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**Subject: State Aid SA.59913 – France
COVID-19 – Recapitalisation of Air France and the Air France –
KLM Holding**

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Excellency,

1. PROCEDURE

- (1) Following pre-notification contacts¹, by electronic notification of 31 March 2021, France (also referred to as the “State”) notified aid in the form of a recapitalisation of Société Air France S.A. (“Air France”) and Air France-KLM S.A. (the “Holding”) (the “Measure”) under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, as amended (the “Temporary Framework”)². The Measure aims at restoring the balance sheet position and liquidity of Air France in the exceptional situation caused by the COVID-19 pandemic.

¹ France sent a first note informing the Commission of the planned recapitalisation on 2 December 2020. The Commission sent several information requests to France. In answer to those requests, France provided further sets of information on 8, 10, 11, 14, 15, 16 and 20 December 2020, 7, 12, 20, 21, 22, 25 and 28 January, 2, 9, 15, 16, 17, 19, 22, 23 and 24 February, 1, 2, 4, 9, 12, 15, 16, 17, 18, 20, 21, 24, 25, 26, 28, 29, 30 and 31 March and 1 and 2 April 2021. The Measure was also discussed between France and the Commission services in the context of several calls during the course of December 2020 and in January, February and March 2021.

² Communication from the Commission - Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak, 19 March 2020, OJ C 91I, 20.3.2020, p. 1, as amended by Communication from the Commission C(2020) 2215 final of 3 April 2020 on the Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, OJ C 112I, 4.4.2020, p. 1, by Communication from the Commission C(2020) 3156 final of 8 May 2020 on the Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, OJ C 164, 13.5.2020, p. 3, by Communication from the Commission C(2020) 4509 final of 29 June 2020 on the Third Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, OJ C 218, 2.7.2020, p. 3, by Communication from the Commission C(2020) 7127 final of 13 October 2020 on the Fourth Amendment of 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, OJ C 340 I, 13.10.2020, p. 1, and by Communication from the Commission C(2021) 564 final of 28 January 2021 on the Fifth 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, OJ C 34, 1.2.2021, p. 6.

- (2) France exceptionally agrees to waive its rights deriving from Article 342 of the Treaty on the Functioning of the European Union (TFEU), in conjunction with Article 3 of Regulation 1/1958³, and to have this Decision adopted and notified in English. France transmitted the language waiver on 24 March 2021.

2. DESCRIPTION OF THE MEASURE

- (3) The Measure follows the grant by France to Air France of a State guarantee (the “State Guarantee”) and a shareholder loan (the “State Loan”) that the Commission approved in its decision of 4 May 2020⁴ (the “State Guarantee and Loan Decision”) as compatible with the internal market under Article 107(3)(b) TFEU.

2.1. The impact of the COVID-19 crisis

- (4) According to the French authorities, Air France was severely affected by the COVID-19 crisis and the significant fall in air traffic it caused. As Air France is the main subsidiary of the Holding, the negative effects of the COVID-19 crisis on Air France also affected the Holding.
- (5) France explained that the COVID-19 crisis started to affect the French air transport sector from the second half of February 2020. In particular, since February 2020, French authorities issued recommendations to stop travelling from France to areas affected by the virus, and adopted measures to close borders and restrict population movements.
- (6) The COVID-19 containment measures adopted by the French authorities included, among other things, a national confinement from 17 March 2020 (phased out in two successive stages starting on 11 May and 2 June 2020), as well as a second national confinement from 28 October 2020 (phased out as from 15 December 2020). Local confinements were then implemented as of 26 February 2021 and further expanded as of 19 March 2021. Another confinement has been announced on 31 March 2021 and is still in place at the date of this Decision.
- (7) France also implemented border restriction measures, including the closure of its borders between 17 March and 15 June 2020. Since then, France progressively partly reopened its borders, but restrictions remained in place. At the end of October 2020, entry onto French territory from a number of authorised countries was made conditional on several factors such as the absence of COVID-19 symptoms and a negative COVID-19 test.
- (8) From 31 January 2021, all entry into and exit from France to or from a third country to the European Union have been prohibited, unless there are compelling reasons. In addition, entries into France, including for the European Union, are

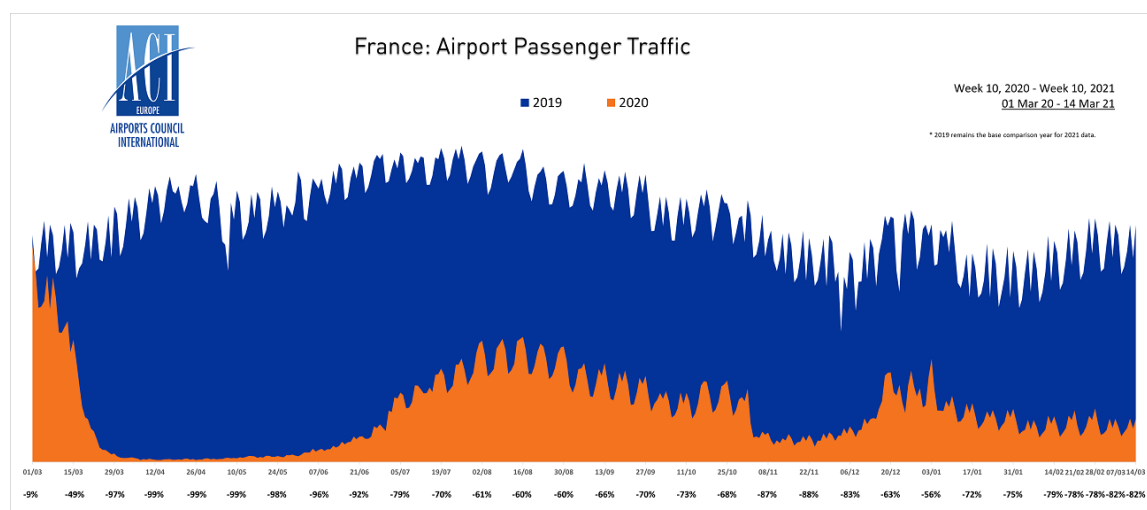
³ Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

⁴ Decision of the Commission of 4 May 2020, SA.57082 (2020/N) – France – COVID-19 – Encadrement temporaire 107(3)(b) – Garantie et prêt d’actionnaire au bénéfice d’Air France (as corrected by the correcting decision of 17 December 2020), paras. 60-87.

subject to the presentation of a negative PCR test. Finally, travel in overseas areas is allowed only for compelling reasons.

- (9) Other countries also adopted COVID-19 containment measures and travel restrictions. France submits that on 22 March 2021, out of the 84 countries served by Air France (with direct flights): (i) entry into 17 countries was either restricted to residents/nationals or prohibited; and (ii) entry into 63 countries was accessible to French citizens but only subject to (a) carrying out of a COVID-19 test (in 33 countries) or (b) compliance with a quarantine (in 30 countries)⁵. In addition, several countries impose health formalities on crew members (tests, hotel confinement, etc.).
- (10) As a result, between 1 March 2020 and 14 February 2021 (included), and despite a slight increase of air traffic during the summer months of 2020, France experienced a 80% decrease in passenger numbers, as compared to 2019, as shown in Figure 1.

Figure 1 – Evolution of airport passenger traffic in France, in 2019 and 2020/2021



Source: Airports Council International EUROPE (ACI EUROPE), 23 March 2021, available at <https://www.aci-europe.org/european-airports-passenger-traffic>

- (11) As regards Air France specifically, France further explained that, also as a result of the COVID-19 outbreak, the company drastically reduced its offer in 2020. This is shown in Figure 2, in terms of available seat kilometre (“ASK”) (indicating the capacity in passenger seats times flown kilometres), and in Figure 3, in terms of numbers of flights.

Figure 2 – Evolution of Air France’s ASK, in 2019 and 2020

[...]

Source: France, internal information from Air France.

⁵ In addition, entry into three countries was subject to administrative formalities (such as a QR code, an insurance proof or a form to fill in before departure). Only one country imposed no administrative formality.

Figure 3 – Evolution of Air France’s number of flights, in 2019 and 2020

[...]

Source: France, internal information from Air France.

- (12) France added that, for 2021 and the coming years, Air France expects that trend to continue, with a decrease of ASKs of around [...] % in 2021 and [...] % in 2022, as compared to 2019. By comparison, Air France’s business plan from December 2019 expected an increase of ASKs in the coming years. That difference is shown in Table 1 and Figure 4.

Table 1 – Comparison of Air France’s business plans, in December 2019 and December 2020

Capacité groupe AF		2019	2020	2021	2022
Business Plan Decembre 2019	ASK (millions)	[150 000- 250 000]	[150 000- 250 000]	[150 000- 250 000]	[150 000- 250 000]
	vs 2019		+ [0-5] %	+ [5-10] %	+ [5-10] %
Business Plan Decembre 2020	ASK (millions)	[100 000- 200 000]	[0-100 000]	[100 000- 200 000]	[100 000- 200 000]
	vs 2019		- [50-60] %	- [40-50] %	- [5-10] %
New plan vs old plan			- [50-60] %	- [40-50] %	- [10-20] %

Source: France, internal information from Air France.

Figure 4 – Evolution of Air France’s ASK, in 2019 and 2021 (estimates)

[...]

Source: France, internal information from Air France.

- (13) France further explained that, on the routes still operated by Air France, the average occupation rates of seats (also called load factor) drastically decreased, as compared to 2019 levels. This is shown in Figure 5 for 2020. In 2021, the load factor stayed at [...] % in January, [...] % in February and [...] % in March.

Figure 5 – Average monthly load factor of Air France, in 2019 and 2020

[...]

Source: France, internal information from Air France.

- (14) France submits that the COVID-19 crisis has severely damaged the financial position of Air France and the Holding, as it is evident from internal documents received from the French authorities. Air France and the Holding faced a significant reduction and/or suspension of services, resulting in high operating losses due to the measures taken by Member States and third countries to tackle

the COVID-19 pandemic⁶. Based on the available information, Air France incurred a net loss of EUR 5.5 billion for the year 2020 (compared to a net loss of EUR 0.1 billion in the year 2019). This resulted in a negative equity position for Air France of EUR 5.4 billion at the end of December 2020 (compared to a positive equity position of 0.2 billion at the end of December 2019). The Holding incurred a net loss of EUR 7.1 billion for the year 2020 (compared to a net profit of EUR 0.3 billion in 2019). This resulted in a negative equity position for the Holding of EUR 5.4 billion at the end of December 2020 (compared to a positive equity position of EUR 2.3 billion at the end of December 2019).

- (15) The French authorities further submit that, to mitigate as much as possible the financial impact of the COVID-19 pandemic, Air France has undertaken several operational, personnel and financial measures.
- (a) Immediately after the start of the outbreak, in mid-March 2020, Air France grounded its fleet of A380 and drastically reduced its activities. In the first half of 2020, a total of 17 aircraft were permanently removed from Air France's fleets, for 6 new aircraft delivered.
 - (b) France explained that, in addition to a significant reduction of its activity as of mid-March, Air France took several measures to further reduce its net labour costs. In particular, Air France (i) used the partial activity mechanism (*activité partielle*) as of mid-March 2020, (ii) froze general and individual salary increases, (iii) suspended the negotiations on the profit-sharing arrangements, and (iv) did not renew temporary contracts. On 3 July 2020, Air France also announced measures to adjust its workforce, through job cuts (around 6 560 out of 41 000 by the end of 2022) and a rescaling of its subsidiaries' activities (including a reduction of 1 020 jobs out of 2 420 by the end of 2020 for its subsidiary HOP!).
 - (c) On 30 October 2020, a further restructuring plan was announced, including a restructuring of market operations, an optimisation of external expenditure, a conversion of support functions, an adaptation of operation and a modernisation of the fleet. A total reduction of 8 500 jobs by the end of 2022 (for Air France and HOP!) is foreseen. Those measures are expected to generate EUR 800 million in cost reduction by 2021, and EUR 1.2 billion by 2022.
 - (d) Following the above, Air France's voluntary departure plan was implemented as of January 2021. In March 2021, a first step was completed with around 3200 applications received, of which 2300 were accepted. These people will leave Air France in 2021. The second and third stages will be conducted in the following weeks, leading to a total of around 3600 voluntary departures from Air France.

