriers and budget airlines. National carriers, or legacy carriers, normally carry the state's flag and operates long-haul, international flights. Budget airlines include both low-cost and ultra low-cost carriers, which have short regional and international flights depending on the size of the carrier. Most EU member states have more than one budget airline, while states have one national carrier each. National carriers have greater operating costs given their massive operations, and as such, they usually require assistance from the state, which is why most national carriers are either owned or partially owned by the state. Budget airlines aim at minimising costs as much as possible through higher fleet utilization, lower employee count, and decreased fixed costs by flying to smaller, less crowded airports.

[24] Akram Chetibi, "Ryanair: The Lowest Cost Airline in Europe." (*Technology and Operations Management - MBA Student Perspectives* December 9, 2015) <https://digital.hbs.edu/platform-rctom/submission/ryanair-the-lowest-cost-airline-in-europe/#> accessed 5 April 2022.
[25] Liz Alderman and Amie Tsang, "Jet Pilot Might Not Seem like a 'Gig,' but at Ryanair, It Is" (*The New York Times* November 16, 2017) <https://www.nytimes.com/2017/11/16/business/ryanair-pilots.html> accessed 5 April 2022.
[26] -- "Ryanair Fleet: Our Boeing Aircraft" (*Ryanair fleet | Our Boeing Aircraft*) <https://www.ryanair.com/us/en/useful-info/about-ryanair/fleet> accessed 5 April 2022

Ryanair, Europe's largest budget airline, started by offering cheap tickets to customers on its short-haul regional flights by reducing amenities and flying into smaller airports with the same fleet of planes. Ryanair's strategy of offering cheaper tickets with less amenities helped attract many customers, with its annual passenger count reaching over 150 million passengers. Ryanair's point-to-point system helped deliver passengers to their desired destination without having to transit in airport hubs, which would have increased the costs and charges incurred by Ryanair per passenger, and increase plane utilization by selling more seats on the plane. As a result, Ryanair and other budget airlines do not have to rely on assistance from the state or need to have the state shoulder the costs in order to operate efficiently throughout the EU and other international destinations.

3. The Temporary Framework for State Aid

3.1. Introduction

State aid has been regulated within the EU under Article 107 TFEU. Since the founding of the Union, state aid has been regulated to ensure that member states do not engage in a subsidies war that would distort competition within the internal market. The objectives of state aid have shifted during the years, broadening to encompass more goals – coordination of national fiscal policies, financial stability, and others.[27] Moreover, applications for state aid by member states have been formalised, where states need to explain how the aid addresses a specific need for state intervention, such as market failure; what are the expected benefits, and what is the minimum amount of aid necessary to achieve those benefits, among other things.[28] For example, the 2008 Financial Crisis required state aid by member states given the overall recession the states' economies were in, the massive employee layoff and turnover, and the need to safeguard what was left of the economy and help it return to its pre-crisis levels or at least survive until the end of the recession.

Facing a similar economic downturn with the onset of the Covid-19 pandemic, the European Commission adopted the Temporary Framework for State Aid on March 19th, 2020, to allow states the flexibility of issuing state aid for firms and businesses afflicted by the pandemic and would be forced to exit the market otherwise.[29] The Temporary Framework highlighted the "need for close European coordination of national aid measures" and the "need for appropriate State aid measures."[30] The Temporary Framework has given states the flexibility to support their economies during the pandemic and aims at safeguarding businesses' access to finance and liquidity, while

[27] Pier Luigi Parcu, Giorgio Monti and Marco Botta, "Introduction," *EU State Aid Law: Emerging Trends at the National and EU Level* (Edward Elgar Publishing 2020), p 1-2.
[28] Communication from the European Commission of 27 June 2014 on Framework for State aid for research and development and innovation [2014] OJ C198/1, paras 35–36.
[29] -- "Temporary Framework" (*Competition Policy*) <https://ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework_en> accessed 5 April 2022.
[30] Communication from the European Commission of 20 March 2020 on Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C91I/1, p 3.

also protecting the employment of their workers.[31] The Framework was initially designed based on Article 107(3) TFEU, with the possibility of complementing certain measures adopted by member states under Article 107(2), which allows for direct compensation of damages to firms afflicted by exceptional circumstances, such as the pandemic.[32] Since the beginning of the pandemic, state aid measures have been approved under the Temporary Framework based on Article 107(2)(b), Article 107(3)(b), and Article 107(3)(c) TFEU.[33] However, under the framework, aid has only been authorised for entities that have witnessed difficulties and disturbances after December 31st, 2019, to ensure that the aid is not misused for incidents unrelated to the pandemic. For a state to issue state aid, it must first notify the Commission prior to implementing the aid and await the approval of the Commission.

The Commission clarifies in point 15bis of the Framework that:

> Aid on the basis of Article 107(2)(b) TFEU must compensate for damage directly caused by the COVID-19 outbreak, such as damage directly caused by restrictive measures precluding the beneficiary, de jure or de facto, from operating its economic activity or a specific and severable part of its activity … By contrast, other kinds of aid addressing more generally the economic downturn from the COVID-19 outbreak are to be assessed under the different compatibility basis of Article 107(3)(b) TFEU, and therefore in principle on the basis of this Temporary Framework.[34]

The Temporary Framework has been amended six times and extended with each wave of the pandemic. Currently, the Framework remains in place until June 30th, 2022. With each extension, certain modifications were made, such as increasing the ceiling for aid where only a limited amount was assigned. Furthermore, the modifications also took into account new measures for solvency assistance after the pandemic. Economic investments and solvency support measures were added to help initiate the sustainable recovery of firms and the economy, with those measures

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[31] Massimo Motta and Martin Peitz, "EU State Aid Policies in the Time of Covid-19" (*VOX EU, CEPR Policy Portal* April 18, 2020) <https://voxeu.org/article/eu-state-aid-policies-time-covid-19> accessed April 6, 2022.

[32] Nicolaides, "Application of Article 107(2)(b) TFEU to Covid-19 Measures," p 239-240.

[33] European Commission, "Coronavirus Outbreak - List of Member State Measures Approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework".

[34] -- "Coronavirus Outbreak - List of Member State Measures Approved under Articles 107(2)b, 107(3)b and 107(3)c TFEU and under the State Aid Temporary Framework" (*European Commission Files* March 11, 2022) <https://ec.europa.eu/competition-policy/system/files/2022-05/State_aid_decisions_TF_and_107_2b_107_3b_107_3c_0.pdf> accessed 6 April 2022.

implemented up until December 31st, 2023. Certain restrictions are in place to safeguard the sanctity of competition within the internal market and ensure that the state's investment policies do not go above assigned thresholds depending on the type of aid supplied – guarantees, loans, or investments.[35]

Under the Temporary Framework, special state aid rules were applied to specific sectors, including the Transport and Tourism sectors. When it comes to the air transport sector, the European Commission services found that passenger airlines were able to return to normalcy when the epidemiological situation improved, and as a result, state aid measures adopted by states should take into consideration the air transport services' ability to return to normal operations at the end of each pandemic wave and removal of flight restrictions.[36] Member states have also been urged to design their response measures on a non-discriminatory basis and in a way that maintains "pre-crisis market structures."[37] The Commission also developed a note that would help guide member states with their state aid measures. The note included measures targeting routes taken by airplanes, public procurement, and state aid that is exempted from requiring sending notification to the Commission.[38]

3.2. Article 107: Sections 2 and 3

3.2.1. Introduction

Articles 107(2) and 107(3) constitute the legal framework and backbone behind the Temporary Framework authorising states with the ability to grant their firms with aid. While Article 107(1) prohibits state aid that will distort, or threaten to distort, competition in any way by favouring one company over the other and providing it with the funds necessary to succeed in the market, Articles 107(2) and 107(3) were laid out to provide exceptions and allow the use of state aid in certain

[35] Annabelle Lepièce and Sander De Volder, "The European Commission Prolongs the State Aid Temporary Framework Until 30 June 2022" (*CMS Law-Now* November 24, 2021) <https://www.cms-lawnow.com/ealerts/2021/11/the-european-commission-prolongs-the-state-aid-temporary-framework-until-30-june-2022> accessed 6 April 2022.
[36] European Commission, 'Overview of the State Aid Rules and Public Service Obligations Rules Applicable to the Air Transport Sector During the COVID-19 Outbreak'(2022) Working Document of the European Commission < https://ec.europa.eu/competition-policy/system/files/2022-03/air_transport_overview_sa_rules_during_coronavirus.pdf> accessed 6 April 2022.
[37] Ibid, p 2.
[38] Ibid, p 3.

circumstances and in ways that are compatible with the internal market.[39] These sections were put in place as a recognition that state aid is needed in certain circumstances to protect the economy and employment, overall. In addition to these sections, the General Block Exemption Regulation also authorises states to provide state aid to businesses that fall under the specified block without needing to notify the Commission.[40] Thus, the exceptions laid out in Article 107 have acted as a risk management tool to combat the effects of the pandemic and other crises on the EU's internal market and member states' economies. Article 107(2) has been useful in reducing businesses' "exposure" to the pandemic, or the direct losses and damages faced by undertakings due to lockdowns and other containment measures.[41] Article 107(3) has permitted a wide range of national actions meant to address the "vulnerability" of specific economic sectors and to stimulate their resilience.[42] Vulnerability here is defined as reduced liquidity due to a decrease in demand.[43]

3.2.2. Article 107(2)

Article 107(2) outlines certain characteristics of state aid that are compatible with the internal market and, thus, not prohibited. Article 107(2)(b) states that "aid to make good the damage caused by natural disasters or exceptional occurrences" is compatible.[44] However, the wording of the section is significant because it encompasses three conditions: exceptionality, causality, proportionality. The event should qualify as an exceptional circumstance, the damages incurred are directly linked to the exceptional event, and the amount of aid granted should not overcompensate for the damages that were incurred.[45] The Commission had already qualified the pandemic as an exceptional occurrence, and now the Commission has to assess whether the state aid measures notified by states fall under Article 107(2)(b)'s conditional authorisation.[46]

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[39] Delia Ferri, "The Role of EU State Aid Law as a 'Risk Management Tool' in the COVID-19 Crisis" (2020) 12 European Journal of Risk Regulation 176, p 177.
[40] Commission Regulation (EU) 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1.
[41] Ilan Noy and others, "The Economic Risk from Covid-19 Is Not Where COVID-19 Is" (*VOX EU, CEPR Policy Portal* May 1, 2020) <https://voxeu.org/article/economic-risk-covid-19-not-where-covid-19> accessed 7 April 2022.
[42] Ferri, "Role of EU State Aid Law as 'Risk Management Tool'," p 180.
[43] Ibid, p 179.
[44] Consolidated Version of the Treaty of the Functioning of the European Union [2012] OJ C326/47, Art 107.
[45] Ferri, "Role of EU State Aid Law as 'Risk Management Tool'," p 181.
[46] European Commission Decision of 12 March 2020 on SA.56685 (2020/N) – DK – Compensation scheme for cancellation of events related to COVID-19 [2020] C(2020) 1698.

Airlines were particularly hit by the pandemic, since most flights were grounded or cancelled due to lockdowns, flight restrictions, and the prohibition of certain categories of passengers from flying (such as non-vaccinated passengers or those who have tested positive for the coronavirus). Such actions have reduced the revenue that airlines would have made compared to previous years, and thus, they require state aid to make up for the lost revenues which would affect their ability to remain in operation. Since it is difficult to quantify the amount of damages due to a general decline in demand or passengers' willingness to travel under such conditions, states cannot supply airlines with aid that is proportional to the damages incurred. The Commission adopted a restrictive approach while applying Article 107(2)(b) in this case, making it easier for states to notify the Commission about aid for airlines based on Article 107(3) instead, where the majority of state aid notifications were not certified as 'compensation for damage.'[47] Since the start of the pandemic and the Temporary Framework, 26 measures targeted specifically towards airlines were approved under Article 107(2)(b), out of the 95 measures approved under it, as it was difficult to quantify the amount damages suffered by airlines.[48] Moreover, aid under Article 107(2)(b) can only be granted for damage that was already incurred,[49] making it difficult for states to factor in future damages incurred from prolonged lockdowns or flight disruptions.