2.2. Objective of the Measure

- (16) As explained above, the COVID-19 outbreak has severely affected the financial position of Air France and of the Holding. The Measure forms part of a broader

⁶ Figure 2 illustrates the decline in passenger traffic in the year 2020 for the Air France-KLM Group, compared to the previous year.

plan in favour of Air France and of the Holding, which aims to ensure that sufficient equity remains available to Air France and to the Holding and that the disruptions caused by the COVID-19 outbreak do not undermine the viability of Air France and the Holding.

- (17) In particular, France explained, and the Commission already acknowledged⁷, that Air France – and thus the Holding – plays an essential role in the French economy and, more broadly, the European economy. That key role is expressed in the following elements: (i) Air France’s weight in the economy and employment at national and regional level; (ii) Air France’s contribution to territorial connectivity in France and Europe; (iii) Air France’s special role in the context of the COVID-19 crisis; and (iv) Air France’s key role in exiting the economic crisis. For the same reasons, the Holding plays an essential role in the French and European economies, as it is the head of this pan-European airline group and contributes to providing capital and funding to its subsidiaries thereby enabling them to operate.
- (18) The Measure will be used to initiate the reconstitution of the equity position of the Beneficiary, in particular Air France. It is a first step that is aimed at preparing a broader recapitalisation, that could take place later on and [...]. That first step will cover only part of the capital losses suffered by the Beneficiary since the beginning of the COVID-19 crisis, while significantly improving its viability. France confirmed that, to the extent that the second recapitalisation step involves State aid, it will be duly notified to the Commission.
- (19) The need for a first stage of recapitalisation is a direct result of the significant financial difficulties that negatively affect the possibility for Air France and the Holding to find financing on debt or equity capital markets at affordable terms and in the timeframe needed to avoid triggering insolvency proceedings. This is a necessary condition to ensure the viability of the Beneficiary.
- (20) Before the COVID-19 crisis, the sources of financing for the Beneficiary mainly consisted of:
- (a) long-term debt and operating leases secured by collateral in the form of own assets (e.g. aircraft);
 - (b) short- to medium-term credit lines (e.g. revolving credit facilities, term loans); and
 - (c) unsecured medium- to long-term financing from capital markets issued mostly at the Holding level (e.g. public and private fixed-income securities, equity capital).
- (21) For the upcoming years, according to France, the implications of the impaired equity position and the large reduction in free cash flows of the Beneficiary are expected to be as follows:

⁷ Recitals 60 to 87 of the State Guarantee and Loan Decision.

- (a) difficulty to obtain secured financing and operating leases to support its operational needs;⁸
 - (b) difficulty to obtain short- to medium-term credit lines (e.g. revolving credit facilities, term loans)⁹ and carry out short- and medium-term market operations (e.g. currency exchange, hedging contracts)¹⁰; and
 - (c) difficulty to obtain unsecured debt¹¹ or equity capital¹² in sufficient nominal amounts to restore its equity position, support additional operational needs or cover losses in the years to come, or replenish a minimal cash buffer position for working capital requirement needs.
- (22) The impairment of the financial situation of the Beneficiary increased its capital requirements, which according to the French authorities cannot be covered on the capital market or by alternative financing options. Against that background, France intends to support the Beneficiary with the Measure aimed at restoring its balance sheet position and liquidity and to prevent a likely insolvency that could trigger an uncontrolled and disorderly process and lead to the collapse of the Beneficiary, with far-reaching effects on the entire aviation sector.
- (23) In that respect, France explained that the existing horizontal measures already adopted by France to mitigate the impact of the COVID-19 crisis are not sufficient to cover the needs of Air France and the Holding. In particular, France adopted horizontal schemes (such as the measures approved by the Commission with its decisions in cases SA.56709¹³, SA.56823¹⁴, SA.56985¹⁵ and SA.57695¹⁶)

⁸ According to France, Air France no longer [...]. The Holding may only obtain such financing in the form of [...], yet at [...].

⁹ According to France, the Beneficiary is not able to secure additional credit lines to cover for operating activities and exceptional items as long as its capital structure is not improved.

¹⁰ According to France, as long as its capital structure is not improved, a number of banking partners have [...].

¹¹ Since the Holding does not have a credit rating, it is part of a niche bond market for unrated issuers. According to France, the total nominal amount of issuances in the bond market for unrated issuers was approximately EUR 10 billion in 2020, compared to close to EUR 400 billion in the bond market for issuers with an investment grade rating (i.e. bonds with a rating of BBB- and above according to Standard & Poor's and Fitch, or Baa3 and according to Moody's). In addition, France argues that the bond market for unrated issuers is prone to increased volatility in times of crisis. This is evidenced by the market yield for a 5-year unsecured bond of EUR 750 million that was issued by the Holding increasing from 1.875% in January 2020 up to 11% in October 2020.

¹² According to France, the amount of equity capital to be replenished is particularly significant in the short term. Due to the severe effects of the COVID-19 crisis on the aviation sector, it may not be likely that [...].

¹³ Decision of the Commission of 21 March 2020, SA.56709 (2020/N) – France – COVID-19: Plan de sécurisation du financement des entreprises.

¹⁴ Decision of the Commission of 30 March 2020, SA.56823 (2020/N) – France – COVID-19 - French Solidarity Fund - Scheme for enterprises in temporary difficulties due to COVID-19.

¹⁵ Decision of the Commission of 20 April 2020, SA.56985 (2020/N) – France – COVID-19 - Régime cadre temporaire au soutien des entreprises dans la crise du Covid 19.

as well as specific measures for the air transport sector (such as the deferral of tax payment approved by the Commission with its decision in case SA.56765¹⁷). Air France also already received a State Guarantee and a State Loan, as approved in the State Guarantee and Loan Decision. France explained that, while those measures covered part of the Beneficiary's liquidity needs, they were insufficient to restore the balance sheet position to restore its solvency. Air France registered a negative result of about EUR -5.5 billion, while the Holding registered a negative result of EUR -7.1 billion in 2020. In turn, this resulted in negative equity at 31 December 2020 of EUR -5.4 billion for Air France and EUR -5.4 billion for the Holding. The objective of the Measure is to remedy that situation by restoring the equity of Air France and the Holding.

2.3. Nature and form of aid

- (24) The Measure provides aid in the form of a recapitalisation for a total amount of up to EUR 4 billion by means of two instruments: (i) conversion of the EUR 3 billion State Loan into a hybrid instrument (the "Hybrid Instrument"), and (ii) State participation in the planned share capital increase up to EUR 1 billion (the "Equity Participation"). France estimates that private participation in the share capital increase will likely reduce the State participation in the share capital increase to EUR 400-500 million. Those two instruments are further described in section 2.8.
- (25) France explains that the Measure is only the first step of a broader recapitalisation plan. The objective of the Measure is to strengthen the financial profile of Air France in view of a second recapitalisation step. That second recapitalisation step could take place later on and [...].

2.4. Legal basis

- (26) The Hybrid Instrument will be based on a subscription agreement, to be signed between the Holding and the French State.
- (27) The Equity Participation will be based on article 102 of the law n° 2020-1721 of 29 December 2020 ("*loi de finances pour 2021*"). It will also be the subject of a decision of the French ministry for economy and finance, based on article 24 of Ordonnance n° 2014-948 of 29 August 2014 ("*ordonnance relative à la gouvernance et aux opérations sur les capital des sociétés à participation publique*").

2.5. Administration of the Measure

- (28) The Measure will be granted by the State and administrated by the '*Agence des Participations de l'Etat*' ("APE"), the State agency in charge of France's shareholdings.

¹⁶ Decision of the Commission of 30 June 2020, SA.57695 (2020/N) – France – COVID-19: Régime d'aides sous la forme de prêts publics subordonnés.

¹⁷ Decision of the Commission of 31 March 2020, SA.56765 (2020/N) – France – COVID-19: Moratoire sur le paiement de taxes et redevances aéronautiques en faveur des entreprises de transport public aérien sous licences d'exploitation délivrées par la France.

- (29) France also provided the letter of the Beneficiary requesting the aid.

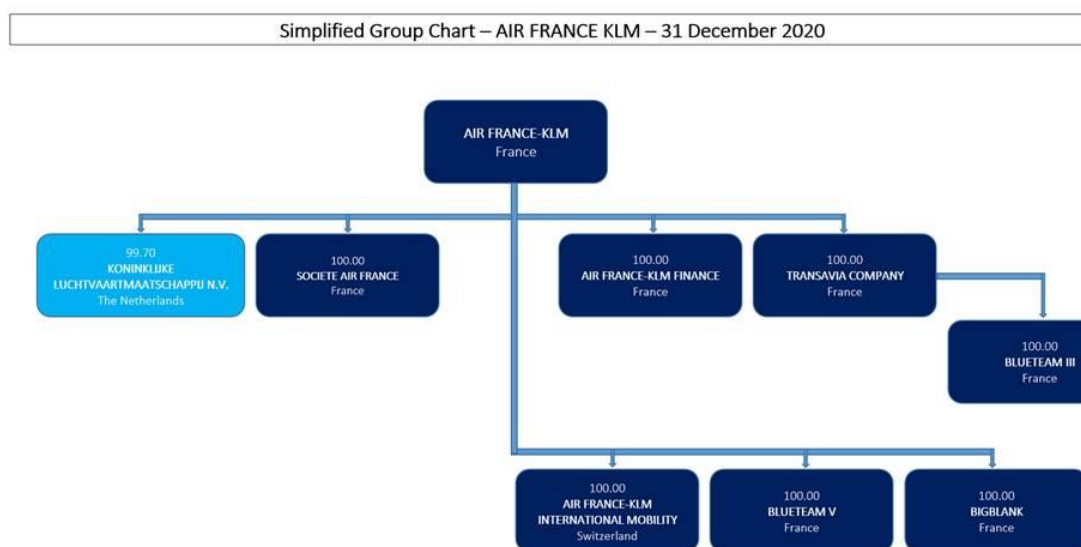
2.6. Budget and duration of the Measure

- (30) The estimated budget of the Measure is ca. EUR 3.5 billion, including EUR 3 billion from the Hybrid Instrument and ca. EUR 400-500 million for the Equity Participation. The budget can increase up to EUR 4 billion, with a State contribution of up to EUR 1 billion for the Equity Participation.
- (31) The Measure will be financed by the State budget.
- (32) Aid will be granted under the Measure as from its approval until no later than 31 December 2021.