The Commission was swift and flexible when it came to approving state aid requests, considering how time sensitive state aid was during the beginning of the pandemic.[50] An advantage to using Article 107(2)(b) is that the amount of aid granted under it is not capped, which means that larger amounts of aid can be supplied proportional to the damages incurred.[51] Moreover, the Commission issued a notification template for aid submitted under Article 107(2)(b), where the transport sector had additional criteria, such as cases being assessed on a case-by-case basis, identification of additional costs and costs not incurred, definition of a reference period, and assessment of damages

[47] Nicolaides, "Application of Article 107(2)(b) TFEU to Covid-19 Measures," p 239.
[48] -- "List of Measures Approved" (*European Commission Files* March 11, 2022).
[49] Nicolaides, "Application of Article 107(2)(b) TFEU to Covid-19 Measures," p 240.
[50] Paula Riedel, Thomas Wilson and Shane Cranley, "Learnings from the Commission's Initial State Aid Response to the COVID-19 Outbreak" (2020) 2020 European State Aid Law Quarterly 115, p 116.
[51] Ibid, p 120.

caused by comparing the current period to the reference period.[52] There is no specific form in which the aid should be provided, as long as it compensates businesses for the damages incurred.[53]

3.2.3. Article 107(3)

The Temporary Framework was also developed based on Article 107(3)(b), which states that "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" is considered compatible with the internal market.[54] First, the seriousness of the disturbance must be determined over the whole European Union and should affect the entire economy of the concerned Member State(s).[55] The flexibility of Article 107(3) resulted in more aid measures and schemes being requested under Article 107(3)(b) than under Article 107(2)(b). Supplying aid based on Article 107(3) has afforded member states the flexibility of compensating businesses without having to calculate the exact amount of damages incurred.

Under the Framework, five types of aid may be granted under Article 107(3): direct grants, state guarantees on loans taken by firms from banks, subsidised public loans, support for bank's lending capacities, and short-term export credit insurance.[56] Direct grants also include tax advantages and advance payments, where member states are authorized to grant up to 800,000 euros for a company to focus on its liquidity needs.[57] The Commission's goals under the Framework to manage the pandemic's economic impact include supplying firms with the liquidity needed to continue their operations and ensuring that support for firms does not impact unity within the EU. On January 28, 2021, when the European Commission extended the Temporary Framework for the fifth time, the Commission raised the cap on state aid granted per firm from 800,000 euros to 1.8 million

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[52] -- "Notification Under Article 107(2)(b) TFEU" (*European Commission Publications* March 12, 2020).
[53] Antonios Bouchagiar, 'State Aid in the Context of the Covid-19 Outbreak, Including the Temporary Framework 2020' (2021) European University Institute Robert Schuman Centre for Advanced Studies Working Paper RSC 2021/03, 1 <https://fsr.eui.eu/publications/?handle=1814/69678> accessed 25 March 2022, p 53.
[54] Consolidated Version of the Treaty of the Functioning of the European Union [2012] OJ C326/47, Art 107.
[55] Joined cases T-132/96 and T-143/96, *Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH v Commission* ECR [1999] II-3663, para 167; Magnus Schmauch, *EU Law on State Aid to Airlines Law, Economics and Policy* (Lexxion, The Legal Publisher 2012), p 167.
[56] Diarmaid Gavin and Kate Murphy, "State Aid Temporary Framework – the European Commission Response to Covid-19" (*Ronan Daly Jermyn More Than Law* April 2, 2020) <https://www.rdj.ie/insights/state-aid-temporary-framework---the-european-commission-response-to-covid-19?s=0.345741545193> accessed 7 April 2022.
[57] Arianna Podesta and Giulia Astuti, "State Aid: Commission Adopts Temporary Framework to Enable Member States to Further Support the Economy in the COVID-19 Outbreak" (*European Commission - Press Corner* March 19, 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_496> accessed 7 April 2022.

euros for any of the firm's costs and liquidity, while it increased the amount that can contributed to a firm's fixed costs to 10 million euros per firm from an initial 3 million euros.[58] This increase in funding and flexibility has been justified by the large scale urgency of the pandemic and its effects on the European economy.

The Framework also distinguished between the several types of aid authorised and recapitalisation measures taken by the state. Recapitalisation occurs when the state participates in the firm, either by acquiring shares, stocks, or temporary ownership of the firm until the pandemic is over and the economy recuperates. The Commission specified that recapitalisation should be used as a measure of last resort, when there is no other suitable solution.[59] However, in all cases and with any type of aid that the state offers, the amount of aid granted should not exceed the amount necessary for the firm to remain viable within the market, and when the economy stabilises, the state should be repaid appropriately for its investment and recapitalisation measures should be exchanged.

Member states have preferred using Article 107(3)(b) for its state aid measures instead of Article 107(2)(b) given that with Article 107(3)(b), member states do not have to establish that a specific sector or firm has been impacted more than other sectors or firms. In addition, aid granted covers indirect damages (compared to Article 107(2)(b)'s direct damages only) and provides greater legal certainty that states can meet the conditions created under the Temporary Framework and would comply with state aid rules.[60] With Article 107(2)(b), member states need to conduct economic and financial analyses into the firm to determine the scope of the damages and the amount of state aid needed; although, there is no cap on the amount of aid that can be granted compared to aid authorised under Article 107(3)(b). As a result, both articles are complementary of one another: Article 107(3)(b) measures are more appropriate for schemes used to re-establish confidence in the market and provide liquidity to businesses impacted by the shutting of their sources of revenue

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[58] Olli Hyvärinen, "European Commission Extends Temporary State Aid Framework until the End of 2021" (*Valtioneuvosto* February 1, 2021) <https://valtioneuvosto.fi/en/-//1410877/european-commission-extends-temporary-state-aid-framework-until-the-end-of-2021> accessed 7 April 2022.
[59] Tania Pantazi, "State Aid to Airlines in the Context of Covid-19: Damages, Disturbances, and Equal Treatment" [2021] Journal of European Competition Law & Practice.
[60] Jacques Derenne, Ciara Barbu-O'Connor and Caterina Romagnuolo, "EU State Aid Control during Covid-19" (2020) 16 Competition Law International 21, p 26.

and reduced demand, while Article 107(2)(b) measures intend to compensate damages confirmed by each firm.[61]

3.3. Historical Usage of Article 107(2)(b)

3.3.1. Introduction

When it comes to state aid, Article 107(3)(b) has been used more frequently compared to Article 107(2)(b). There are two prominent examples of state aid given to the airlines sector using Article 107(2)(b): the September 11 attacks in the US in 2001 and the explosion of Icelandic volcano Eyjafjallajökull in 2010. It is difficult to notify the Commission about aid granted under Article 107(2)(b) because of the three conditions that need to be met first: exceptionality, causality, and proportionality. The Commission needs to deem an event as an exceptional occurrence for Article 107(2)(b) to come into effect. Previously, the Commission marked several events as an exceptional occurrence, including war, acts of terrorism, natural disasters, and epidemics. During both exceptional occurrences, the Commission emphasised the importance of non-discrimination between airlines in a member state and uniformity of state aid applications.

3.3.2. The September 11 Attacks

During the September 11 attacks, the US airspace was shut for four days, which affected flights to and from the EU, resulting in many cancelled flights. In addition, the attacks resulted in decreased demand for trans-Atlantic flights, and flights overall, due to increased fear among passengers. European airlines were already suffering from rising fuel costs and minimal liquidity. Moreover, extensive security measures and increased insurance coverage increased the costs incurred by airlines, resulting in the Commission approving member states' request for state aid to the airline sector. However, the Commission approved the usage of the article in a restrictive manner, where it imposed additional conditions on the states: non-discrimination of application, where all airlines should be compensated; proportionality of state aid to costs, where it should only cover the costs incurred between September 11 and 14 due to the closing of the US' airspace; and fair and accurate calculation of aid provided, where states need to compare each airline's traffic during those four days to that of the previous week.[62]

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[61] Ibid, p 27.
[62] Schmauch, *EU Law on State Aid to Airlines*, p 145.

While the state aid provided was for the damages incurred during those four days, member states introduced temporary insurance measures for thirty days following the attacks. The Commission stated in its Communication on Insurance in the Air Transport Sector following the September 11 attacks that:

> The Commission stressed in its Communication that if the situation were to continue beyond the initial 30-day period, Member States might decide to continue providing a supplementary guarantee to the insurance companies, or to underwrite the risk directly themselves.[63]

While the Commission considered member states providing insurance for airlines as unsustainable, it recognized that a solution was necessary for the rising insurance costs and decreased coverage, resulting in Regulation No 785/2004 on insurance requirements for air carriers and aircraft operators.[64] The Commission approved the usage of Article 107(2)(b) instead of Article 107(3)(b) or other state aid exception laws, given the extraordinary nature of the event, and thus, it should be interpreted narrowly.

3.3.3. The Explosion of Eyjafjallajökull

The volcano Eyjafjallajökull erupted in Iceland in April 2010, resulting in clouds of ash over Europe and causing the severe restriction of European airspace between 15 and 21 April. Over 67,000 flights were cancelled and about 5.5 million passengers were unable to board their flights, with flight traffic falling by approximately 64% and peaking at 90% in some countries.[65] The Commission noted that the explosion is considered an exceptional circumstance and that Article 107(2)(b) may be applied, given the severity of the explosion's consequences (even more than the September 11 attacks). The Commission, however, emphasised that there has to be a direct link between the explosion and the damages incurred by airlines and that airlines are not overcompensated for the damages.[66]

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[63] Communication from Commission of 2 February 2002 on Insurance in the Air Transport sector following the terrorist attacks of 11 September 2001 in the United States, COM(2002) 320 final, point 7.
[64] European Parliament and Council Regulation (EC) No 785/2004 of 21 April 2004 on insurance requirements for air carriers and aircraft operators, OJ 2004 L 138/1.
[65] Schmauch, *EU Law on State Aid to Airlines*, p 148.
[66] Information note to the Commission – The impact of the volcanic ash clouds crisis on the air transport industry, SEC(2010) 533, at paras 38-39.

The event resulted in only one state aid case, SA.32163 “Remediation of damage to airlines and airports caused by seismic activity in Iceland and the volcanic ash in April 2010,” given to Slovenian airlines. The Commission approved Slovenia’s support scheme to cover 60% the damages incurred by its airports and airlines, in the form of direct grants, following the catastrophe and until the operators are able to function normally.[67]

Article 107(3)(b) has been easier to utilise given its greater elasticity. Previously, the Commission approved state aid measures authorised under Article 107(3)(b) on a European scale following the 2008 economic crisis. The Commission then approved many state aid schemes to assist financial institutions through specialised temporary frameworks, similar to the Covid-19 Temporary Framework.[68]

3.4. Summary and Conclusion

The Temporary Framework was drafted by the European Commission to address the economic ramifications of the Covid-19 pandemic and the measures that states can take to support their firms and businesses. The Framework was built based on Articles 107(2)(b) and 107(3)(b) of the TFEU to address the exceptions laid out to the strict state aid rules written in Article 107(1) TFEU. Member states have requested the Commission’s approval for their most of their state aid schemes based on Article 107(3)(b) given that Article 107(2)(b) requires extra steps that take time. Under Article 107(2)(b), three criteria must be satisfied: proportionality, exceptionality, and causality. The aid given must be proportional to the damages incurred by each firm and should not exceed that amount. The aid must be given due to an exceptional circumstance, and the aid must be given according to the damages directly caused by the exceptional circumstance. Article 107(3)(b), however, can be given to alleviate a disturbance in the economy of a member state. The Commission raised the cap on individual state aid from 800,000 euros to 1.8 million euros considering the extent of the pandemic and its ongoing disturbance to the economy.

There are five types of aid approved under the Framework, and they generally fall under direct grants, state guarantees on loans, subsidised interest rates on loans, or recapitalisation measures.