2.7. Beneficiary

- (33) The final beneficiary of the Measure is Société Air France S.A. (Air France) (which encompasses the Société Air France and its subsidiaries), as well as Air France-KLM S.A. (the Holding) and the subsidiaries that it controls, with the exception of Koninklijke Luchtvaart Maatschappij N.V. (“KLM”) and its subsidiaries, as will be explained below (the “Beneficiary”). Figure 6 contains a simplified group structure.

Figure 6 – Simplified group structure of the Air France – KLM group



Source: France, internal information from Air France.

2.7.1. Overview of the Beneficiary

- (34) Air France is the main French airline company. It offers freight and passenger services, including domestic, intra-Union and intercontinental flights. In 2019, its turnover reached EUR 16.6 billion, which represented 1% of France’s GDP. It has about 50 000 employees in France. In 2019, it operated about 1 200 daily flights.
- (35) Air France is part of the Air France – KLM group, a European-based global aviation company. The Air France – KLM group is the 10th aviation company worldwide, and the 4th European aviation company. In 2019, it transported about 50 million passengers.

- (36) Air France is wholly owned by the Holding, which is the ultimate mother company of the Air France – KLM group. The Holding also owns 99.7% of the shares of KLM, which represent 93.48% of the economic rights and 49% of the voting rights. The Holding also has 100% shares in the following subsidiaries¹⁸ Air France-KLM International Mobility S.A.¹⁹, Blueteam V S.A.S.²⁰, BigBlank S.A.S.²¹, Air France-KLM Finance S.A.S.²², and Transavia Company S.A.S.²³. The Beneficiary encompasses Air France (and the subsidiaries that it controls), as well as the Holding and the subsidiaries that it controls with the exception of KLM and its subsidiaries.
- (37) The Holding is not directly active on the aviation market. It coordinates the activities of its subsidiaries and provides financial services (including [...]). It employs [...] full-time equivalents, and relies on [...] full-time equivalents that are seconded from Air France ([...]) and KLM ([...]). It derives its revenues from management fees, trademark fees and certain redistribution mechanisms (such as for insurances). The consolidated own equity of the Holding amounted to EUR 2.3 billion on 31 December 2019.
- (38) The French authorities explained that the Beneficiary was not in difficulty within the meaning of the General Block Exemption Regulation (GBER)²⁴ on 31 December 2019.

2.7.2. *Description of the mirror instruments mechanism*

- (39) France explained that the Measure will be formally granted to the Holding, and then channelled through to Air France through mirror instruments, the objective being to ensure that the financial and economic benefit from the Measure is fully channelled to Air France, and does not benefit KLM (and its subsidiaries) in particular.
- (40) Specifically, with respect to the Hybrid Instrument, the State Loan will be converted into a hybrid instrument. Simultaneously, the intra-group loan granted by the Holding to Air France that was concluded at the same time as the State Loan to channel the benefits of the State Loan to Air France (see recital 21 of the

¹⁸ It also has a non-controlling minority participation in [...] ([...]).

¹⁹ Air France-KLM International Mobility's activities are [...].

²⁰ Blue Team V is [...].

²¹ BigBlank is a start-up incubator developing projects in the travel, mobility, logistic and entertainment sectors. It is being liquidated.

²² Air France-KLM Finance is [...].

²³ Transavia Company is active in passenger air transport and aircraft purchase/sale and renting. Transavia's activities are performed and Transavia's assets and trademarks are owned by the Air France and KLM subsidiaries, with respect to Transavia France and Transavia Netherlands respectively.

²⁴ As defined in Article 2(18) of Commission Regulation (EU) No 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, OJ L 187, 26.6.2014, p. 1.

State Guarantee and Loan Decision), will also be converted into a hybrid instrument. The intra-group hybrid instrument will mirror all the features of the hybrid instrument between the State and the Holding.²⁵ Any reimbursement of the intra-group hybrid instrument will coincide with reimbursements to the State under the hybrid instrument between the State and the Holding²⁶. France confirmed that, therefore, the cash derived from the Hybrid Instrument will – and can – be used only by Air France.

- (41) Likewise, with respect to the Equity Participation, new equity will first be injected by the State into the Holding. That injection will be reflected by a corresponding equity injection from the Holding into Air France.

2.7.3. Relationships between Air France and KLM

- (42) France explained that the relationships between Air France and KLM (and, more generally, between all subsidiaries of the Air France – KLM group) already take place at normal market terms due to the way in which the Air France – KLM group is structured and managed:

- (a) Air France and KLM remain taxable in France and the Netherlands respectively. Indeed, the Air France – KLM merger agreement signed in 2004 provides that [...]. In addition, on 7 April 2004, France and the Netherlands agreed on an amendment to the bilateral tax treaty between France and The Netherlands (signed on 16 March 1973)²⁷, in order to ensure that KLM would remain taxable in the Netherlands²⁸. In France and in the Netherlands, the respective tax legislations dictate that the relation between related parties must be governed by the arm's length principle. It means that all intragroup transactions must be conducted as if they were concluded between unrelated parties. Consequently, transactions between Air France and KLM must be conducted at normal market terms as deviation from market terms could lead to tax optimisation contrary *inter alia* to the merger agreement and the above-mentioned tax provisions.
- (b) The governance structures within the Air France – KLM group have the effect of directly incentivising the management of each of the subsidiaries to negotiate the terms of its contracts with its sister companies in the best possible manner for the interests of the subsidiary concerned. Indeed, the

²⁵ This can be confirmed by comparing the term sheets of both instruments.

²⁶ Nevertheless, the hybrid instrument between the State and the Holding may be reimbursed in advance of the intra-group hybrid instrument.

²⁷ Convention between the Government of the French Republic and the Government of the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and fortune.

²⁸ In France that agreement was ratified by the law n° 2005-500 of 19 May 2005 (JO n° 116 of 20 May 2005), and published by a decree n° 2005-1077 of 23 August 2005 « *portant publication de l'avenant à la convention entre le Gouvernement de la République française et le Gouvernement du Royaume des Pays-Bas tendant à éviter les doubles impositions et à prévenir l'évasion fiscale en matière d'impôts sur le revenu et sur la fortune signée à Paris le 16 mars 1973, signé à La Haye le 7 avril 2004* » (JO n° 203 of 1 September 2005)

Air France and the KLM subsidiaries are two sister companies that are managed autonomously by distinct management teams. One of the key criteria for assessing the performance of the managers of Air France and KLM is [...]. Therefore, the managers of Air France have no incentive to accept unfavourable agreements with KLM (and vice-versa).

- (43) France also provided an overview of the commercial arrangements involving financial flows between, on the one hand, Air France and/or its subsidiaries, and, on the other hand, KLM and/or its subsidiaries, as well as supporting documents. For each category of commercial arrangements, France provided examples and elements showing that they have been – and are being – carried out at normal market terms:
- (a) As regards commercial relationships such as services rendered, or goods sold, by Air France (or its subsidiaries) to KLM (or its subsidiaries), or *vice-versa*, France provided examples of existing agreements. For example, France explained that [...]. In addition, France explained that [...].
 - (b) As regards cost sharing agreements and common activities performed in common by Air France and KLM (or their subsidiaries), France explained that costs are [...]. France provided examples of cost sharing agreements and provided elements indicating that they were carried out at normal market terms.

2.7.4. *Ring-fencing commitments*

- (44) Furthermore, in order to ensure that KLM (or its subsidiaries) does not actually benefit from the aid deriving from the Measure, France has given the following commitments (the “Ring-fencing Commitments”):
- (a) Any financial or commercial relationships between Air France (or its subsidiaries) and KLM (or its subsidiaries) will be based on market terms and conditions. Therefore, Air France (or its subsidiaries) will not grant preferential terms to KLM (or its subsidiaries) as compared to normal market terms.
 - (b) Any financial or commercial relationships between the Holding (or its subsidiaries other than Air France, KLM and their subsidiaries) and KLM (or its subsidiaries) will be based on market terms and conditions. Therefore, the Holding (or its subsidiaries other than Air France, KLM and their subsidiaries) will not grant preferential terms to KLM (or its subsidiaries) as compared to normal market terms.
 - (c) In case part of the aid resulting from the Measure is transferred (directly or indirectly) to KLM (or its subsidiaries), France will recover such aid amounts with interest from KLM and/or its subsidiaries.
- (45) The Ring-fencing Commitments will be subject to the monitoring of a trustee (the “Monitoring Trustee”). To that end, with respect to the relationships between the Holding (or its subsidiaries other than Air France, KLM and their subsidiaries) and KLM (or its subsidiaries) the Holding will:

- (a) inform the Monitoring Trustee of any of its existing financing arrangements, financial flows, and/or cooperation between the Holding (or its subsidiaries other than Air France, KLM and their subsidiaries) and KLM (and its subsidiaries);
 - (b) inform the Monitoring Trustee of any amendment to existing financing arrangements, financial flows, and/or cooperation between the Holding (or its subsidiaries other than Air France, KLM and their subsidiaries) and KLM (or its subsidiaries) before they are implemented;
 - (c) inform the Monitoring Trustee of any new financing arrangements, financial flows, and/or cooperation between the Holding (or its subsidiaries other than Air France, KLM and their subsidiaries) and KLM (or its subsidiaries) before they are implemented; and
 - (d) implement any adjustments and/or remedial measures required by the Monitoring Trustee.
- (46) As part of its monitoring activities, the Monitoring Trustee will have, in particular, the following tasks.
- (a) The Monitoring Trustee will review any existing financing arrangements, financial flows, and/or cooperation between the Holding (or its subsidiaries other than Air France, KLM and their subsidiaries) and KLM (or its subsidiaries) with a view to confirming the adherence to market term conditions. If needed, the Monitoring Trustee will propose any adjustments and/or remedial measures required, that the Holding commits to implement.
 - (b) The Monitoring Trustee will be kept informed of any new or modified financing arrangements, financial flows, and/or existing cooperation between the Holding (or its subsidiaries other than Air France, KLM and their subsidiaries) and KLM (or its subsidiaries) before they are implemented. The Monitoring Trustee will review the compliance with the commitments. In case any proposed new or modified financing arrangement, financial flow, and/or cooperation is not in line with market terms, the Monitoring Trustee will suggest adjustment and remedial measures, which the Holding commits to implement.

2.8. Basic elements of the Measure

- (47) The approximately EUR 4 billion Measure consists of (i) an Equity Participation (EUR 1 billion at maximum), and (ii) a conversion of a State loan into a Hybrid Instrument (EUR 3 billion). It is subject to the Ring-fencing Commitments, the Structural Commitments and the Behavioural Commitments (together the “Commitments”).
- (48) France committed that Air France and the Holding will appoint, subject to Commission's approval, a Monitoring Trustee in charge of the overall task of monitoring and ensuring, under Commission's instructions, compliance with the Commitments. For that purpose, France will propose to the Commission for approval, no later than one month from the date of this Decision, a list of one or more persons whom it proposes to appoint as Monitoring Trustee. The

Monitoring Trustee will be appointed within one week of the Commission's approval in accordance with the mandate approved by the Commission and will report to the Commission on a quarterly basis as to France, Air France and the Holding's compliance with the Commitments. The Monitoring Trustee will be paid by Air France and the Holding.

- (49) France committed that the Measure shall not be granted later than 31 December 2021 in line with point 48 of the Temporary Framework.

2.8.1. Equity participation under section 3.11 of the Temporary Framework

- (50) The equity component of the Measure refers to the subscription of France to a share capital increase²⁹ through the issuance of new ordinary shares of the Holding (the "Share Capital Increase") The Share Capital Increase will involve a maximum volume of 214 million shares, representing 50% of existing outstanding shares.
- (51) To incentivise the participation of private investors, the Share Capital Increase will be covered by underwriting commitments in which France will contribute up to a maximum amount of EUR 1 billion. Also, France will ensure that its increase in the equity capital of the Holding³⁰ does not result in an acquisition of a controlling interest, de facto or de jure.³¹ To meet this condition, France estimates that it can subscribe to the Share Capital Increase up to a maximum of 130 million shares.³²
- (52) The Share Capital Increase will be approved by the Board of Directors of the Holding upon delegation of a General Meeting of its shareholders and will follow the below procedure:
- (a) Initially, the Share Capital Increase will be directed to the market via a private placement with institutional investors. The subscription price for the Share Capital Increase will be based on the orders placed by institutional investors.
 - (b) Subsequently, the Share Capital Increase will be available to existing shareholders including the State with a priority subscription period of three trading days on a pro rata basis according to their shareholding. Existing shareholders will also be able to subscribe to additional shares through reducible orders.
 - (c) Within the same period of three trading days, the Share Capital Increase will open up to new market investors.

²⁹ Defined as the Equity Participation.

³⁰ At 30 September 2020, France held 14.3% of the equity capital and 22.6% of the voting rights within the Holding.

³¹ Within the meaning of Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, p. 1.

³² This corresponds to the maximum amount of EUR 1 billion to which France will contribute as part of the Share Capital Increase.

- (d) Finally, if shares were not subscribed for by existing shareholders during the priority subscription period, they could be allocated to institutional investors that have placed orders during the private placement and to new market investors.
- (53) Pursuant to French law applicable to capital increases with a priority subscription period³³, the subscription price will be based on the average share price weighted by the transaction volumes during the 3 days preceding the launch of the capital increase, subject to a maximum discount of 10%.
- (54) According to point 60 of the Temporary Framework, a capital injection by the State, or an equivalent intervention, should be conducted at a price that does not exceed the average share price of the beneficiary over the 15 days preceding the request for the capital injection (the “Entry Price Limit”).
- (55) France will ensure that the Equity Participation will comply with point 60 of the Temporary Framework. The French authorities argued that points 59 and 62 of the Temporary Framework allow for a certain degree of flexibility provided that the proposed alternative mechanism overall leads to a similar outcome as foreseen under point 60, in particular with regard to the incentive effects on the exit of the State and the overall impact on the State’s remuneration.
- (56) As the subscription price of the Equity Participation may exceed the Entry Price Limit, France proposed an alternative approach to deal with any potential scenario in which the actual subscription price would exceed the Entry Price Limit. In such a case, the Beneficiary commits to pay to the State an additional remuneration based on a comparison of the actual share capital injection and a counterfactual scenario of strict compliance with point 60 (the “Required Compensation”). In that setting, the Required Compensation would be equal to the difference between the actual subscription price and the Entry Price Limit, multiplied by the number of newly acquired shares. If the actual subscription price remains under the Entry Price Limit, there will be no need for the Required Compensation.
- (57) The nominal amount, subscription price and volume of new shares of the Equity Participation will be determined at the end of the transaction once the Share Capital Increase is closed. France commits that its maximum subscription amount will not exceed EUR 1 billion, irrespective of the subscription price and the level of participation of institutional investors, other shareholders and new market investors.
- (58) As indicated in recital (39), although the Measure will be formally granted to the Holding, it will be fully channelled through to Air France via a mirror instrument.³⁴ In that setting, France and the Beneficiary commit to inject the new equity into the Holding, after which these funds will be transferred downstream through a corresponding equity injection from the Holding into Air France.

³³ Code de Commerce (Art. L. 225-136 and R. 225-119).

³⁴ The objective is to ensure that the financial and economic benefit from the Measure is fully channelled to Air France, and does not benefit to KLM in particular.

2.8.2. *Hybrid instrument under section 3.11 of the Temporary Framework*

- (59) France will subscribe to the Hybrid Instrument by converting the State Loan granted to Air France (via the Holding) for a maximum amount of EUR 3 billion.³⁵ The Hybrid Instrument will take the form of a deeply subordinated capital security of perpetual nature.³⁶ That operation does not entail any additional injection of new money by the State.³⁷
- (60) The Hybrid Instrument will be treated as equity in the accounts of the Beneficiary under International Financial Reporting Standards (“IFRS”) rules. In order to allow for equity treatment under IFRS rules, the Hybrid Instrument is of perpetual nature, and payment of coupons is non-mandatory and at the sole discretion of the Beneficiary. Deferred coupons will accrue compound interests that will be added to the initial nominal amount of the instrument until effective payment.
- (61) The Hybrid Instrument will not be convertible into equity, and will be callable by the Beneficiary at set dates each year at par value after a first period with no possibility of early repayment. The Hybrid Instrument will be structured in three tranches, each of EUR 1 billion, with first call dates at 4, 5 and 6 years in order to spread the possibilities for repayment. Each tranche is repayable at par value at the first call date (i.e. in 2025, 2026 and 2027 respectively for each of the tranches) and each year thereafter.
- (62) France commits that the remuneration mechanism, which establishes the coupon rates on the Hybrid Instrument over time, will comply with the following two principles:
- (a) First, in view of the additional level of risk to which the State is exposed compared to standard hybrid instruments³⁸, France confirms that the coupon rates will be at least equal to (i) the minimum level as set out in point 66 of the Temporary Framework for the remuneration of instruments issued by large companies, (ii) supplemented by an additional margin of 90 basis points per year.
 - (b) Second, France relies on an alternative approach for compliance with point 60 of the Temporary Framework, by setting the coupon rates on the Hybrid Instrument above the minimum margin as defined in point (a) to offer the State additional remuneration if the actual subscription price of

³⁵ France estimates that private participation in the share capital injection will likely reduce the State participation in the share capital injection to EUR 400-500 million.

³⁶ In case of insolvency, the Hybrid Instrument is senior to subscribed capital and to capital reserves.

³⁷ In line with point 48 of the Temporary Framework, the conversion of the State loan in the Hybrid Instrument will not take place later than 31 December 2021.

³⁸ The Commission notes that the Hybrid Instrument will be treated as equity under IFRS rules, as it exhibits many equity-like characteristics, resulting in a higher risk for investors. Therefore, the higher remuneration above the minimum required under point 66 of the Temporary Framework ([...] bps) takes into account the additional risk borne by the State due to the fact that the Hybrid Instrument is close to equity in terms of seniority, is not convertible into shares, bears coupons only payable at the Beneficiary’s discretion, and is perpetual in duration.

the Share Capital Increase, to which the State plans to subscribe, exceeds the Entry price limit. In such a case, the Beneficiary commits to adjust the remuneration profile on the Hybrid Instrument³⁹ to ensure that the present value of the resulting additional remuneration⁴⁰ will be equal to or exceed the Required Compensation (see recital (56)). To accommodate that alternative approach, the issuance of the Hybrid Instrument establishing the additional remuneration will only take place following the planned Share Capital Increase and the determination of the subscription price (see recital (52)(a)). In addition, France commits to provide this additional remuneration through adjusting the remuneration profile on the Hybrid Instrument from the moment of its issuance until the first call dates that apply to each of its tranches, thereby ensuring that the present value of this additional remuneration will be sufficient. Finally, France commits that the Beneficiary will make a cash payment to the State to ensure compliance with point 60 of the Temporary Framework in case the additional remuneration would not be sufficient *ex post* (for instance, in case of an early repayment of the Hybrid Instrument). That alternative approach is referred to as the Remuneration Commitments and its correct functioning and compliance will be monitored by the Monitoring Trustee. Until the end of the Mandate, the Monitoring Trustee will monitor the accrued additional remuneration to the State on a yearly basis, and instruct a payment in cash in case of insufficient compensation.⁴¹ In the latter case, the Beneficiary will be required to pay the difference in cash together with accrued compound interest (within three months of the request).

- (63) Therefore, France submits that the minimum remuneration of the Hybrid Instrument takes into account the two principles (see recitals (62)(a) and (62)(b)) to comply with the Temporary Framework, as described in Table 2.

³⁹ The Beneficiary will provide additional remuneration on the Hybrid Instrument by increasing its coupon rates in certain years.

⁴⁰ The present value is calculated by discounting the additional remuneration over time at the minimum coupon rates on the Hybrid Instrument (as set out in Table 2).

⁴¹ At the latest when the Hybrid Instrument will be fully redeemed.

Table 2 – Remuneration of Hybrid Instrument: 1-year EURIBOR + margin

	<i>1st year</i>	<i>2nd and 3th year</i>	<i>4th and 5th year</i>	<i>6th and 7th year</i>	<i>8th year and after</i>
<i>Temporary Framework: Minimum margin for large enterprises</i>	<i>250bps</i>	<i>350bps</i>	<i>500bps</i>	<i>700bps</i>	<i>950bps</i>
<i>Additional margin for non- standard instruments</i>	<i>90 bps</i>	<i>90 bps</i>	<i>90 bps</i>	<i>90 bps</i>	<i>90 bps</i>
<i>Minimum margin for the Hybrid Instrument</i>	<i>340bps</i>	<i>440bps</i>	<i>590bps</i>	<i>790bps</i>	<i>1040bps</i>

Note: The coupon rates in certain years may increase above the minimum margin for the Hybrid Instrument as part of the alternative approach for compliance of the Share Capital Increase with point 60 of the Temporary Framework.

Source: France, internal information from Air France.

- (64) As indicated in recital (39), although the Measure will be formally granted to the Holding, it will be fully channelled through to Air France via mirror instruments.⁴² In that setting, France and the Beneficiary commit to simultaneously convert the State Loan to a hybrid instrument both at the level of the Holding and Air France. It is specified that both hybrid instruments will be issued at the same terms and conditions⁴³, and that any reimbursement of the hybrid instrument at the level of Air France will coincide with a corresponding reimbursement to the State under the hybrid instrument at the Holding level.⁴⁴

2.8.3. Step-up mechanism

- (65) In line with points 61 and 62 of the Temporary Framework, France will introduce a step-up mechanism in order to increase the remuneration of the State and incentivise the Beneficiary to buy back the Equity Participation.
- (66) France will receive a remuneration equivalent to an additional 10% shareholding after 4 and 6 years from the State recapitalisation if, at those dates, 40% and 100% of the Equity Participation respectively, have not been redeemed by the Beneficiary or sold by the State. That step-up remuneration will be equal to the market value of the shares that are necessary to achieve a 10% increase of the COVID-19 capital injection that is still outstanding at years 4 and 6 after the State recapitalisation.

⁴² The objective is to ensure that the financial and economic benefit from the Measure is fully channelled to Air France, and does not benefit to KLM in particular.

⁴³ France relies on an alternative approach for compliance with point 60 of the Temporary Framework, by setting the coupon rates on the Hybrid Instrument above the minimum margin to offer the State additional remuneration if needed. In that case, this adjustment will apply to the hybrid instrument at the level of the Holding as well as that at the level of Air France.

⁴⁴ Nevertheless, the hybrid instrument between the State and the Holding may be reimbursed in advance of the intra-group hybrid instrument.