[67] European Commission Decision of 1 August 2011 on SA.32163 (2010/N) – Slovenia – Rectification of consequences of the damage caused to air carriers and airports by earthquake activity in Iceland and the resulting volcano ash in April 2010 [2011] C(2011) 5495 final, para 22.
[68] Pantazi, “State Aid to Airlines in the Context of Covid-19,” p 3.

Recapitalisation measures undertaken by the state include the state owning shares or stocks in the firm; however, the state is required to return those shares when the market stabilises. Since the beginning of the pandemic, the Commission has approved hundreds of state aid mechanisms across the EU. The airline industry has also received its fair share of aid schemes and grants, considering the containment measures imposed by states, such as lockdowns, flight restrictions, and border closures. To ensure the airlines' continued liquidity and ability to retain their employees, multiple state aid measures have been approved in varied forms, including direct grants, recapitalisation, state loans, and tax credits.

Previously, Article 107(2)(b) has not been applied as liberally as Article 107(3)(b) given its stringent requirements. Two prominent examples of the usage of Article 107(2)(b) throughout the airline industry include the ramifications endured due to the September 11 attacks in the US and the explosion of Eyjafjallajökull volcano in Iceland, where assistance was granted to all European airlines in the former and the Slovenian airlines in the latter.

4. State Aid to European Airlines

4.1. Introduction

Many European airlines have received state aid from their governments, mainly legacy carriers, such as Air France-KLM, SAS, and Finnair, and in various forms. State aid to airlines has been approved under both Articles 107(2)(b) and 107(3)(b). The European Commission has approved 34 state aid measures submitted by member states for airlines operating within their territories under the Temporary Framework, with no objections, as of 30 April 2021.[69] Of those 34 schemes, sixteen were based on Article 107(2)(b) to compensate for the damages incurred, and eighteen were based on Article 107(3)(b) to rectify a market failure within the economy.[70] Following that date, ten additional measures explicitly targeting airlines, such as TAP Air Portugal, airBaltic, and Air Nostrum, have also been approved by the Commission under Article 107(2)(b).[71] Moreover, member states were also submitting state aid measures to generally support companies affected by the pandemic, serving as an umbrella scheme, while other measures were targeting tour operators, airports, and other types of transportation systems.

To receive approval from the Commission for their state aid measures, states need to notify the Commission of the amount they wish the state aid would cover, which firms will receive the aid, and based on which factors. If the aid is submitted according to Article 107(2)(b), states need to conduct a thorough investigation to calculate the exact amount of damages incurred by the firm to ensure that it is not overcompensating the firm. To calculate the damages incurred, a cut-off date needs to be set to compare the statistics of the current period with that before the cut-off date. The Temporary Framework set the cut-off date on January 1st, 2020, where any damage before that date would not be eligible for state aid under Article 107(2)(b).[72] In addition to the cut-off date, a time period where the damage occurred needs to be defined. Initially, the Framework allowed state aid measures up until December 31st, 2020, but the Framework has been extended six times, with

[69] Ibid, p 3.
[70] Ibid.
[71] -- "List of Measures Approved" (*European Commission Files* March 11, 2022).
[72] Nicolaides, "Application of Article 107(2)(b) TFEU to Covid-19 Measures," p 243.

the new time period set to expire on December 31st, 2022.[73] Furthermore, the Commission introduced new tools to support the economy's recovery: investment support measures and solvency support measures. Solvency support measures are targeted towards small and medium sized enterprises (SMEs) to help them leverage private funds; the time period for solvency support measures ends on December 31st, 2023.[74]

States are required to calculate and quantify the damages incurred by firms due to the exceptional circumstance to receive approval from the Commission. While ex post checks can determine the state of a firm before the pandemic to assess its current state during the pandemic in some cases, in other situations, it is harder for states to reach an accurate and definitive calculation. Another situation states need to consider in their calculations is isolating the impact of the pandemic on the firm from other factors influencing it, such as seasonal demand, supply chain conditions, and other aspects. Thus, this adds the additional calculation of comparing the current time period to a similar period before, for example in the previous year or the previous season. State aid can be granted up to 100% of the damage incurred by firms, but member states are not obligated to cover the full scope of the damages. Losses that are easily quantifiable and identifiable, for instance replacement costs and repairs, can be fully compensated. However, other revenues stream losses can be numerically manipulated, and as a result, member states would offset them at a lower rate, which helps thwart cheating within firms.[75]

Based on Table 1 below, European airlines employed one or more of five responses to the Covid-19 pandemic: retrenchment, perseverance, innovation, exit, or resume. With retrenchment, airlines were forced to significantly reduce their costs and/or assets due to reduced demand and containment measures. As a result, airlines grounded their flights and reduced their employment level, or shifted the work pattern and pay to retain their employees during this non-operative phase. Through perseverance, airlines needed support to maintain the status quo and their position in the

[73] Communication from the Commission of 24 November 2021 on Sixth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance [2021] OJ C473/1, para 93.
[74] Arianna Podesta, Giulia Astuti and Maria Tsoni, "State Aid: Commission Sets out Future of Temporary Framework to Support Economic Recovery in Context of Coronavirus Outbreak" (*European Commission - Press Corner* November 18, 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6092> accessed 8 April 2022.
[75] Nicolaides, "Application of Article 107(2)(b) TFEU to Covid-19 Measures," p 243-244.

market. To retain their financial position, they relied on state aid and loans, while other airlines focused on their market position by adjusting their operations after the restrictions are lifted, such as price competition by Ryanair. Other airlines started generating innovative plans to survive the pandemic, with either crisis-specific shifts or long-term goals, such as reconfiguring their fleet towards cargo shipping or entering into joint ventures with other international airlines. The fourth option some airlines took was exiting the market, given that they were not able to maintain profitability and operations. Finally, with the lifting of containment measures and restrictions, airlines focused on resuming their operations, whether it was returning to their regularly scheduled flights or introducing new flight paths to increase demand.[76]

Table 1: European Airlines Response to Covid-19

Response category	Corresponding findings/airline prevalence
1) Retrenchment *Substantial cost/asset reduction*	*75 news items in total*
Short-term orientation	All European airlines grounded their fleets more or less completely due to the imposed travel restrictions. Almost all airlines announced job cuts and/ or reduced work patterns in accordance with the respective national policy schemes to maintain employment. → More or less all European airlines
Long-term orientation	• Air France (brings forward A-380 retirement; restructure domestic network with less flights and more LCC Transavia) • Austrian Airlines (reduce fleet by 25%, management by 30%) • Brussels Airlines (reduce fleet by 30%) • EasyJet (cancel aircraft orders, slim fleet) • Helvetic Airways (stopped growth strategy) • Lufthansa (deep cuts into future fleet, grounding A-380s probably permanently, reposition 20% smaller)
2) Persevering *Safeguarding status quo*	*37 news items in total*
Financial	Most European airlines have sought government aid through grants, loans at preferred conditions/state guarantees, or subsidies. → Most European airlines
Position	• Alitalia (Italy's plan to safeguard nationalized airline as springboard for relaunch of Italian economy; continue codeshare with Delta Air Lines) • Ryanair (committed to drive price competition after crisis)
3) Innovating *Strategic renewal*	*16 news items in total*
Crisis-specific	• Austrian (reconfiguring aircraft for cargo) • Icelandair (reconfiguring aircraft for cargo) • Lufthansa (LH Technik offers cargo conversion) • Sun Express (switch aircraft to freight operations) • Swiss (reconfiguring aircraft for cargo)
Longer term	• Aeroflot (plans to open Europe-Asia transfers) • Air France-KLM (transatlantic joint-venture with Delta Air Lines and Virgin Atlantic) • British Airways (UK-Australia joint venture with Qatar Airways) • IAG (remains committed to takeover of Air Europa) • Volotea (plans 40 new routes for summer) • Wizz Air (plans to enter new markets in Europe, increase scale of Abu Dhabi venture, intends to grow ancillary business)
4) Exit *Discontinuation of activities*	*11 news items in total*
Failure	• Air Italy (ceased operations) • AtlasGlobal Airlines (filed for bankruptcy) • Braathens (filed for court administration) • CityJet (entered local equivalent of Chapter 11) • Flybe (gone into administration) • Norwegian Air Shuttle (pilot and cabin crew subsidiaries filed for bankruptcy in Denmark and Sweden)
Withdrawals	• British Airways (could pull out of LGW permanently) • LOT (giving up bid for Condor) • Lufthansa (close Germanwings subsidiary) • Virgin Atlantic (exit base at LGW)
5) Resume	*9 news items in total* Airlines re-introduce flights and/or increase schedules for summer 2020 onwards, returning to (still considerably modified) flight operations at least on the continent.

Airlines featured in alphabetical order in each category.

Source 1: Albers & Rundshagen, "European Airlines Strategic Response to the Covid-19 Pandemic," p 3.

[76] Sascha Albers and Volker Rundshagen, "European Airlines′ Strategic Responses to the COVID-19 Pandemic (January-May 2020)" (2020) 87 Journal of Air Transport Management 1, p 2-3.

4.2. State Aid Distribution

4.2.1. Introduction

While the Commission has approved over 40 state measures targeting European airlines, most of the schemes were designed to target a specific air carrier. There are four state aid measures that targeted all carriers within a member state, or those with an operating license issued by that member state – SA.56865, SA.56812, SA.59029, and SA.59370. Out of those four measures, two were authorised under Article 107(2)(b) and the other two under Article 107(3)(b).[77] Moreover, another four measures were open to all international airlines in order to re-establish connectivity in specific airports and were permitted based on Article 107(3)(b) – SA.59124, SA.57691, SA.58157, and SA.59156.[78] State aid to airlines has also been granted to a couple of airlines based on Article 107(3)(c) TFEU and the Rescue and Restructuring Guidelines. TAP Portugal received 1.2 billion euros as restructuring aid (SA.58463), while France's Corsair received 106 million euros. The aid they received was marked as restructuring aid, instead of aid authorised under the Temporary Framework, since they had already been in difficult financial situations during December 2019, whereas the cut-off date for aid was January 1st, 2020.[79]

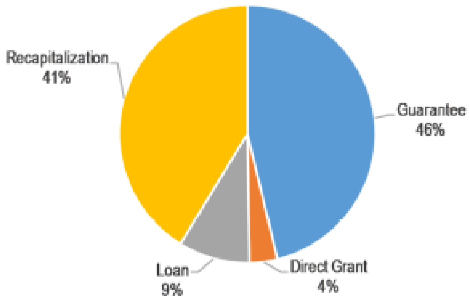
One state aid measure that benefitted airlines but has not been listed as an airline-specific scheme was the TUI Group recapitalisation measure by Germany (SA.59812), where 1.25 billion euros in aid were approved under Article 107(3)(b) for recapitalisation of the German tour operator, which retains five European air carriers – TUI fly, TUI Airways, TUI fly Nordic, TUI fly Belgium, and TUI fly Netherlands.[80] Another general state aid scheme that also benefitted airlines was the 10 billion euros measure to arrange capital and debt support to Spanish businesses afflicted by the pandemic (SA.57659), where Iberia and Vueling airlines benefitted.[81]

State aid towards airlines has been mainly divided into four categories: recapitalisation measures, guarantees, loans, or direct grants. According to Figure 1 below, recapitalisation measures and guarantees make up the majority of state aid measures in terms of volume, accounting for 87% of

[77] Pantazi, "State Aid to Airlines in the Context of Covid-19," p 3.
[78] Ibid.
[79] Ibid, p 4.
[80] Ibid.
[81] Ibid.

total state aid allocated to airlines.[82] With 31 billion euros allocated towards state aid for airlines, approximately 27 billion euros have been utilised under guarantees and recapitalisation schemes.

Figure 1: Covid-19 EU State Aid to Airlines (EUR 31 billion) By Aid Type



Source 2: Martín-Domingo & Martín, "The Effect of Covid-Related EU State Aid on the Level Playing Field for Airlines," p 6.

4.2.2. State Aid Reasoning and Allocation

As shown in the tables below, most airlines that have received state aid are national carriers, with the select few budget airlines, such as Corsair in France. Table 2 lists all the state aid measures granted to airlines under Article 107(2)(b), as damages paid for an exceptional circumstance, with the amount of aid that each airlines received. The two recipients of the largest state aid under Article 107(2)(b), TAP Portugal and Finnair, received the aid in the form of a loan, where the two airlines are expected to pay back the loan in the future. French carriers received a deferral on payment of their taxes, amounting to 200 million euros.

Table 2: State Aid to Airlines Under Article 107(2)(b) TFEU

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

Source 3: Pantazi, "State Aid to Airlines in the Context of Covid-19," p 4.

[82] Luis Martín-Domingo and Juan Carlos Martín, "The Effect of Covid-Related EU State Aid on the Level Playing Field for Airlines" (2022) 14 Sustainability 1, p 6.

Table 3 lists all the state aid authorised under Article 107(3)(b) given the market disruptions induced by the pandemic. Under this article, states are not limited to the amount of damages sustained by the airlines, but rather have the flexibility to distribute aid as they see fit. As a result, state aid given was in the billions of euros, compared to the millions allocated under Article 107(2)(b). Lufthansa and Air France have been the recipients of the two largest state aid measures, with 9 billion euros and 11 billion euros, respectively. While Table 3 shows Lufthansa receiving 6 billion euros, the air carrier received an additional 3 billion euros from KfW, a state-backed bank. Moreover, 4 billion euros of the aid that went towards Air France was handed out as a recapitalisation measure, giving the French government a greater stake in the airline. The recipients of the four largest state aid measures were Lufthansa, Air France, KLM, and SAS, divided into state loans or state-backed loans or recapitalisation schemes.

Table 3: State Aid to Airlines Under Article 107(3)(b) TFEU

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

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

Source 4: Pantazi, "State Aid to Airlines in the Context of Covid-19," p 4.

Finally, based on Table 4, the largest European airlines received state aid from their governments, including Ryanair, which has filed 16 lawsuits in the Court against EU member states' state aid measures. Although Ryanair's CEO Michael O'Leary spoke out against the government aid packages received by rival European airlines,[83] Ryanair accepted a 600 million sterling pound loan from the United Kingdom's (UK) Covid Corporate Financing Facility (CCFF), which it aimed to

[83] Mark Sweney, "Lufthansa Agrees €9bn Bailout with German Government" (*The Guardian* May 26, 2020) <https://www.theguardian.com/business/2020/may/26/lufthansa-9bn-bailout-german-government-coronavirus-flights> accessed 8 April 2022.

repay within twelve months.[84] Another low-cost carrier that accepted state aid from the CCFF was easyJet, which received the same amount that Ryanair received.

Table 4: Government Support Conditions for the Largest European Airlines

Airline (Group)	Key points/explanations
Air France-KLM	Air France • French government package of €7bn (€3 bn in loans, €4 bn in state-guaranteed funds) • Carbon emission reductions; discontinuation of domestic routes where railway connections of under 2.5 h are available as alternatives • Profitability targets (unspecified as yet) • Air France has to remain a loyal customer of Airbus (the airline's short-haul fleet is all-Airbus, the widebody fleet has been tilted towards Boeing during recent fleet updates) KLM • Dutch government is preparing €2bn to €4bn. The respective state support packages can only be used for each airline separately. Both governments own ca. 14% in the airline construct, respectively.
IAG	• Tapped ca. €1.2bn from coronavirus emergency funds in UK and Spain; no bailout package yet
Lufthansa Group	Lufthansa • German government package of €9bn: €5.7bn as loan at 4%, €3bn credit facility by state-owned bank, €300m in return for 20% government stake in the company • Two seats on Lufthansa's supervisory board to be filled in agreement with the German state • Government option to increase stakes to 25% plus one share to block potential takeover • Waiver of future dividend payments and senior management salary restrictions likely • Carbon emission reduction measures demanded (but unspecified as yet) • EU commission approval requirement: ceding take-off and landing rights to competitors at major hubs in Frankfurt and Munich, as well as giving up aircraft to competitors Austrian Airlines • Negotiations with Austrian government under way • Likely conditions: environmental goals, stakes for government, guarantees for hub at Vienna Brussels Airlines • Negotiations under way, airline asked for €290m from Belgian government • Likely conditions: outline of future airline plan, continuation of hub at Brussels Swiss International Air Lines • Swiss government provides €1.2bn • No outflows to parent company abroad allowed • Future earnings priority use: repay state aid; dividends forbidden until that is completed
easyJet	• Tapped ca. €660m from coronavirus emergency funds in UK; no bailout package yet
Ryanair	• Tapped ca. €660m from coronavirus emergency funds in UK; officially opposes bailout packages

Data sources: BBC, CNN, Forbes, Handelsblatt, Simpleflying, The Guardian.

Source 5: Albers & Rundshagen, "European Airlines Strategic Response to the Covid-19 Pandemic," p 5.

4.2.3. State Aid to Airlines Compared to GVA, Employment, and States' GDP

The airline sector within the EU has received a greater share of state aid compared to its contribution to member states' gross domestic product (GDP) and the European GDP overall. Within the EU, the airline sector makes up 2.1% of the EU's GDP, while only contributing less than 1% in terms of employment and gross value added (GVA).[85] However, based on the amount of aid approved by the Commission, the airline industry received approximately 5% of total state aid disbursement, with airlines receiving approximately 30.8 billion euros in total, while airports received only 538 million euros.

As shown in the Table 5 below, while EU air transport sector (including both airlines and airports) received 4.95% of total approved state aid, the sector employs 0.157% of European workers, and only adds 0.338% to the economy in terms of value. A prominent reason for the wide disparity in

[84] Gwyn Topham, "Ryanair Boss Says UK Government Support for Aviation Just 'PR Stunt'" (*The Guardian* March 3, 2021) <https://www.theguardian.com/business/2021/mar/03/ryanair-boss-michael-o-leary-says-uk-government-support-for-aviation-just-pr-stunt> accessed 8 April 2022.
[85] Pantazi, "State Aid to Airlines in the Context of Covid-19," p 5.

state aid to overall value is the continuous need for airlines and airports to facilitate day-to-day activities, such as travelling, cargo shipping, and connectivity between cities and states. Demand for airlines and airports may have fallen during the pandemic, but the industry was able to rebound as soon as containment measures were lifted, even partially.

Table 5: Percentage (%) of Contribution to Total Economic Activity and State Aid Received in EU Air Transport

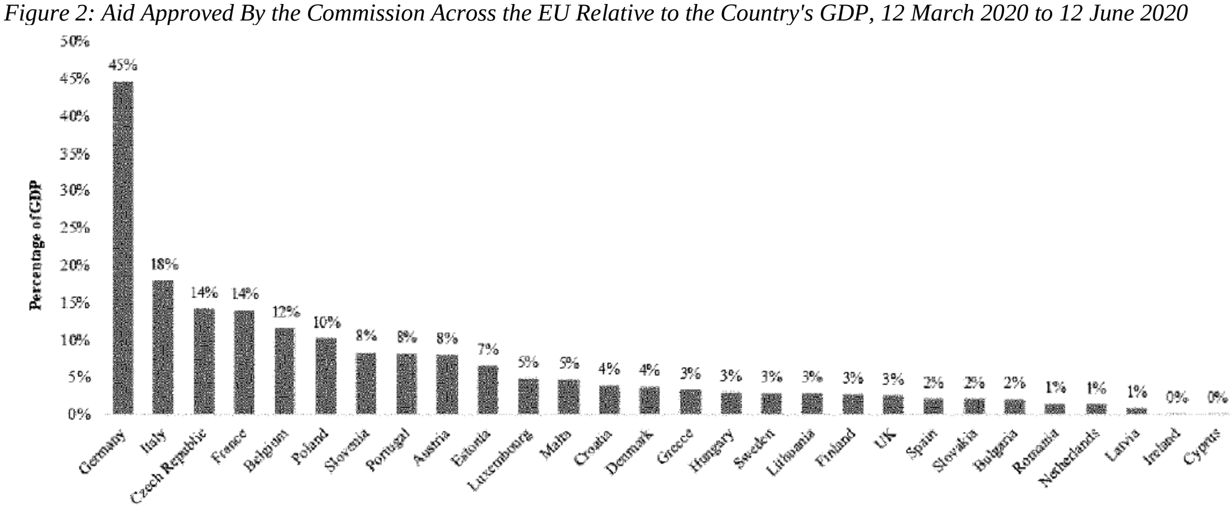
Indicator/year	**2017**	**2018**	**2020-2021**
Gross value added	0.313	0.338	-
Persons employed	0.156	0.157	-
Approved state aid	-	-	4.95

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

Source 6: Pantazi, "State Aid to Airlines in the Context of Covid-19," p 5.

In addition, some member states supplied their businesses with a considerable amount of aid relative their GDP, with Germany contributing 45% of its GDP in state aid. Figure 2, below, displays each member state's aid schemes approved by the Commission in terms of its GDP. Germany, Italy, the Czech Republic, France, and Belgium distributed a significant amount of aid relative to their GDP, with each country giving more than 12% of its GDP between March 12th and June 12th of 2020.[86]

Figure 2: Aid Approved By the Commission Across the EU Relative to the Country's GDP, 12 March 2020 to 12 June 2020



Source: Robins, Puglisi & Yang, "State Aid Tools to Tackle the Impact of Covid-19," p 148.

[86] Nicole Robins, Laura Puglisi and Ling Yang, "State Aid Tools to Tackle the Impact of Covid-19: What is the Role of Economic and Financial Analysis?" (2020) 2020 European State Aid Law Quarterly 137, p 148.

The massive discrepancy between Germany’s state aid resources and other member states’ resources has resulted in concerns within European businesses about competition distortion in the EU’s internal market. Given the massive influx of aid that national carriers have received in state aid, while most budget airlines did not receive aid or as much as national carriers, concerns over equity and levelling the playing field between airlines have also been raised, given that the Commission’s interpretation of Article 107(2)(b) requires states not to discriminate between firms within the same sector receiving state aid, especially during the pandemic under the Temporary Framework.

4.3. Concerns Raised With EU State Aid

4.3.1. Introduction

Under the Temporary Framework, the main goal was to ensure the survival of European businesses during the pandemic without distorting competition within the market. As a result, small and medium sized enterprises were given extra incentives and aid to ensure their viability throughout the pandemic and its market disruption. Moreover, state aid was supposed to be allocated fairly and without discrimination between firms, where the Commission insisted that states should ensure that their distribution of state aid did not favour one firm over another, or result in wide disparities among recipients of state aid. As a given, this should entail that member states resource allocation also be consistent with the other states and not result in one state allocating a much larger amount of funds for state aid simply because it has a larger economy and government funds. This might lead to most businesses being able to receive state aid in one country, while another country is unable to support most of its businesses and some would have to exit the market. Given that the EU has an internal market, where all businesses are able to conduct their operations across the EU without obstacles, businesses in larger economies that have received state aid would be to able survive the pandemic and resume operations normally, while other firms in smaller economies did not receive the funds necessary, or did not receive funds at all, to endure the pandemic that has entered its third year of market disturbance.

4.3.2. Fairness and Competition

Regulating competition and state aid have been at the forefront of EU policy to ensure that all businesses throughout the EU are given a fair chance to compete within the internal market, regardless of their size.[87] As a result, the Temporary Framework has been put in place to allow state aid measures to take place and protect businesses during market disruptions and exceptional circumstances, but also to ensure that competition is not distorted when governments favour some firms over other firms. The Commission stressed the importance of non-discrimination, especially within the transportation sector, given the size of the industry and number of market players. The Framework included safeguards to protect the level playing field within the market.[88] However, that may not have been enough to address the differences in spending power between member states.