- (67) The compensation for France will be an amount denominated in EUR corresponding to a 10% increase in the State's COVID-19 shareholding for each of the step-up steps. The compensation will be paid either in additional shares, a corresponding amount of cash or in the form of a hybrid instrument for the same value in line with market conditions (the "Step-up Hybrid") at the discretion of the Beneficiary at the date of triggering of the step-up mechanism.
- (68) The Step-up Hybrid will have the same characteristics as the Hybrid Instrument as part of the Measure (e.g. perpetual maturity, deferrable coupons at the discretion of the issuer, deeply subordinated), except for the remuneration. To ensure that the nominal value of the Step-up Hybrid is equivalent to the alternative step-up payment options in the form of cash or additional shares, the remuneration of the Step-up Hybrid will be set in line with the market conditions at the time of issuance for similar instruments (in terms of maturity, level of subordination, conditions on coupon payments, etc.) and for issuers with a similar credit quality as the Beneficiary. France commits to inform the Commission on the level of the Step-up Hybrid remuneration and the methodology used for its determination in view of obtaining approval by the Commission.
- (69) To incentivise the Beneficiary to pay the coupons on the Step-up Hybrid and ensure the State receives adequate step-up remuneration, France commits to comply with the following conditions: (1) the Beneficiary will make a coupon payment on the Step-up Hybrid in case it pays a dividend or makes a non-mandatory coupon payment on another hybrid instrument⁴⁵; (2) the behavioural requirements laid down in section 3.11.6 of the Temporary Framework will continue to apply until the nominal amount of the Step-up Hybrid Instrument and the accrued unpaid coupons (including compound interest) have been fully repaid by the company irrespective of a potential sale, unless the Step-up Hybrid is sold at par value or above including accrued unpaid coupons (including compound interest).

2.8.4. *Structural Commitments*

- (70) The Measure is subject to the following Structural Commitments, which are set out in full in the Annex to this Decision.
- (71) France committed that Air France makes available to a remedy taker up to 18 daily slots at Paris Orly airport (ORY) by way of code-sharing⁴⁶ and to definitively transfer the slots (without transferring staff or else)⁴⁷ to the remedy taker on the later of: (i) the date on which the applicable legal framework allows the definitive transfer of slots (without any transfer of staff or else), and (ii) the

⁴⁵ This condition would apply after the governance conditions under point 77 of the Temporary Framework were to be lifted after the COVID-19 recapitalisation measures have been fully redeemed.

⁴⁶ See notably recital (84) for the specific conditions applicable to code-sharing. Under the Structural Commitments, code-sharing is used as a provisional solution until the slots are definitively transferred from Air France to the remedy taker.

⁴⁷ The references in this Decision to the definitive transfer of slots (without transferring staff or else) refer to the operation by which only slots would be divested from Air France to the remedy taker. No other asset or right held by Air France, such as employment contracts (staff), owned or leased aircraft, ground-handling contracts, other supply contracts, etc. would be divested to the remedy taker.

expiry date of the period during which compliance of the remedy taker with the requirement to maintain a base at Orly airport is controlled.

- (72) France's commitment to have Air France enter into a code-share agreement as described in recital (71) applies from the date of adoption of this Decision and expires four years after the first cut-off date for the call for proposals implementing the code-sharing procedure.⁴⁸ This means that no call for proposals will take place after four years from the first cut-off date. For the avoidance of doubt, the expiry of France's commitment will not affect the validity of the code-share agreement already concluded. As long as such an agreement continues to apply beyond the expiry of France's commitment, the provisions of the Structural Commitments that concern the code-share agreement (including Air France's obligation to definitively transfer the slots) also continue to apply.
- (73) To be eligible, a potential remedy taker must:
- (a) be an air carrier holding a valid operating licence issued by an EU/EEA Member State;
 - (b) be independent of Air France-KLM and unconnected with Air France-KLM at the time of signing of the code-share agreement;
 - (c) not be subject to competition remedies having received a COVID-19 recapitalisation instrument of more than EUR 250 million;
 - (d) commit to comply with the applicable EU and national labour laws, as interpreted, in particular and as relevant, by the EU Courts (see e.g. Nogueira, Joined Cases C-168/16 and C-169/16⁴⁹); and
 - (e) have or establish an operating base at ORY in compliance with Article R. 330-2-1 of the French Civil Aviation Code, including all the aircraft using the remedy slots, except aircraft that the remedy taker cannot, for operational reasons, base using the remedy slots (the burden of proof rests on the remedy taker).⁵⁰ A base implies that the said aircraft stay overnight at the airport and are used to operate several routes from that airport, and that crews working on the said aircraft habitually start and end their working days at ORY. Potential remedy takers indicate in their proposals the number of aircraft to be based at ORY using the remedy slots.⁵¹
- (74) The Monitoring Trustee will control compliance of the remedy taker with the obligation to maintain a base at ORY, as described in recital (73)(e), for a period

⁴⁸ As further explained in recital (76), the remedy taker will be approved following a call for proposals published by the Monitoring Trustee, who will regularly set deadlines for the submission of proposals (cut-off dates).

⁴⁹ EU:C:2017:688.

⁵⁰ This means that potential remedy takers explain in their proposals why, from an operational point of view, the remedy slots that they request for inbound flying cannot be used for based operations.

⁵¹ See recital (263) for the detailed information on the number of aircraft based to use the remedy slots to be provided by potential remedy takers in their proposals (average and range).

of four years from the first cut-off date of the call for proposals implementing the code-sharing procedure.

- (75) If the Commission finds that the remedy taker breaches its obligation to maintain a base at ORY and that the situation is not exceptionally justified by circumstances significantly impacting market conditions, and if the Monitoring Trustee finds that the breach has not been remedied after a three-month remedial period, Air France has the right to terminate the code-share agreement. In such a case, a new code-sharing procedure for all the remedy slots will be initiated, in order to designate a new remedy taker (the former remedy taker may not participate in the new procedure). At the end of the new procedure, if a new remedy taker is designated, Air France will enter into a new code-share agreement with the remedy taker, providing for the definitive transfer of slots (without any transfer of staff or else) to the new remedy taker on the later of: (i) the date on which the applicable legal framework allows the definitive transfer of slots (without any transfer of staff or else), and (ii) the expiry date of the period during which compliance of the remedy taker with the requirement to maintain a base at ORY is controlled.
- (76) The remedy taker will be approved by the Commission following a transparent and non-discriminatory procedure. The corresponding call for proposals will be open continuously as from the date of its publication by the Monitoring Trustee, who will regularly set cut-off dates for the submission of proposals. The Commission, advised by the Monitoring Trustee, will evaluate the proposals.
- (77) The Commission may reject the proposals if they are not credible from an economic or operational point of view or in terms of compliance with Union competition law.
- (78) In case of competing proposals, the Commission will first give priority to proposals submitted by potential remedy takers that already operate a base at ORY, and then that offer in particular the greatest number of destinations served (connectivity) and the largest capacity deployed at the airport (in number of seats for the IATA Summer and Winter Seasons).
- (79) If the Commission gives the same evaluation to several proposals (tied proposals), it will give preference to the proposal best ranked by Air France, which may use any criteria of its choice, provided that they are transparent, such as the level of State aid received by the potential remedy takers or their compliance with labour standards.
- (80) The slots made available by Air France to the remedy taker at the time of signing of the code-share agreement will correspond to the slot times requested by the remedy taker within +/- 10 minutes for short-haul flights and within +/- 30 minutes for long-haul flights. By exception, Air France will not be obliged to make available more than one departure slot between 6:00 and 7:00 (local time) and more than one arrival slot between 22:00 and 23:30 (local time) per aircraft based by the remedy taker to use the remedy slots, up to two departure slots between 6:00 and 7:00 (local time) and two arrival slots between 22:00 and 23:30

(local time).⁵² For those slots, Air France may not offer slots after 7:00 or before 22:00 (local time) if the slot times requested by the remedy taker are before 7:00 or after 22:00 (local time).

- (81) The slots made available by Air France to the remedy taker at the time of signing of the code-share agreement will be such as to allow the aircraft rotations planned by the remedy taker on the basis of the requested slot times. If the remedy taker considers that the slots offered by Air France do not allow the planned aircraft rotations, the remedy taker may inform the Monitoring Trustee accordingly, who will provide a reasoned opinion on that matter to the Commission. If the Commission confirms that the slots offered by Air France do not allow the aircraft rotations planned by the remedy taker, Air France will offer to the remedy taker and to the Commission alternative slots, to be approved by the Commission. If the Commission does not approve the alternative slots, Air France will make available the slots as requested by the remedy taker. This will nevertheless not result in exceeding the ceilings referred to in recital (80) for the number of slots that Air France is obliged to make available between 6:00 and 7:00 (local time) and between 22:00 and 23:30 (local time).
- (82) Air France will make slots available to the remedy taker for free, under the control of the Monitoring Trustee.
- (83) Air France will not be entitled to any claim for compensation, even if the slots are not used in compliance with the Slot Regulation⁵³, notably with the “use-it-or-lose-it” rule⁵⁴.
- (84) Air France will have no right regarding the flight capacity deployed by the remedy taker. The remedy taker will have full commercial and operational independence, and Air France will have no power of commercial or operational control over the operations of the remedy taker (e.g. choice of destinations, types of aircraft, fares, etc.).
- (85) Air France will make best efforts to support the operations of the remedy taker, including Air France obtaining, as relevant, the traffic rights (without prejudice to the traffic rights that the remedy taker may have to obtain), if needed for the operation of certain routes planned by the remedy taker, as well as slot retiming and/or related changes (e.g. conversion of departure/arrival slots, changes of destinations, of aircraft, etc.).

⁵² This means that Air France will make available one departure slot between 6:00 and 7:00 (local time) and one arrival slot between 22:00 and 23:30 (local time) to a remedy taker basing one aircraft at ORY to use the remedy slots, and two departure slots between 6:00 and 7:00 (local time) and two arrival slots between 22:00 and 23:30 (local time) to a remedy taker basing two or more aircraft at ORY to use the remedy slots.

⁵³ Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L 14, 22.1.1993, p. 1).

⁵⁴ Under Article 8(2) of the Slot Regulation, the general principle regarding slot allocation is that an air carrier having operated its particular slot series for at least 80% during the summer or winter scheduling period is entitled to the same slot series in the equivalent scheduling period of the following year (the “grandfather rights”). Consequently, slot series which are not sufficiently used by air carriers are returned to the slot pool for reallocation.

- (86) The code-share agreement will be renewed tacitly until the definitive transfer of the slots (without transfer of staff or else) to the remedy taker. Without prejudice to the exception described in the following sentence, only the remedy taker may decide to terminate the code-share agreement, without any financial penalty. Air France has no right to terminate unilaterally the code-share agreement (including in case of change of control over the remedy taker or commercial partnership entered into by the latter with third party carriers), except in case of breach by the remedy taker of its obligation to maintain a base at ORY.⁵⁵
- (87) In case of early termination of the code-share agreement by the remedy taker, Air France will return the corresponding slots to the slot pool and will not request the returned slots through the general slot allocation procedure foreseen by the Slot Regulation. For the avoidance of doubt, this commitment will not apply to remedy slots that the remedy taker would return to the slot pool after the definitive transfer of the remedy slots to the remedy taker.