While state aid laws were put in place to ensure that competition within the market is not distorted and that one firm or set of firms are not given an advantage over other firms, it is significant to note the divergence in state aid contributions between Germany and the rest of the European member states. Based on Figure 2, while all other member states were supplying aid between 1% and 18% relative to their GDP, Germany was injecting 45% of its GDP as state aid. Moreover, Germany has the largest economy across with the EU, making up 25.1% of the EU's GDP in 2020, followed by France at 17.2% and Italy at 12.3%. The size of Germany's state aid contribution raises questions of fairness and equity among European businesses.

One significant German state aid measure towards its air carriers was the 9-billion-euro bailout it provided Lufthansa, its national carrier. The 9-billion-euro deal will be divided into a 6-billion-euro aid from the government in the form of loan guarantee, equity, and silent participation,[89] and a 3-billion-euro three-year loan from KfW, a state-backed bank, and other private banks. The state aid measure gave the German government a 20% stake in the airlines, which could increase to 25% plus one share if there is a takeover attempt or a hostile bid in place.[90] The initial 6 billion euros were divided into 300 million euros paid to purchase shares at the nominal price of 2.56 euro per share, and 5.7 billion euros injected as non-voting capital, or silent participation.[91] The

[87] Arianna Podesta, Giulia Astuti and Maria Tsoni, "Remarks by Executive Vice-President Vestager on the Communication on a Competition Policy Fit for New Challenges" (*European Commission - Press Corner* November 18, 2021) <https://ec.europa.eu/commission/presscorner/detail/en/speech_21_6115> accessed 8 April 2022.
[88] Ibid.
[89] Pantazi, "State Aid to Airlines in the Context of Covid-19," p 4.
[90] Sweney, "Lufthansa Agrees €9bn Bailout with German Government," (*The Guardian* May 26, 2020).
[91] Ibid.

government plans to sell those shares at the end of 2023 after the economy stabilises and Lufthansa is not impacted by the pandemic.

Moreover, the German government had initially allocated 600 billion euros as part of its Economic Stabilisation Fund (*Wirtschaftsstabilisierungsfonds,* or WSF), to be used to help firms in need during the pandemic.[92] The WSF's volume was later reduced to 250 billion euros since January 1st, 2022. The WSF is divided as follows: 100 billion euros to bridge liquidity shortages, 50 billion euros as recapitalisation measures, and 100 billion euros as credit authorisation with KfW bank.[93] The Commission approved Germany's WSF and its allocation of resources, along with the state aid measures submitted for each firm it benefitted.

4.4. Summary and Conclusion

State aid to European airlines amounted to 5% of the overall budget allocated towards state aid. Under the Temporary Framework, state aid towards airlines has been allocated under both Article 107(2)(b) and 107(3)(b). However, aid supplied to airlines under Article 107(2)(b) has been significantly lower than aid supplied under Article 107(3)(b), and that is due to the nature of the articles, where states have to calculate the damages sustained by airlines and reimburse them for the same amount without overcompensating. The largest sums of aid have been allocated to the EU's largest airlines, including Lufthansa, Air France, and KLM. Although Ryanair filed proceedings against the Commission for what it labelled as "illegal state aid,"[94] it accepted approximately 600 million euros from the UK's CCFF as a state loan during the pandemic. Based on the amount of aid supplied and the recipients of aid (being mostly national carriers), it appears that states did not practice non-discrimination, as the Commission has stressed previously. As a result, Ryanair's sixteen lawsuits against the Commission may hold evidence of wrongdoing by member states and the Commission for hastily approving state aid measures, which the following chapter covers. Issues of fairness, discrimination, and distortion of the market and competition negate the purpose of Article 107(1), which was set in place to protect against state's wrongdoing and favouritism.

[92] -- "Economic Stabilisation Fund" (*Economic Stabilisation - Finanzagentur GmbH* March 2020) <https://www.deutsche-finanzagentur.de/en/economicstabilisation/> accessed 9 April 2022.
[93] Ibid.
[94] Sweney, "Lufthansa Agrees €9bn Bailout with German Government," (*The Guardian* May 26, 2020).

5. Ryanair and its State Aid Contention

5.1. Introduction

Following the Commission's quick approvals of numerous state aid applications for mainly national carriers within EU member states, Ryanair filed sixteen lawsuits in the General Court against the Commission, targeting specific state aid applications towards SAS, Air France-KLM, Lufthansa, and other major airlines, as well as national schemes that target primarily air carriers.[95] Ryanair felt that the state aid provided discriminated between airlines, especially between legacy carriers and budget airlines. Legacy carriers have usually been unable to keep up with the competition they have faced from budget airlines and their low prices.[96] Ryanair's cases rely on five principal arguments: misapplication of the Temporary Framework; misapplication of Article 107(2)(b) or 107(3)(b); violating principles of EU law, namely non-discrimination, freedom of establishment, and freedom to provide services; failing to investigate each state's claims for state aid properly; and violating its duty to state reasons for its approval of aid.[97]

Ryanair's claims that the European Commission violated the EU's principles of fairness, freedom, and non-discrimination are grave, considering that the Commission ensures that any regulation, directive, or document issued by the Commission and voted on by the Council and Parliament are compatible with EU's principles and ensuring that member states properly apply EU law in their states.[98] While the Commission loosened its state aid rules during the pandemic, it did not allow states to violate EU rules and principles, with the Commission highlighting the importance of non-

[95] Chee, "Ryanair's Fight against Airline State Aid Faces Court Rulings" (*Reuters* February 16, 2021).
[96] Silvia Amaro, "Europe's Low-Cost Airlines Could Have the Edge in a Post-Covid World" (*CNBC* September 16, 2021) <https://www.cnbc.com/2021/09/16/europes-low-cost-airlines-could-have-the-edge-in-a-post-covid-world.html> accessed 9 April 2022; Alanna Petroff, "European Airlines: Why Do They Keep Going Bust?" (*CNN Money* October 2, 2017) <https://money.cnn.com/2017/10/02/news/europe-airlines-monarch-competition/index.html> accessed 9 April 2022.
[97] -- "Ryanair's Action for Annulment against Commission State Aid Decision Concerning Lot: Action Published" (*EU Law Live* August 24, 2021) <https://eulawlive.com/ryanairs-action-for-annulment-against-commission-state-aid-decision-concerning-lot-action-published/> accessed 9 April 2022. See also Case T-398/21: Action Brought on 6 July 2021 [2021] OJ C338/36.
[98] -- "Applying EU Law" (*European Commission* December 19, 2018) <https://ec.europa.eu/info/law/law-making-process/applying-eu-law_en> accessed 9 April 2022.

discrimination when states applied for state aid for its businesses and set a cut-off date for state aid, to ensure that only firms that have been impacted by the pandemic would be compensated for their losses. However, Ryanair's CEO accused member states of "selectively gifting billions of euros to their inefficient flag carriers,"[99] with the Commission not investigating each state's state aid claims thoroughly to ensure that the aid is proportional to the damages ensued. While Ryanair's CEO has challenged the state aid granted to European airlines during the Covid-19 pandemic and labelling flag carriers as "state aid crack cocaine junkies,"[100] Ryanair has received state aid in the past, specifically receiving 2 million euros in subsidies from the Austrian government in 2016, which the General Court found to be in violation of EU state aid rules in 2021.[101] Other cases of state aid that Ryanair received, that were also found to be incompatible with EU law, were its 9.6 million euros it received from the French government in 2014[102] and the 8.5 million euros it has to pay back France in 2019.[103] Thus, Ryanair, like any other airline, has received state aid in the past and in the present, but it objects to state aid provided to its competitors during a market destabilising pandemic. To understand Ryanair's arguments and claims, key principles of EU law need to be defined and examined.

5.2. Principles of EU Law

5.2.1. Introduction

The general principles of EU law allow the EU's legal order to evolve and adapt with the changing circumstances, whether it is the principle of non-discrimination or the principle of proportionality

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[99] Rupert Neate, "Ryanair to Challenge EU Court Ruling on French and Swedish State Aid" (*The Guardian* February 17, 2021) <https://www.theguardian.com/business/2021/feb/17/ryanair-appeal-eu-court-ruling-french-swedish-state-aid-airline-covid-bailout> accessed 10 April 2022.
[100] Arthur Sullivan, "State Aid Debate Central to Aviation's Uncertain Post-Pandemic Future" (*DW* May 19, 2021) <https://www.dw.com/en/state-aid-debate-central-to-aviations-uncertain-post-pandemic-future/a-57518877> accessed 9 April 2022.
[101] Padraic Halpin and Foo Yun Chee, "Ryanair to Appeal after Court Backs EU Order to Repay Austrian Airport Aid" (*Reuters* September 29, 2021) <https://www.reuters.com/business/aerospace-defense/ryanair-appeal-after-court-backs-eu-order-repay-austrian-airport-aid-2021-09-29/> accessed 9 April 2022.
[102] News Wires, "Ryanair Ordered to Pay Back €9.6M in Illegal State Aid to France" (*France 24* July 23, 2014) <https://www.france24.com/en/20140723-france-ryanair-european-commission-illegal-subsidies-repay> accessed 9 April 2022.
[103] Johannes Bahrke and Maria Tsoni, "State Aid: France to Recover €8.5 Million of Illegal Aid to Ryanair at Montpellier Airport" (*European Commission - Press Corner* August 2, 2019) <https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4991> accessed 10 April 2022.

and equality.[104] The general principles also act as the protector of fundamental rights within the EU, where Article 6 of the TEU "recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union."[105] Ryanair argued that the Commission had violated the general principles of EU law, specifically regarding non-discrimination, proportionality, fairness, and freedom of establishment and freedom to provide services.[106] While fairness is not an explicit concept within the general principles of EU law, fairness is implied within EU law, namely when it comes to "fair treatment" of individuals, businesses, or other entities within the EU, and falls under the principle of non-discrimination.[107]

5.2.2. Non-Discrimination

Under EU law, discrimination between individuals or entities on the basis of race, citizenship, religion, political opinion, or any other group is prohibited.[108] This principle and right is enshrined in the Charter of Fundamental Rights (CFR) under Article 21, with section 2 stating that "any discrimination on grounds of nationality shall be prohibited."[109] Under this principle, states are not allowed to treat people differently based on the social group that they belong to, nor can they favour one group over the other. Furthermore, Article 18 TFEU also prohibits discrimination on the grounds of nationality.[110] As a result, EU institutions, bodies, and member states cannot treat firms differently based on their origin, nationality, or other identifying factors, since it would violate the principle of non-discrimination and Articles 18 TFEU and 21 CFR. All of this acts as

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[104] Armin Cuyvers, "6A: General Principles of EU Law" in Emmanuel Ugirashebuja and others (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill | Nijhoff 2017); David Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (4th edn Cambridge University Press 2019), p 260.

[105] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Art 6(1).

[106] David Waelbroeck, "The EU General Court Hands Down Two Judgments Dismissing an Airline Company's Challenges Against Decisions by the Commission Approving French And Swedish Measures to Support Airlines in the Context of the Covid-19 Pandemic (Ryanair)" (*Concurrences: Antitrust Publications & Events* February 17, 2021) <https://www.concurrences.com/en/bulletin/news-issues/february-2021/the-eu-general-court-hands-down-two-judgments-dismissing-an-airline-company-s> accessed 11 April 2022.

[107] -- "Tackling Discrimination at Work" (*European Commission - Employment, Social Affairs & Inclusion*) <https://ec.europa.eu/social/main.jsp?catId=158&langId=en> accessed 10 April 2022.

[108] -- "Non-Discrimination" (*European Commission – Information* August 1, 2018) <https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/know-your-rights/equality/non-discrimination_en> accessed 10 April 2022.

[109] European Parliament, Council and Commission Notice of 14 December 2007 on Charter of Fundamental Rights of the European Union [2007] OJ C303/1, Art 21.

[110] Consolidated Version of the Treaty of the Functioning of the European Union [2012] OJ C326/47, Art 18.

a basis for the general principle of equal treatment or non-discrimination which provides that comparable situations or parties in comparable circumstances shall be treated in the same manner.

5.2.3. Proportionality

The principle of proportionality is protected within Article 5(4) Treaty on EU (TEU), where "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."[111] Such a principle helps regulate the actions and powers of the EU and its bodies. Thus, EU bodies should only act in the manner necessary to achieve its goals and aims, without going overboard.[112] The actions of the bodies should be proportional to the current situation they are handling. One example of the application of the principle of proportionality in the state aid context is the cohesion policy. To act in a proportional manner is a requirement which is part of the broader cohesion policy between and within member states, where resources, effort, and spending are concentrated where needed and in the amount required while also ensuring that there is still enough for other projects or states.[113] As a result, the principle of proportionality, applied within the cohesion policy, safeguards resources and funding, ensuring that any support provided is balanced and available for all other projects, safeguarding resources from misuse.

The general meaning of the principle of proportionality is that all acts adopted by EU institutions shall not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question.[114] This is also the case when the Commission decides on national state aid notifications. Moreover, if there is a choice between several appropriate measures, recourse must be made to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.[115]

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[111] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Art 5.
[112] -- "Proportionality" (*European Commission - Glossary*) <https://ec.europa.eu/regional_policy/en/policy/what/glossary/p/proportionality> accessed 11 April 2022.
[113] -- "Cohesion Policy: Principles" (*European Commission - Regional Policy*) <https://ec.europa.eu/regional_policy/index.cfm/en/policy/how/principles/> accessed 11 April 2022.
[114] Christoph Sobotta, "Recent Applications of the Precautionary Principle in the Jurisprudence of the CJEU – a New Yardstick in EU Environmental Decision Making?" (2020) 21 ERA Forum 723.
[115] See Case C-283/11 Sky Österreich GmbH v Österreichischer Rundfunk [Court of Justice 2013], para 50.

5.2.4. Freedom of Establishment and to Provide Services

Under the freedom of establishment, businesses are guaranteed mobility throughout the EU, where entrepreneurs and professionals are free to start and operate their business anywhere in the EU.[116] As a result, there are no restrictions placed on economic actors regarding the establishment of their business units in other EU member states and would be treated in the same manner as nationals of that member state are treated. Articles 49 to 55 TFEU highlight economic actors of EU member states' right to establishment in any member state they covet and abolishing restrictions on freedom of establishment.[117] Companies are also afforded the same treatment as natural persons who are EU member state nationals, based on Article 54,[118] while Article 55 stresses the importance of non-discrimination within a member state between its nationals and EU residents.[119]

Articles 56 to 62 TFEU focus on the freedom to provide services, which is considered crucial for the completion and operation of the internal market.[120] Article 56 lifts any restrictions placed on the provision of services within the EU based on the nationality of firms offering the services and prohibits the imposition of restrictions, with Article 57 setting the definition of services and including those of "a commercial character" within the meaning of services.[121] However, the field of transport is not directly covered by the freedom to provide services in the Treaty, as highlighted under Article 58 TFEU, since the transport sector is regulated by a specific legal system – Regulation (EC) No 1008/2008.[122] This regulation, however, is based on similar principles.

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[116] Christina Ratcliff, Barbara Martinello and Kevin Paul Kaiser, "Freedom of Establishment and Freedom to Provide Services" (*Fact Sheets on the European Union | European Parliament* December 2021) <https://www.europarl.europa.eu/factsheets/en/sheet/40/freedom-of-establishment-and-freedom-to-provide-services> accessed 11 April 2022.

[117] Consolidated Version of the Treaty of the Functioning of the European Union [2012] OJ C326/47, Art 49-55.

[118] Ibid, Art 54.

[119] Ibid, Art 55.

[120] Ratcliff, Martinello and Kaiser, "Freedom of Establishment and Freedom to Provide Services," (2021).

[121] Consolidated Version of the Treaty of the Functioning of the European Union [2012] OJ C326/47, Art 56-57.

[122] Ibid, Art 58; -- "The EU General Court Clarifies the Relationship Between the Rules on State Aid and the Principle of Non-Discrimination on Grounds of Nationality (Ryanair)" (*Concurrences: Antitrust Publications & Events* May 19, 2021) <https://www.concurrences.com/en/bulletin/news-issues/may-2021/the-eu-general-court-clarifies-the-relationship-between-the-rules-on-state-aid> accessed 12 April 2022.

5.3. Ryanair's Cases Against the Commission

5.3.1. Introduction

Ryanair's general arguments against the Commission revolved around three main principles: non-discrimination, proportionality, and freedom to establishment and providing services. Within those main principles, Ryanair argued that the Commission failed to perform its functions well by not investigating member states' claims for state aid thoroughly and misapplying the Temporary Framework to support the economy. By not carrying out its tasks properly, the Commission was unsuccessful in protecting competition within the internal market from distortion and safeguarding the principles of non-discrimination when national carriers (including budget airlines with an operating license in that member state) were favoured over other airlines with an operating license from another EU member state.

5.3.2. Case T-238/20 (Swedish Scheme)

Ryanair filed a case against the European Commission in the General Court, focusing on its approval of Sweden's state aid scheme, where the Swedish government supplied Swedish airlines with loan guarantees to support them during the pandemic.[123] Ryanair called for the annulment of the Commission's decision to approve the measure (SA.56812) under Article 263 TFEU, which states that the Court of Justice can annul legislative acts issued by the EU's main bodies after reviewing their legality and compatibility with EU law.[124] The scheme presented by the Swedish government was notified in accordance with Article 108(3) and provided airlines with a Swedish operating license loan guarantees to provide them with adequate liquidity during and after the pandemic, with the loan guarantees: not exceeding five billion SEK, tackling investment and working capital loans, granted until December 31st, 2020, and limited to a maximum duration of six years.[125] The Commission ruled that the Swedish scheme was compatible with the internal market under Article 107(3)(b), met all the condition set in Section 3.2 of the Temporary Framework (Aid in the Form of Guarantees on Loans), and proportionate, appropriate, and necessary to alleviate a grave disturbance within the Swedish economy.[126] In its case, Ryanair filed

[123] Case T-238/20 *Ryanair v European Commission* [General Court 2021].
[124] Consolidated Version of the Treaty of the Functioning of the European Union [2012] OJ C326/47, Art 263.
[125] Case T-238/20 *Ryanair v European Commission* [General Court 2021], para 1.
[126] Ibid, para 3.

that the Court should annul the Commission's decision and order it to pay the costs, while the Commission called on the Court to dismiss Ryanair's action and order it to pay the costs.

Ryanair entered four pleas in law against the Commission. The first plea held that the Commission "infringed on the principles of non-discrimination on the grounds of nationality and the free provision of services."[127] Within the first plea, Ryanair submitted a four-pronged argument: the aid discriminated based on nationality, the aid was not necessary or proportionate to achieve its objectives, the aid restricted the free provision of services, and the restriction that ensued is not justified.[128] The second plea entered by Ryanair argued that the Commission "infringed on its obligation to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition."[129] Under this plea, Ryanair believes that the Commission did not fulfil its duty to asses the consequences of such aid against trade within the internal market and its duty to protect market competition from distortion as stated under Article 107(1) TFEU. The third plea entered states that the Commission violated the "procedural rights under Article 108(2) TFEU."[130] Finally, the fourth plea states that the Commission violated its "duty to state reasons,"[131] where Ryanair believes that the Commission did not state sufficient reasons to justify the approval of such state aid schemes, proving whether it was non-discriminatory or necessary in such a scenario.

The General Court rejected all four pleas submitted by Ryanair. For the first argument, the Court stated that the state aid measure satisfied the requirements presented in Article 107(3)(b) and that it did not act beyond what was necessary to achieve its objectives. It also stated that Sweden was justified in limiting its state aid schemes to airlines with an operating license issued in Sweden, since the disruption of operations for Swedish airlines affected the Swedish economy mainly, and that aid given to non-Swedish carriers would not have a significant effect on the Swedish economy.[132] The second argument was also rejected based on the Court's conclusion that Article 107(3)(b) does not entail that the Commission has to weigh the benefits and adverse effects of aid on the distortion of competition, and that the Temporary Framework does not have a 'balancing

[127] Ibid, para 24.
[128] Ibid, para 24.
[129] Ibid, para 65.
[130] Ibid, para 81.
[131] Ibid, para 72.
[132] Ibid, paras 49-57.

test' to study such distortions, as stated by Ryanair.[133] The third and fourth pleas were rejected based on the Court's findings that the Commission did not need to provide details explaining the reasons behind its approval of aid based on Article 107(3)(b) and that paragraphs 6-8, 15, 17, 27, 41, and 43 of its decision (SA.56812) laid out sufficient reasoning behind its approval,[134] while it did not see it necessary to examine the third plea.[135] As a result, the General Court dismissed Ryanair's lawsuit, ordered it to pay its own costs and that of the Commission's, and ordered France and Sweden to pay for their own costs.

5.3.3. Case T-259/20 (French Scheme)

Filed in the General Court, Ryanair sued the Commission for its approval of a French state aid measure (SA.56765) that allowed airlines with a French license to defer on their payment of the civil aviation tax and monthly solidarity tax on airline tickets during March 2020 until December 2020.[136] The measure was approved by the Commission under Article 107(2)(b), where it verified that the pandemic was an exceptional occurrence, the aid was proportionate to the damages sustained by the airlines (with the aid provided being lower than the damages incurred), and that is was non-discriminatory since it included all French airlines (those with a French license).[137] Similar to the previous case, Ryanair contested that decision and called for its annulment under Article 263 TFEU based on four pleas: infringement of the principles of non-discrimination and free provision of services, error in the Commission's assessment of the proportionality of aid, infringement of the procedural rights under Article 108(2), and violation of its responsibility to state reasons.[138]

The Court began by examining whether the conditions within Article 107(2)(b) were met, confirming the Commission's rationale. The Court rejected Ryanair's argument that the state aid measure was used to "preserve the structure of the aviation sector,"[139] but rather that it was put in place to decrease the financial burden on airlines during containment measures. The Court also emphasised that the nationality of the airlines are not taken into account, but rather the institutional

[133] Ibid, paras 69-70.
[134] Ibid, paras 79-80.
[135] Ibid, para 84.
[136] Case T-259/20 *Ryanair v European Commission* [General Court 2021], para 1.
[137] Ibid, paras 4-6.
[138] Ibid, para 21.
[139] Ibid, para 33.

link they have with the member state; moreover, airlines cannot quickly transfer their operations to another member state, given the restrictions placed in Regulation No 1008/2008.[140] Thus, France ensured a permanent link between the airlines receiving aid and itself, and the first argument was rejected. The second argument was also rejected based on the Court's findings where the Commission adopted oversight measures to prevent overcompensation, the government's commitments to communicate its methodological assessment of aid, and that the damages sustained are significantly larger than the aid approved (EUR 680 million vs EUR 200.1 million).[141] Regarding the third and fourth pleas, the Court rejected both arguments citing that the Commission stated its reasons for accepting the measure within its decision and that the third plea repeats the arguments raised in the first and second plea without providing the Court with evidence; thus, the case was dismissed, and Ryanair had to pay its own costs and the Commission's.[142]

5.3.4. Case T-378/20 & T-379/20 (Swedish & Danish Scheme)

In April of 2020, Sweden and Denmark adopted a common state aid measure for SAS in the shape of a guarantee on revolving credit up to 1.5 billion SEK. While the state aid applications were separate (SA.56795 for Denmark and SA.57061 for Sweden), it is considered a joint venture between the two states in support of an airline that has operates majorly out of Sweden and Denmark. However, Ryanair filed two separate cases against the Commission pertaining to those measures.