2.8.5. *Behavioural Commitments*

- (88) France undertakes to implement, and to have the Beneficiary comply with, the following behavioural commitments, described in recitals (89) to (102) (the “Behavioural Commitments”), subject to the monitoring of the Monitoring Trustee.
- (89) France commits that the Measure will contain a prohibition for the Beneficiary to engage in aggressive commercial expansion financed by State aid and excessive risk taking.
- (90) France commits that the Beneficiary will not advertise the Measure for commercial purposes.
- (91) France commits that, as long as at least 75% of the Measure has not been, redeemed, the Beneficiary will be prevented from acquiring a more than 10% stake in competitors or other operators in the same line of business, including upstream and downstream operations. France also committed that the Beneficiary will seek and wait for the prior authorisation of the Commission before acquiring a stake of more than 10% in operators in the same line of business, including upstream and downstream operations, if the acquisition is necessary to maintain their viability.
- (92) France commits that State aid resulting from the Measure will not be used to cross-subsidise economic activities of integrated undertakings that were in economic difficulties already on 31 December 2019, and that a clear account separation will be put in place in integrated companies to ensure that the Measure does not benefit those activities.
- (93) France commits that, as long as the Measure has not been fully redeemed, the Beneficiary cannot make dividend payments, nor non-mandatory coupon payments, nor buy back shares, other than in relation to the State.

⁵⁵ The procedure for the enforcement of the obligation of the beneficiary to maintain a base at ORY is described in recital (75).

- (94) France commits that, as long as at least 75% of the Measure has not been redeemed:
- (a) the remuneration of each member of the management of the main companies of the Beneficiary⁵⁶ (i.e. Air France-KLM S.A., Air France S.A. and Transavia France S.A.S.)⁵⁷ must not go beyond the fixed part of his/her remuneration on 31 December 2019. For persons becoming members of the management on or after the recapitalisation, the applicable limit is the fixed remuneration of the members of the management with the same level of responsibility on 31 December 2019;
 - (b) under no circumstances, may bonuses or other variable or comparable remuneration elements be paid to the management of the main companies of the Beneficiary (as in the preceding subparagraph)).
- (95) France commits to receive from the Beneficiary, and endorse, a credible exit strategy in line with points 79 to 81 of the Temporary Framework, within 12 months after the aid is granted, unless the State's intervention is reduced below the level of 25% of equity by that deadline.
- (96) As will be detailed in recitals (107) and (108), France and the Beneficiary commit to comply with the monitoring and publication requirements of points 82 to 85 of the Temporary Framework.
- (97) France further commits that the Beneficiary will pay the Required Compensation on the Equity Participation if required, based on the mechanism described in recitals (56) and (62)(b).
- (98) France commits to introduce a step-up mechanism for the Equity Participation along the lines described in recitals (65) to (69).
- (99) To allow for the exit of the State from its Equity Participation, France commits that the Beneficiary would rely on the two options as defined by the Temporary Framework, namely through a buy-back of the newly acquired shares as defined by point 63 or through alternative exit mechanisms as defined by points 64, 64bis and 64ter.
- (100) France also commits that the remuneration mechanism of the Hybrid Instrument will comply with the two principles described in recitals (62) and (63) and in Table 2.
- (101) To ensure that the coupons on the Hybrid Instrument are ultimately paid, especially given that the Beneficiary has the option not to do so, the Hybrid Instrument needs to be redeemed in order for the behavioural commitments imposed on the Beneficiary under this Decision to end, as will be detailed in recitals (181) and (182).

⁵⁶ It will apply in any event to the management of all other companies of the Air France – KLM group (except for KLM and its subsidiaries) that is also part of the management of Air France-KLM S.A., Air France S.A. et Transavia France S.A.S.

⁵⁷ This part of Beneficiary accounts for more than [90-100]% of the Beneficiary's annual turnover.

(102) France commits that the Measure will not be granted later than 31 December 2021 in line with point 48 of the Temporary Framework.

2.9. Cumulation

(103) France confirmed that the aid granted under the Measure may be cumulated with aid under de minimis Regulations⁵⁸ or the GBER⁵⁹ provided the provisions and cumulation rules of those Regulations are respected.

(104) France confirmed that the aid granted under the Measure may be cumulated with aid granted under other measures approved by the Commission under other sections of the Temporary Framework provided the provisions in those specific sections are respected.

2.10. Monitoring and reporting.

(105) As explained at recital (48), France commits that Air France and the Holding will appoint, subject to Commission's approval, a Monitoring Trustee in charge of the overall task of monitoring and ensuring, under Commission's instructions, compliance with the Commitments, covering the Ring-fencing Commitments, the Behavioural Commitments and the Structural Commitments.

(106) France confirmed that it will respect the monitoring and reporting obligations laid down in section 4 of the Temporary Framework. In particular, it commits that:

- (a) it will publish relevant information on the recapitalisation granted to the Beneficiary on the comprehensive State aid website or Commission's IT tool within three months from the moment of granting;⁶⁰
- (b) it will submit annual reports to the Commission, in line with point 89 of the Temporary Framework; and
- (c) it will ensure that detailed records regarding the granting of aid under the Measure (including all information necessary to establish that the necessary conditions have been observed) are maintained for ten years upon granting of the aid and are provided to the Commission upon request, in line with point 91 of the Temporary Framework.

(107) France also confirmed that it will ensure that:

- (a) the Beneficiary will submit reports to France based on the progress in the implementation of the repayment schedule and compliance with the

⁵⁸ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (OJ L 352, 24.12.2013, p.1), Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8).

⁵⁹ Commission Regulation (EU) No 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, OJ L 187, 26.6.2014, p. 1.

⁶⁰ Referring to information required in Annex III to Commission Regulation (EU) No 651/2014.

conditions of section 3.11.6 of the Temporary Framework within 12 months of the schedule's presentation, and thereafter periodically every 12 months;

- (b) as long as the Measure has not been fully redeemed, the Beneficiary will, within 12 months from the date of the granting of the aid and thereafter periodically every 12 months, publish information on the use of the aid received (including information on how the Beneficiary's use of the aid received supports its activities in line with EU objectives and national obligations linked to the green and digital transformation, including the EU objective of climate neutrality by 2050);

(108) Finally, France confirmed that:

- (a) it will provide annual reports to the Commission on the implementation of the repayment schedule and compliance with the conditions in section 3.11.6 and point 54 of the Temporary Framework; and
- (b) it will notify a restructuring plan in line with point 85 of the Temporary Framework if, within 6 years after the recapitalisation, France's intervention has not been reduced below 15% of the Holding's equity.

3. ASSESSMENT

3.1. Lawfulness of the Measure

(109) By notifying the Measure before putting it into effect, the French authorities have respected their obligations under Article 108(3) TFEU.

3.2. Existence of State aid

(110) For a measure to be categorised as aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. First, the measure must be imputable to the State and financed through State resources. Second, it must confer an advantage on its recipients. Third, that advantage must be selective in nature. Fourth, the measure must distort or threaten to distort competition and affect trade between Member States.

(111) The Measure is imputable to the State, since it is granted by the State, it is administered by APE, and it is based on an agreement to be signed by the State and on French laws, as described in recitals (26) and (27). It is financed through State resources, since it is financed by public funds (see recital (31)).

(112) The Measure confers an advantage on its Beneficiary (Air France and the Holding and their subsidiaries, with the exception of KLM and its subsidiaries), in the form of a recapitalisation. The Measure thus relieves the Beneficiary of costs which it would have had to bear under normal market conditions.

(113) In this respect, for the following reasons, and based on the mechanisms and commitments described in section 2.7, the Commission concludes that the aid beneficiaries of the Measure are Air France and the Holding, and their subsidiaries, with the exception of KLM and its subsidiaries.

- (a) Air France (and the subsidiaries that it controls) will benefit from the aid, even though the funds transit through the Holding, as a result of the mirror instruments described at recitals (39) to (41)⁶¹. Air France will thus receive a direct advantage from the Measure, and must be regarded as the recipient of the aid.
- (b) The Holding (and the subsidiaries that it controls) will also receive an advantage from the Measure. This results from a combination of two factors. First, the Holding's own equity will be increased as a result of the Measure. Second, the Holding has no commercial activity on its own. Hence, its financial situation depends mostly on those of its subsidiaries. In this respect, Air France is the main subsidiary of the Holding. As a result of the State Loan and State Guarantee, the Holding had increased its exposure to Air France's financial situation. Specifically, the State Loan and State Guarantee result in a debt from the Holding to the State of EUR 7 billion. While the Holding has a similar credit from Air France, that credit would be lost in case of Air France's bankruptcy. Hence, the non-consolidated own equity of the Holding⁶² would be insufficient to cover losses resulting from a hypothetical bankruptcy of Air France (in particular the EUR 7 billion losses linked to the State Loan and State Guarantee). As a result, by guaranteeing the viability of Air France (which is the aim of the Measure as explained in recital (16)), the Measure also guarantees the viability of the Holding.
- (c) Air France and the Holding have commercial and financial relationships with the other strategic subsidiary of the Holding, KLM, which is active in the same market as Air France and has coinciding air-transport interests. There is some degree of integration between the Holding, Air France and KLM, concerning mostly mutualisation of costs, strategic alignments and access to finance⁶³. There could thus be a risk that the aid resulting from the Measure would be transferred (in part) to KLM from Air France or the Holding, for example via financial arrangements or via commercial cooperation agreements at advantageous terms. However, this is effectively prevented, for several reasons, with the result that KLM (and its subsidiaries) is not a beneficiary of the Measure:
- First, the Commission considers that the mirror instruments described at recitals (39) to (41) will ensure that the cash derived from the Hybrid Instrument and the Equity Participation is fully channelled to Air France, and does not benefit KLM.

⁶¹ See by analogy, judgment of 3 July 2003, *Belgium v Commission*, C-457/00, EU:C:2003:387, paragraphs 55-60.

⁶² Based on the available evidence, the non-consolidated own equity of the Holding amounted to EUR 4.6 billion at the end of December 2019, whereas the consolidated own equity of the Holding was equal to EUR 2.3 billion at that time.

⁶³ However, a bankruptcy of Air France and/or the Holding would not necessarily lead to a bankruptcy of KLM. KLM has limited financial exposure to Air France and the Holding and it has its own capital and cash flows. A bankruptcy of Air France and the Holding would merely lead to a change in KLM's shareholders as its shares would be granted to the creditors of the Holding.

- Second, the Commission considers that the corporate and governance structure of the Air France – KLM group as described at recital (42) will also prevent the risk of aid spill-over from Air France to KLM. In that regard, the Commission considers that the explanations and examples provided by France (see recital (43)) demonstrate that the commercial relationships between Air France and KLM take place at normal market terms.
- Finally, the Commission considers that the Ring-fencing Commitments given by France and detailed in recital (44) effectively ensure that the aid derived from the Measure will not be transferred to KLM. The Measure does not bring into question that KLM remains an independent company from Air France (and other subsidiaries of the Holding), both legally and financially. The Ring-fencing Commitments ensure that KLM will bears its own costs, until the Measure is fully redeemed. This will further be verified by an independent Monitoring Trustee (see recital (48)). As a result, KLM will not receive any advantages from the Measure that go beyond mere secondary economic effects⁶⁴.

(114) The advantage granted by the Measure is selective, since it is awarded only to a limited number of undertakings, namely Air France, the Holding and their subsidiaries other than KLM and its subsidiaries. The Measure, therefore, favours the Beneficiary over other airlines or undertakings active in sectors outside aviation.

(115) The Measure is liable to distort competition, since it strengthens the competitive position of the Beneficiary. It also affects trade between Member States, since the Beneficiary is active in sectors in which intra-Union trade exists.

(116) In view of the above, the Commission concludes that the Measure constitutes aid within the meaning of Article 107(1) TFEU. The French authorities do not contest that conclusion.