For the first case, Denmark requested the Commission's approval for a 1.5 billion SEK measure that would compensate SAS for the cancellation of flights, which the Commission deemed as compatible under Article 107(2)(b).[143] Ryanair contested this decision and raised five arguments: the Commission breached Article 107(2)(b)'s requirement to not compensate one firm, erred in its assessment of proportionality, breached various rules on the liberalisation of air transport in the EU, infringed Ryanair's procedural rights by not opening a formal investigation, and violated Article 296(2) TFEU.[144] The Court disputed each of Ryanair's arguments, by first stating that both Articles 108(3) and 107(2)(b) do not state that states must compensate all victims of market

[140] Ibid, para 37.
[141] Ibid, paras 68-74.
[142] Ibid, paras 83-84, 87-90.
[143] Case T-378/20 *Ryanair DAC v European Commission* [General Court 2021], para 2.
[144] Ibid, para 15.

disruptions;[145] second, the type of aid given is a revolving credit, meaning that the full amount will be paid if SAS is unable to repay everything it borrowed and that the Commission was not wrong in its calculation.[146] Ryanair's third argument revolved around the principles of non-discrimination, freedom of establishment, and free provision of services, which the Court rejected in its entirety since SAS is the only airline to hold an operating license from Denmark and Ryanair failed to provide the Court with evidence supporting its pleas.[147] Similarly to previous cases, the Court rejected Ryanair's arguments pertaining to infringing procedural rights and that the Commission did not properly state its reasons, which it did within its decision.[148] Thus, the court dismissed the case and ordered Ryanair to pay its costs and the Commission's. For the second case, Ryanair filed a case against Sweden's state aid measure of loan guarantees, with the same arguments as the previous case,[149] and in the same scenario, each argument was rejected based on the same reasoning. The case was dismissed, and Ryanair had to pay its costs and the Commission's.[150]

5.3.5. Case T-388/20 (Finnish Scheme)

In this case, Ryanair opposed the Commission's approval of Finland's state aid scheme that provided Finnair with a state loan guarantee (SA.56809). Within this measure approved under Article 107(3)(b), Finland helped Finnair attain a 600-million-euro loan from a pension fund, with the guarantee triggered only if Finnair defaults on its pension fund loan.[151] Ryanair submitted four arguments for its case: infringement of Article 107(3)(b), infringement of EU principles (non-discrimination, freedom to provide services, and freedom of establishment), infringement of Article 108(2), and not stating reasons.[152] The first argument, which asserts that favouring Finnair would not help improve the Finnish economy and that the Commission failed to undertake a balancing test to measure the benefits of the aid against its consequences, was rejected by the Court, similar to Case T-238/20.[153] The second argument was also rejected after the Court stated

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[145] Ibid, para 24.
[146] Ibid, paras 41-43, 51-53.
[147] Ibid, paras 64, 81.
[148] Ibid, paras 88, 101.
[149] Case T-379/20 *Ryanair DAC v European Commission* [General Court 2021], para 16.
[150] Ibid, para 117.
[151] Case T-388/20 *Ryanair DAC v European Commission* [General Court 2021], paras 2-5.
[152] Ibid, para 25.
[153] Ibid, paras 63, 74-75.

that the Commission did not have to inspect whether a member state has to broaden its scope of beneficiaries, and that the measure was not a restriction on Ryanair's freedom to provide services or establish itself within Finland.[154] The final two arguments were also rejected after the Court found it unnecessary to continue examining them following Ryanair's inadequate reasoning; the case was dismissed, and Ryanair had to handle the Commission's and its own costs.[155]

5.3.6. Case T-465/20 (Portuguese Scheme)

In June of 2020, Portugal requested the Commission's approval for a state aid scheme in the shape of a state loan or a combination of a state guarantee and loan, with a maximum amount of 1.2 billion euros. This measure (SA.57369) was targeted towards TAP Air Portugal, where the state owned 50% of shares at the time, and applied under Article 107(3)(c).[156] Ryanair filed a case against the Commission in the General Court and submitted five arguments: misapplying points 8 and 22 of the Guidelines on State Aid for Rescuing and Restructuring Non-financial Undertakings in Difficulty, infringing Article 107(3)(c), violating key EU law principles, misapplying Article 108(2), and breaching its duty to state its reasoning.[157] The Court began by analysing the final plea which was the Commission's failure to state its reasoning behind accepting the state aid request. Under this plea, Ryanair claims that the Commission did not study whether TAP's difficulties were too grave and unable to be handled by the group itself, without government aid.[158] Ryanair continued that the Commission continued to be unable to provide adequate reasons to support its approval or showcase TAP's necessity to receive the aid.[159]

The Court started by stating that Article 296 TFEU requires the statement of reasons, detailing why a state aid measure is reasonable, necessary, and appropriate for the issue being dealt with. The Court specified that the Commission did not indicate whether the airline belonged to a group, which negatively impacted its case and subsequent investigation given that there are additional conditions set for aid given to groups.[160] Within the Commission's decision, the paragraphs still do not indicate whether TAP's liquidity difficulties were due to the entire group or to study the

[154] Ibid, paras 88, 102.
[155] Ibid, paras 109, 125-128.
[156] Case T-465/20 *Ryanair DAC v European Commission* [General Court 2021], paras 1-3.
[157] Ibid, para 26.
[158] Ibid, para 32.
[159] Ibid, para 33.
[160] Ibid, paras 38-47.

other shareholders within the group's financial situations.[161] The Commission was unable to showcase whether TAP was eligible for aid under the criteria set out in the Framework under previous financial difficulty. As a result, the Court found that the fifth argument is well-founded and that there is no need to review the rest of the arguments. The Court ordered the annulment of the Commission's decision, while a new decision is to be made by the Commission, with the Commission paying for its costs and those of Ryanair.[162]

5.3.7. Case T-628/20 (Spanish Scheme)

Within this case, Ryanair opposed Spain's state aid measure in the form of a recapitalisation fund and filed a case against the Commission. Spain requested the Commission's approval for a state aid scheme in July of 2020 to create a solvency support fund for Spain's vital firms, necessary for the economy. The Fund was not limited to airlines and included any firm necessary for the endurance of Spain's economy, with a budget of 10 billion euros and approximately 25 million euros for each firm (with the exception of 250 million euros given to certain beneficiaries which require the Commission's individual approval).[163] For firms to benefit from the fund, they need to be established and operating in Spain, have systemic importance to the Spanish economy, present a plan for reimbursement, and be at risk of serious difficulties or ceasing of operations.[164]

The case involved five arguments: infringement of key EU principles, not conducting a balancing test on the economy and possible distortion of competition, not classifying the measure correctly, infringing on Ryanair's procedural rights, and not stating reasons.[165] The Court rejected Ryanair's arguments and dismissed the case. The first argument was rejected based on the same grounds that previous cases included, while the second argument was refused after the Court reassured Ryanair that Article 107(3)(b) does not require a balancing test.[166] The third argument, a novel argument not presented previously, claims that the measure was incorrectly classified as an aid scheme. The Court rejected this claims as "unfounded," establishing that the measure has an exhaustive set of criteria to determine eligibility of firms for aid, requiring all conditions to be met (which also

[161] Ibid, para 52.
[162] Ibid, paras 60-64.
[163] Case T-628/20 *Ryanair DAC v European Commission* [General Court 2021], paras 1-3.
[164] Ibid, para 4.
[165] Ibid, para 20.
[166] Ibid, paras 52, 62, 70.

abides by the list set within the Temporary Framework).[167] The fourth and fifth arguments were rejected for the same reasons as in previous cases employing the same pleas. Thus, Ryanair had to bear the Commission's and its own costs after losing the case.

5.3.8. Case T-643/20 (Dutch Scheme)

Ryanair's case against the Commission, specifying its approval of the Netherlands' state aid scheme (SA.57116), follows the same arguments presented in its previous case against the Portuguese state aid measure. The Netherlands provided KLM with a state guarantee for loans and a state-subordinated loan, under Article 107(3)(b), where a total of 3.4 billion euros were awarded to ensure KLM's liquidity during the pandemic.[168] Ryanair opposed the Commission's position and filed a case against it with the General Court while submitting five arguments. The first argument states that the Commission was wrong when it did not consider the 7 billion euros in aid that was granted by France to Air France, which is owned by the Air France-KLM group along with KLM.[169] The remaining arguments were similar to the arguments presented in Ryanair's case against the Portuguese scheme: breaching key EU legal principles, misapplying Article 107(3)(b), not opening a formal investigative procedure, and not stating its reasons based on Article 296 TFEU.[170]

Ryanair argued that it had grounds to file this case, given that KLM received the aid to help mitigate the effects of the pandemic, while Ryanair, the third largest carrier in the Netherlands, did not receive such benefits, which the Court found valid and proceeded with the case.[171] Such an admission allowed for the admissibility of the fourth argument, whereby Ryanair believed that its procedural rights under Article 108(2) have been violated.[172] This argument goes hand-in-hand with Ryanair's fifth plea that the Commission failed in its duty to state reasons, prompting the Court to examine it first. Ryanair emphasised that the Commission did not express why it did not consider the aid granted to Air France and its impact on the Air France-KLM group and, ultimately, KLM, which Ryanair believed to have helped the entirety of the group and its subsidiaries. [173] The

[167] Ibid, paras 107, 110-111.
[168] Case T-643/20 *Ryanair DAC v European Commission* [General Court 2021], para 1.
[169] Ibid, paras 2, 19.
[170] Ibid, para 19.
[171] Ibid, para 21.
[172] Ibid, paras 28-30.
[173] Ibid, para 36.

Court ruled that the Commission's decision does not include whether the aid authorised for Air France through its parent company could also be used to help KLM,[174] and, as a result, the Commission has to investigate thoroughly the aid notified by the Netherlands along with other related aid measures to ensure that it has all the necessary information when reaching a decision.[175] Moreover, the Court found that the parent company was involved in both aid measures concerning its subsidiaries, Air France and KLM, given that the transaction's contractual structure does not include clauses that differentiate each entity's rights, obligations, and position within the aid measure that would ensure that the aid reaches its target entity and not benefit other firms within.[176] Thus, the Court found that the Commission failed in establishing its reasons to accept the aid given the facts of the case, which vitiates the aid measure it approved, and moved towards annulling the Commission's decision, without considering the other pleas submitted.[177] With the decision annulled, the Court concluded that the Commission had to bear its own costs and Ryanair's and adopt a new decision under Article 108 TFEU.[178]

5.3.9. Case T-677/20 (Austrian Scheme)

For the final settled case, Ryanair contested the Commission's approval of Austria's state aid given to Austrian Airlines as a subordinated loan. In collaboration with Laudamotion GmbH, Ryanair filed a case in the General Court against the Commission's decision. The contested state aid decision (SA.57539) was based on Article 107(2)(b) where 150 million euros where granted to Austrian Airlines as a subordinated loan convertible to a grant; an additional measure requested by Germany (SA.56714) provided Austrian Airlines' parent company, Lufthansa Group (DLH), with a state guarantee on 80% of a 3-billion-euro loan.[179] Moreover, several other measures benefitting Austrian businesses and DLH (SA.56981, SA.57520, SA.57153, etc.) were addressed in the case, given that the Commission ruled that aid given by other member states to firms within the DLH would be subtracted from the separate aid awarded to DLH (6 billion euros).[180]

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[174] Ibid, para 43.
[175] Ibid, para 49.
[176] Ibid, paras 59-61, 63-65.
[177] Ibid, paras 76-78.
[178] Ibid, paras 84-85.
[179] Case T-677/20 *Ryanair DAC and Laudamotion GmbH v European Commission* [General Court 2021], paras 2-7.
[180] Ibid, para 9.

Ryanair submitted five arguments for its case. The first argument stated that the Commission did not account for the aid given "to or from 'Lufthansa.'"[181] The second argument put forth alleged an infringement of the EU's key principles, while the third argument claims that the Commission erred in its assessment and misapplied Article 107(2)(b).[182] The fourth and fifth arguments tackled not initiating a formal procedure and not stating reasons.[183] The Court rejected the first argument on the grounds that the Commission had taken into account the aid granted to DLH within its decision, with aid from other member states being deducted from DLH's total aid amount.[184] The second argument was rejected, following the same pattern used by the Court in describing the reasoning behind rejecting them in previous cases. The third argument was then rejected, since the Commission already took into account the possible advantage that Austrian Airlines gained from its individual state aid and that granted to DLH, and as a result, fulfilled its duty in that regard.[185] The fourth and fifth argument tackling procedural rights and stating reasons were also rejected, following the arguments put forth in previous cases. Thus, the case was dismissed, and Ryanair and Laudamotion GmbH had to handle their own costs and the Commission's.

5.4. Summary and Conclusion

The General Court has reached a decision on ten of Ryanair's sixteen cases against the Commission, of which nine have been analysed in the previous section, given that they tackle national carriers while the tenth case pertained to Condor airlines, a budget airline based in Germany. Ryanair presented similar arguments throughout its cases, mainly arguing that the Commission violated EU legal principles, did not conduct a thorough investigation, did not state its reasons for approval, misapplied the Temporary Framework, allowing states to discriminate between airlines, and infringing on Ryanair's procedural rights. While the Court rejected Ryanair's arguments in most cases, two of the cases studied were decided in favour of Ryanair, specifically for its argument regarding the Commission's failure to state its reasons properly.

[181] Ibid, para 25.
[182] Ibid, para 25.
[183] Ibid, para 25.
[184] Ibid, paras 31-35, 38-42.
[185] Ibid, paras 92-94, 119-120.

6. Analysis and Conclusion

The Covid-19 pandemic has impacted every aspect of the EU's economy, with businesses unable to weather the resulting economic downturn had it not been for state aid. While the EU has developed a single market over the years and free movement between member states, governments will continue to help their own businesses or those that have a profound impact on their economy. As a result, states tailored their state aid programs to businesses that operate within their territory or hold operating licenses issued by them. The Commission approved of such distinction, seeing that states cannot finance all businesses operating within the EU, and that not all member states decided to supply state aid (or limited their aid to specific sectors). Thus, many EU member states granted state aid to their own airlines (those holding an operating license from that state), whether they were national carriers or budget airlines, according to the strict criteria expressed in the Temporary Framework. The Commission was quick in approving state aid notifications from states, given the gravity of the pandemic and its repercussions. Containment measures and border closures had a grounding effect on airlines, with most flights cancelled and travel between states almost extinguished. Aid to airlines made up 5% of the total state aid approved, with each state helping its own airlines. Ryanair opposed those state aid measures, claiming that it targeted national carriers mostly and discriminated between airlines based on their nationality.

Ryanair's cases have been a significant challenge to the Commission's numerous approvals of state aid notifications from member states, which poses the question of whether Ryanair had hoped to receive state aid from its own government, Ireland. While Ryanair was vehemently opposed to state aid distributed among EU airlines, it benefitted from the UK's state aid measures and accepted a loan that it repaid within the agreed upon period. However, Ryanair not only opposed state aid given in the form of grants or tax exemptions, but it also rejected aid that was given in the form of state guaranteed loans or aid that was stipulated to be repaid in a specific timeframe. Thus, why would Ryanair be entitled to state aid from the UK government even though it is based in Ireland, while other airlines should not benefit from state aid from their own governments? When arguing that the Commission violated the principle of non-discrimination, Ryanair positioned itself within a state's economy and argued that by not receiving state aid from that government, it was being discriminated against based on its nationality.[186] However, the Court reaffirmed the Commission's position that states were right to have limited state aid to airlines with a national license, given their direct effects on the state's economy, and that this limitation does not violate the principle of non-discrimination.

The cases that have been dismissed follow the same pattern. Ryanair presented mostly the same pleas in all of its cases, which the Court generally rejected given that Ryanair could not provide the evidence to support its arguments. Ryanair's arguments of the Commission misapplying Articles 107(2)(b) or 107(3)(b) were rejected by the Court, maintaining that the Temporary Framework and the Articles do not include specific clauses or criteria that prohibit states from narrowing state aid towards their national firms and that Ryanair's arguments in that regard were not plausible. Ryanair's pleas that the Commission violated key principles of EU law were also rejected given that member states were entitled to distributing aid among their national firms and that does not violate the freedom of establishment or provision of services, since none of the member states were barred from handing state aid. Simply, the Court argues that Ryanair should not expect state aid from other member states, when it could simply request aid from its own government, Ireland. Ryanair should have notified its own government of its need for state aid on the grounds that the pandemic has negatively impacted operations, its liquidity is at stake, and that this state aid would help level the playing field with other airlines and not distort competition. While the Court did agree with Ryanair that state aid could distort competition, it deemed it necessary to given the repercussions of Covid-19. Thus, Ryanair should have turned to its own government, instead of focusing on what other airlines were receiving from their states.

The two cases that favoured Ryanair were decided based on the same argument: the Commission did not properly state its reasons for approving the state aid. Ryanair believed that the Commission did not provide enough justification in its measures that warrant the approval of the aid. Had the Commission elaborated on its decision further and connected past aid to parent companies with the current aid being approved, it seems unlikely that the outcome would remain the same. In the Dutch aid case, the Commission did not connect the aid authorised towards Air France and Air

[186] In the previous cases studied, Ryanair argued that by limiting state aid to airlines with an operating license issued in that state, the state is discriminating against airlines that have a major share in its economy, such as Ryanair being the third largest airline in France (see Case T-259/20 *Ryanair DAC v European Commission* [GC 2021]).

France-KLM holding company to the current aid being approved towards KLM. Ryanair argued that the aid measures approved benefitted all firms involved with Air France through its holding company, including KLM. The Court agreed with Ryanair's argument under the pretense that the Commission should have expanded on its decision further and investigated whether the aid given to one airline would benefit another, and ordered it to pass a new decision on the matter within two months. This conclusion does not tell whether the Court agreed with Ryanair's other pleas given that they were not studied, and it also gives the Commission time to amend and improves its decision, instead of rejecting it entirely. The Portuguese aid scheme case reaches a similar conclusion, where the Commission was given time to amend its decision by justifying its reasons for approval clearly and elaborately. The Commission needed to examine whether TAP's financial difficulties fall within the scope of the Framework and the reasons behind such difficulties, whether it was structure or external influences. Thus, the Court's decision to annul the Commission's decisions were not because the decisions violated the Temporary Framework, distorted competition, or flagrantly discriminated between airlines, but rather because the Commission did not conduct its due diligence and explained its reasoning clearly.

In conclusion, this thesis answers the research questions posed previously of how member states applied the Temporary Framework on their airlines and whether they discriminated between airlines. Member states provided their airlines with state aid either as compensation for damages caused by an exceptional circumstance (Covid-19 pandemic) or to rectify a market failure, which fall under Articles 107(2)(b) and 107(3)(b), respectively. Airlines were provided with state aid in four main forms: grants, recapitalisation methods, loans, or guarantees. Moreover, state aid was typically granted to all of a state's national airlines (including its budget airlines); thus, member states did not favour their national carriers over their budget airlines. In addition, some state aid schemes benefitted all interested airlines, such as measures by Denmark, Cyprus, and Slovenia.[187] Ryanair's arguments that the states discriminated between national and non-national airlines was rejected by the Court, after it affirmed a state's right to help its airlines (with a national operating license) given their effects on the state's economy and in order to maintain connectivity between the state and other states and areas. Ryanair targeted national carriers in its cases because it views them as competition, inefficient, and not deserving of aid during the pandemic if they cannot

[187] See Table 3: "State Aid to Airlines Under Article 107(3)(b) TFEU."

survive on their own, as Ryanair's CEO pointed out.[188] Ryanair has lost the majority of the cases it has filed and appealed them to the Court of Justice, which is costing Ryanair a significant amount, since it has to pay for its own costs and the Commission's, which begs the question of why Ryanair is adamant on fighting every state aid decision authorised by the Commission for airlines. Is Ryanair employing a business strategy that would help garner media attention and thus increase sales, or is Ryanair starting a conversation about the effects of state aid for future events? Ryanair's motive behind those cases may not be released to the public, but its actions and its CEO's brazen comments have stirred a media frenzy around the topic of state aid and the performance of national carriers and budget airlines.

Ryanair believed that it was not fair for states to grant aid to their own airlines and not other airlines, which would distort competition in the single market. From a legal standpoint, state aid rules have been put in place to prevent states from subsidizing their own firms; however, those rules are applied when states want to supply aid on individual cases. When it comes to exceptional circumstances that disrupt the entirety of the EU's single market, the Commission lays out a framework that details to member states how to distribute aid among firms in a non-discriminatory manner and in a way that does not distort competition (e.g., the September 11 attacks). The Court reaffirmed the Commission's position that legally, states have been authorised to limit state aid to their own firms, citing that it is fair for states to operate in that manner given that their resources are finite and should go towards firms that have a direct influence on their economies. Nevertheless, from a moral perspective, it appears that limiting state aid towards local firms is not fair to other member states' firms given the wide discrepancy in member states' resources and budgets. For example, Germany was able to provide 45% of its GDP in state aid, while smaller countries, like Romania and Latvia, only provided 2% of their GDP in aid during the same time period.[189] Such a difference in resources could be seen as morally unfair given some states' ability to provide for all of its firms, while other states' had to prioritise other areas within the budget, such as healthcare or education, instead of bailing out their firms. Finally, in the event of future

[188] Neate, "Ryanair to Challenge EU Court Rulings on French and Swedish State Aid" (*The Guardian* 2021); Euronews, "Ryanair's O'Leary Slams 'State Aid Junkies Lufthansa and Air France'" (*Euronews* May 7, 2020) <https://www.euronews.com/2020/05/05/ryanair-ceo-michael-o-leary-says-eu-transport-chief-talking-nonsense-on-state-aid> accessed 30 April 2022.
[189] See Figure 2: "Aid Approved By the Commission Across the EU Relative to the Country's GDP, 12 March 2020 to 12 June 2020."

crises, the Commission should look into the possibility of setting a cap on total state aid expenditure by each state to try and level the playing field between member states, and it should conduct a thorough investigation into state aid notifications to be able to state and justify its reasons and ensure that state aid is being distributed fairly among firms.

Appendix

Case filed in the General Court	Decision of the Case	Appeal filed in the Court of Justice
Case T-238/20 (Swedish Scheme)	Ryanair lost; appeal filed	C-209/21, in progress
Case T-259/20 (French Scheme)	Ryanair lost; appeal filed	C-210/21, in progress
Case T-378/20 (Swedish Scheme)	Ryanair lost; appeal filed	C-321/21, in progress
Case T-379/20 (Danish Scheme)	Ryanair lost; appeal filed	C-320/21, in progress
Case T-388/20 (Finnish Scheme)	Ryanair lost; appeal filed	C-353/21, in progress
Case T-465/20 (Portuguese Scheme)	Ryanair won; no appeal filed	-
Case T-628/20 (Spanish Scheme)	Ryanair lost; appeal filed	C-441/21, in progress
Case T-643/20 (Dutch Scheme)	Ryanair won; no appeal filed	-
Case T-657/20 (Finnish Scheme II)	Case in progress	-
Case T-677/20 (Austrian Scheme)	Ryanair lost; appeal filed	C-591/21, in progress
Case T-737/20 (Latvian Scheme)	Case in progress	-
Case T-769/20 (Estonian Scheme)	Case in progress	-
Case T-14/21 (Belgian Scheme)	Case in progress	-
Case T-34/21 (German Scheme)	Case in progress	-

Case T-111/21 (Croatian Scheme)	Case in progress	-
Case T-216/21 (French Scheme)	Case in progress	-
Case T-225/21 (Italian Scheme)	Case in progress	-
Case T-238/21 (Danish & Swedish Scheme)	Case in progress	-
Case T-268/21 (Italian Scheme)	Case in progress	-
Case T-333/21 (Italian Scheme II)	Case in progress	-
Case T-340/21 (Greek Scheme)	Case in progress	-
Case T-398/21 (Polish Scheme)	Case in progress	-
Case T-494/21 (French Scheme)	Case in progress	-
Case T-499/21 (Portuguese Scheme)	Case in progress	-
Case T-743/21 (Portuguese Scheme)	Case in progress	-
Case T-146/22 (Dutch Scheme)	Case in progress	-
Case T-164/22	Case in progress	-
Case T-185/22 (Portuguese Scheme III)	Case in progress	-

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