3.3. Compatibility

(117) Since the Measure involves aid within the meaning of Article 107(1) TFEU, it is necessary to consider whether that Measure is compatible with the internal market.

(118) Pursuant to Article 107(3)(b) TFEU the Commission may declare compatible with the internal market aid “*to remedy a serious disturbance in the economy of a Member State*”.

(119) By adopting the Temporary Framework on 19 March 2020, the Commission acknowledged (in section 2) that, “*the COVID-19 outbreak affects all Member States and that the containment measures taken by Member States impact*

⁶⁴ See by analogy the judgment of 25 June 1998, *British Airways and Others and British Midland Airways v Commission*, T-371/94 and T-394/94, EU:T:1998:140, paragraphs 313-323; see also Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1), points 66-68 and 115-116 and case-law quoted.

undertakings”. The Commission concluded that “*State aid is justified and can be declared compatible with the internal market on the basis of Article 107(3)(b) TFEU, for a limited period, to remedy the liquidity shortage faced by undertakings and ensure that the disruptions caused by the COVID-19 outbreak do not undermine their viability*”.

- (120) Section 3.11 of the Temporary Framework deals with recapitalisation measures. It sets out the criteria under which Member States may provide public support in the form of equity and/or hybrid capital instruments to undertakings facing financial difficulties due to the COVID-19 outbreak, aiming to ensure that the disruption of the economy does not result in the unnecessary exit from the market of undertakings that were viable before that outbreak.

3.3.1. Applicability

- (121) Point 46 of the Temporary Framework states that: “*The following conditions shall apply to recapitalisation schemes and individual recapitalisation measures of Member States for non-financial undertakings (collectively referred to as “COVID-19 recapitalisation” measures) under this Communication, which are not covered by section 3.1 of this Communication. They apply to COVID-19 recapitalisation measures for large undertakings and SMEs*”. Point 47 adds that: “*The following conditions shall also apply to subordinated debt instruments that exceed both of the ceilings referred to in point 27bis (i) and (ii) in section 3.3 of this Communication*”.
- (122) The Measure aims at strengthening the equity of the Beneficiary, in particular of Air France, and its access to liquidity at a time when the normal functioning of credit markets is severely disturbed by the COVID-19 outbreak, which is affecting the wider economy and leading to severe disturbances of the real economy of Member States.
- (123) The Measure amounts to a recapitalisation, where France plans to subscribe to a share capital increase of new ordinary shares of the Holding (EUR 1 billion at maximum) and convert an existing State loan into a Hybrid Instrument (EUR 3 billion).
- (124) The Commission observes that the Measure concerns the recapitalisation of a large non-financial undertaking (the Holding and then Air France) as a result of the COVID-19 outbreak. Hence, the Measure can be qualified as a COVID-19 recapitalisation to remedy a serious disturbance in the economy of the Member State.
- (125) Point 48 of the Temporary Framework states that COVID-19 recapitalisation measures may not be granted later than 31 December 2021. The Commission notes that France committed to grant the Measure no later than 31 December 2021 (see recital (32)).
- (126) Therefore, in the following sections, the Commission will assess the compatibility of the Measure under section 3.11 of the Temporary Framework.

3.3.2. Eligibility and entry conditions

- (127) According to point 49 of the Temporary Framework, a COVID-19 recapitalisation measure must fulfil the following conditions:

- (a) *“without the State intervention the beneficiary would go out of business or would face serious difficulties to maintain its operations. Such difficulties may be shown by the deterioration of, in particular, the beneficiary's debt to equity ratio or similar indicators;*
 - (b) *it is in the common interest to intervene. This may relate to avoiding social hardship and market failure due to significant loss of employment, the exit of an innovative company, the exit of a systemically important company, the risk of disruption to an important service, or similar situations duly substantiated by the Member State concerned;*
 - (c) *the beneficiary is not able to find financing on the markets at affordable terms and the horizontal measures existing in the Member State concerned to cover liquidity needs are insufficient to ensure its viability; and*
 - (d) *the beneficiary is not an undertaking that was already in difficulty on 31 December 2019 (within the meaning of the General Block Exemption Regulation⁶⁵)”.*
- (128) The Commission notes that the objective of the Measure is to preserve the viability of the Beneficiary and, in particular, Air France (see section 2.2).
- (129) The Commission notes that the negative circumstances due to COVID-19 described in the State Guarantee and Loan Decision still affect the Beneficiary and, in particular, Air France.
- (130) The Commission notes that, as a result of the COVID-19 crisis and the incurred losses by Air France, its equity position became negative at the end of 2020 (see recital (14)). That impaired equity position not only affects Air France’s liquidity, but also threatens its solvency and viability in the short term. In addition, this also has a direct impact on the Holding’s own viability given that Air France is its main subsidiary, as explained in recital (113). Against that background, the Measure is a first step towards restoring the balance sheet of the Beneficiary (see section 2.2) with a view to avoid its exit from the market and, therefore, the halt of its operations. The Commission therefore considers that, in absence of the capital increase, the Beneficiary would face serious difficulties to maintain its operations.
- (131) Furthermore, the Commission notes that the considerations leading to the conclusion that the Beneficiary and, in particular, Air France has a systemic importance for the French economy from several standpoints and that a default of Air France or a significant downsizing of its activities would entail severe consequences for the French economy, in particular in the COVID-19 outbreak context, as described in the State Guarantee and Loan Decision, are still applicable since no major changes have happened in this respect since the State Guarantee and Loan Decision (see recital (17))⁶⁶. Likewise, by preventing a

⁶⁵ As defined in Article 2 (18) of the Commission Regulation (EU) No 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, OJ L 187, 26.6.2014, p. 1.

⁶⁶ See recitals 59 to 88 of the State Guarantee and Loan Decision.

downsizing of the Beneficiary's and, in particular, Air France's activities or even its exit from the markets where it operates, the Measure avoids significant loss of employment and thus social hardship, as well as a detrimental impact on connectivity in the Union. The Commission therefore considers that it is in the common interest to intervene.

- (132) The French authorities further set out the reasons why the Beneficiary is not able to find financing on debt or equity capital markets at affordable terms and in the timeframe needed to avoid triggering insolvency proceedings (see recitals (19) to (22)).
- (133) Furthermore, France also demonstrated that the existing horizontal measures in France to cover liquidity needs and the State aid previously received by the Beneficiary are not sufficient to ensure its viability in the short term. In particular, the Commission notes that such measures were aimed at addressing liquidity issues, whereas the Measure aims at restoring the Beneficiary's solvency and its continued viability. It is clear that, despite those previous measures, the Beneficiary's equity position was negative at the end of 2020 and, therefore, additional measures are needed to restore the equity position of the Beneficiary, and hence its solvency (see recital (23)).
- (134) Finally, as indicated by France (see recital (38)), and based on the evidence submitted by France, the Commission concludes that the Beneficiary is not an undertaking that was already in difficulty on 31 December 2019 within the meaning of the GBER. The Commission also notes that France committed that State aid resulting from the Measure will not be used to cross-subsidise economic activities of integrated undertakings that were in economic difficulties already on 31 December 2019, and that a clear account separation will be put in place in integrated companies to ensure that the Measure does not benefit those activities
- (135) Therefore, the Commission considers that all conditions of point 49 of the Temporary Framework are fulfilled.
- (136) Pursuant to point 50 of the Temporary Framework, when Member States notify COVID-19 individual recapitalisation measures, they must provide evidence of a written request for such aid by the prospective beneficiary undertaking as part of the notification to the Commission. The Commission takes note that the notification included such a written request in the form of a letter. The Commission concludes that the requirement set out in point 50 is therefore fulfilled.
- (137) Based on the above, the Commission concludes that the Measure fulfils the eligibility and entry conditions as set out in section 3.11.2 of the Temporary Framework.

3.3.3. *Types of recapitalisation measures*

- (138) According to point 52 of the Temporary Framework, "*Member States can provide COVID-19 recapitalisation measures using two distinct sets of recapitalisation instruments: (a) equity instruments, in particular, the issuance of new common or preferred shares; and/or (b) instruments with an equity component (referred to as*

'hybrid capital instruments'),⁶⁷ in particular profit participation rights, silent participations and convertible secured or unsecured bonds". Point 53 of the Temporary Framework states that "[t]he State intervention can take the form of any variation of the above instruments, or a combination of equity and hybrid capital instruments". In any event, "[t]he Member State must ensure that the selected recapitalisation instruments and the conditions attached thereto are appropriate to address the beneficiary's recapitalisation needs, while at the same time being the least distortive to competition".

- (139) The Measure comprises both an equity instrument (the Equity Participation), as well as a hybrid capital instrument (the Hybrid Instrument), as further detailed in sections 2.8.1 and 2.8.2.
- (140) The Commission notes that the Measure and the conditions attached to it are appropriate to address the Beneficiary's recapitalisation need, while at the same time being the least distortive to competition. As explained in recitals (14) and (23), the COVID-19 crisis resulted in significant losses for the Beneficiary, which in turn led to a negative equity position for both Air France and the Holding amounting to around EUR -5.4 billion at the end of December 2020 (while both Air France and the Holding had a positive equity position at the end of 2019). Therefore, to address this situation and restore the equity position of the Beneficiary, the Measure is both appropriate and necessary. Mere liquidity measures (such as a loan) would not be sufficient to that end. The proportionality of the Measure is also further assessed in section 3.3.4.

3.3.4. Amount of the recapitalisation

- (141) According to point 54 of the Temporary Framework, *"[i]n order to ensure proportionality of the aid, the amount of the COVID-19 recapitalisation must not exceed the minimum needed to ensure the viability of the beneficiary, and should not go beyond restoring the capital structure of the beneficiary to the one predating the COVID-19 outbreak, i.e. the situation on 31 December 2019. In assessing the proportionality of the aid, State aid received or planned in the context of the COVID-19 outbreak shall be taken into account"*.
- (142) The proportionality test set out in point 54 of the Temporary Framework has two cumulative conditions. On the one hand, the COVID-19 recapitalisation must not exceed the minimum needed to ensure the viability of the aid beneficiary, that is, it cannot go beyond the minimum amount of recapitalisation aid needed to restore the company's access to private capital markets (and be in a position to get debt and/or equity financing at affordable rates from the markets). On the other hand, the COVID-19 recapitalisation cannot go beyond restoring the capital structure of the aid beneficiary to the one predating the COVID-19 outbreak.
- (143) First, in order to assess whether the aid does not exceed the minimum needed to ensure the viability of the aid beneficiary, the Commission will consider what is

⁶⁷ Hybrid capital instruments are instruments that have characteristics of debt as well as of equity. For instance, convertible bonds are remunerated like bonds until they are converted into equity. The assessment of the overall remuneration of hybrid capital instruments thus depends on the one hand on their remuneration while they are debt-like instruments and on the other hand on the conditions for conversion into equity-like instruments.

the minimum amount of the State recapitalisation needed to restore the aid beneficiary's access to capital markets. To that end, the Commission will analyse the following actual and forecasted indicators:

- (a) The net debt-to-equity ratio of the aid beneficiary at the end of 2021 vis-à-vis that of the aid beneficiary's peer airlines. The net debt-to-equity ratio is typically considered by rating agencies when assessing the creditworthiness of companies. It is widely considered one of the most important corporate valuation metrics because it highlights a company's dependence on borrowed funds and the company's ability to meet those financial obligations. Because debt is inherently risky, lenders and investors tend to favour businesses with lower debt-to-equity ratios. A company with a higher ratio than its peers, therefore, may find it more difficult to secure additional funding from the market. The Commission will compare the net debt-to-equity ratio of the aid beneficiary after the COVID-19 recapitalisation with a benchmark net debt-to-equity ratio of other European airlines. The Commission considers the net debt-to-equity ratio of the third quartile of comparable companies as a useful and appropriate benchmark.
 - (b) The net debt-to-EBITDA ratio, which is another indicator that rating agencies use to determine a company's creditworthiness. The net debt-to-EBITDA ratio is a debt ratio that shows how many years it would take for a company to pay back its debt if net debt and EBITDA are held constant. In particular, the Commission will assess whether the net debt-to-EBITDA ratio after the COVID-19 recapitalisation is not below the 3.0-3.5 threshold. That is a conservative test, because it is common practice to consider a net debt-to-EBITDA ratio higher than 3.5 as a signal of poor creditworthiness. Even though actual credit ratings depend on a number of factors, companies with those values of net debt-to-EBITDA ratio do not normally have an investment grade rating, which means they find it more difficult and expensive to access private capital markets.
 - (c) The equity-to-asset ratio, which is an alternative creditworthiness indicator to the net debt-to-EBITDA ratio, for example when the EBITDA multiplier cannot be calculated due to negative EBITDA figures of the aid beneficiary. In particular, the Commission will assess whether the equity-to-asset ratio of the aid beneficiary after the State recapitalisation is above 15%. If the equity of a company is partially or completely depleted due to losses during the COVID-19 outbreak, the capability to obtain debt financing at market terms will also require replenishment of the equity basis. The Commission considers an equity-to-asset ratio of 15% as a sufficient level to enable companies to obtain debt financing at reasonable market terms. Nonetheless, a company's access to market finance depends on multiple factors including the type of industry in which it operates.
- (144) Second, in order to assess whether the aid goes beyond restoring the capital structure of the aid beneficiary before the COVID-19 outbreak, the Commission will take into account the financial projections concerning (i) the equity position of the aid beneficiary and (ii) the net debt-to-equity ratio of the aid beneficiary at the end of 2021, which takes into account the State recapitalisation. It will, however, also consider the whole length of the forecast period. The Commission

will compare the value of those indicators to those predating the COVID-19 outbreak.

- (145) The Commission will conduct the analyses mentioned in recitals (143) and (144) on the basis of the financial projections of the Beneficiary, which France has submitted. Those projections cover the period 2021-2025 and include all the recapitalisation measures in favour of the Beneficiary, including the State and private contributions. More specifically, the Beneficiary's financial projections include the EUR 3 billion State Hybrid Instrument and the State Equity Participation of EUR 1 billion at maximum.
- (146) As indicated in recital (57), the Commission notes that, at the time of this decision, the exact amount of the Equity Participation is unknown, as it depends on the subscription price at the time of the equity issuance and the extent of the participation of private investors. Nonetheless, France committed to inject not more than EUR 1 billion in the form of share capital. The Commission will take into account that maximum amount in the proportionality assessment, which is a conservative assumption.
- (147) The Commission observes that France expects private investors to contribute at most EUR 650 million to the recapitalisation of the Beneficiary. France explained that this estimate has been made on a conservative basis by the Beneficiary's advisory banks. The Commission also notes that the Beneficiary may use those EUR 650 million to strengthen the equity position of the Holding (instead of channelling those funds in full to Air France). On a conservative basis, the Commission will assess the proportionality of the State recapitalisation including the EUR 650 million contribution from private shareholders.
- (148) In addition, the Commission will undertake a sensitivity analysis to assess up to which level of private contribution to the recapitalisation of the Beneficiary the proportionality test would be still met. In the unlikely event, which would not be in line with the estimate of the advisory banks of the Beneficiary, that the contribution from private shareholders were to exceed this critical threshold, France commits to re-notify the Measure to the Commission.
- (149) The Commission has benchmarked the projections of the Beneficiary against industry studies to assess whether those are in line with industry forecasts. In particular, the Commission scrutinized the forecasted operational performance indicators, financial indicators and losses. Overall, the benchmarking analysis of the Commission demonstrates that the projections of the Beneficiary are in line – and even more optimistic (and therefore conservative for the present assessment as it might underestimate the equity shortfall of the Beneficiary) – with forecasts from IATA for the airline industry. For example, Air France expects a [40-50]% increase in available seat kilometers (ASK) and a [40-50]% increase in revenues in 2021 vis-a-vis 2020, which is more optimistic than the projections of IATA (35.5% and 39.9%, respectively)⁶⁸. The Commission also notices that the proportionality assessment takes into account projected losses only in year 2021,

⁶⁸ Source: <https://www.iata.org/en/iata-repository/publications/economic-reports/airline-industry-economic-performance---november-2020---data-tables/>.

as the losses in year 2020 are already realized and therefore not subject to uncertainty.

- (150) Finally, the Commission will assess the proportionality of the State recapitalisation both at the level of (a) Air France (and its subsidiaries) and (b) the Beneficiary (i.e. Air France as well as the Holding including the subsidiaries that it controls, with the exception of KLM and its subsidiaries), as defined in recital (33).⁶⁹

3.3.4.1. Whether the public support is limited to the minimum needed to ensure the viability of the Beneficiary

- (151) Table 3 illustrates the effect of the State recapitalisation from France on the capital structure of (a) Air France (and its subsidiaries) and (b) the Beneficiary.

Table 3 – Proportionality indicators

Description	Air France (EUR million, unless ratios)	Beneficiary (EUR million, unless ratios)
<i>Total COVID-19 recapitalisation planned</i>	4650	4650
<i>Equity position without recapitalisation (31.12.2021)</i>	[...]	[...]
A. Equity position (31.12.2019)	180	553
B. Equity position after recap (31.12.2021)	[...]	[...]
Proportionality indicator I: $B - A \leq 0$	[passed]	[passed]
C. Net Debt/Equity Ratio (31.12.2019)	[...]	[...]
D. Net Debt/Equity Ratio after recap (31.12.2021)	Negative	Negative
Proportionality indicator II: $C - D \leq 0$	Passed	Passed

Source: France, internal information from Air France.

- (152) Table 3 shows that the equity position of Air France after the recapitalisation (on 31 December 2021) is [...] EUR [...]. That amount of equity includes the following recapitalisation instruments: (i) EUR 1 billion of share capital injection from the French State, (ii) EUR 3 billion of hybrid instrument and (iii) the estimated participation in the share capital injection from private shareholders amounting to EUR 650 million. On this basis, the total recapitalisation amounts to EUR 4 650 million.

⁶⁹ The Commission received the consolidated accounts of the Holding with an adjustment made to exclude KLM and its subsidiaries.

- (153) Following the COVID-19 outbreak, Air France incurred losses of EUR [...] in 2020 and expects losses of EUR [...] in 2021.⁷⁰ Moreover, Air France forecasts an additional loss of EUR [...] in 2022 and a return to profitability in 2023. As such, taking into account the State recapitalisation, the equity position of Air France on 31 December 2021 will be [...] and will not be higher than that before the COVID-19 outbreak (on 31 December 2019).
- (154) The Commission notes that the recapitalisation of Air France does not go beyond restoring its capital structure from before the COVID-19 outbreak. The reason is that the projected net debt-to-equity ratio of Air France is negative on 31 December 2021, due to the negative equity position on that date. By contrast, the net debt-to-equity ratio was [20-30] on 31 December 2019. Based on the forecasts submitted by France, the 2019 net debt-to-equity ratio of Air France is not expected to be restored before the end of the planning horizon, namely by the year [...].
- (155) The effects of the State recapitalisation measure on the Beneficiary are qualitatively the same. The (projected) cumulated losses for the years 2020 and 2021 are equal to EUR [...] and the net debt-to-equity ratio is estimated to be negative on 31 December 2021. By contrast, the net debt-to-equity ratio was [6-7] on 31 December 2019. Therefore, the Commission concludes that, both at the level of Air France and the Beneficiary, the State recapitalisation does not go beyond restoring the capital structure to the one predating the COVID-19 outbreak, i.e. the situation on 31 December 2019.

3.3.4.2. Whether the public support is limited to the minimum needed to restore the capital structure of the Beneficiary

- (156) To assess the viability condition of point 54 of the Temporary Framework, the Commission will employ the tests mentioned in recital (143).
- (157) With regard to test a), the Commission compared the forecasted net debt-to-equity ratio of Air France and the Beneficiary, taking into account the State recapitalisation, to the same ratio of a sample of peer European airlines on 31 December 2019. This sample consists of 11 European airlines.⁷¹ Among them, five had a credit rating on 31 December 2019, which ranges between BBB+ and B+.⁷²
- (158) The Commission notes that, taking into account the State recapitalisation, the expected net debt-to-equity ratio of Air France on 31 December 2021 is negative, due to its negative equity position on that date. By contrast, all the peer airlines of

⁷⁰ The (projected) cumulated losses for Air France over the years 2020 and 2021 amount to EUR [...].

⁷¹ The sample is comprised of Aegean Airlines, Croatia Airlines, Deutsche Lufthansa, easyJet, Finnair, Icelandair Group, International Consolidate Airline Group, Norwegian Air Shuttle, Ryanair, SAS Scandinavian Airlines and Wizz Air. Among those airlines, the median net debt-to-equity ratio was 0.7 and the third-quartile was 2.7 on 31 December 2019.

⁷² The rated peers are Deutsche Lufthansa, easyJet, International Consolidate Airline Group, Ryanair and SAS Scandinavian Airlines (Source: Capital IQ). Their net debt-to-equity ratio on 31 December 2019 was between 0.1 and 5.2.

Air France had a positive net debt-to-equity ratio before the COVID-19 outbreak, (i.e. on 31 December 2019).

- (159) The same conclusion is reached for the Beneficiary since its expected net debt-to-equity ratio on 31 December 2021 taking into account the State recapitalisation is also negative (owing to a negative equity position on that date) in contrast to that of the sample of peer European airlines.
- (160) Therefore, the Commission concludes that the capital structure of Air France and the Beneficiary does not improve compared to their peer airlines before the COVID crisis, indicating that the State recapitalisation does not exceed the minimum to restore the viability of the Beneficiary.
- (161) With regard to test b), the Commission has assessed whether, and in which fiscal year, Air France and the Beneficiary expect the net debt-to-EBITDA ratios to fall below the 3-3.5 thresholds. It is common market practice to consider companies with a net debt-to-EBITDA ratio above those thresholds as highly risky. Hence, companies with those net debt-to-EBITDA ratios would find it difficult to access private capital markets.
- (162) The financial projections of Air France show a negative net debt-to-EBITDA ratio on 31 December 2021. Hence, as of 31 December 2021, the Measure is not higher than the amount needed to ensure the viability of Air France and its access to capital markets once the COVID-19 crisis ends. The projected net debt-to-EBITDA ratio of Air France turns positive in [...], when it is equal to [3-4], and then gradually decreases over time to reach a value of [1-2] in [...]. Those dynamics indicate that the State recapitalisation will allow Air France to face the negative effects of the COVID-19 crisis and enable it to restore its access to private capital markets from the year [...] onwards (when its net debt-to-EBITDA ratio is expected to fall below the critical threshold as defined in recital (161)).
- (163) The dynamics of the net debt-to-EBITDA ratio of the Beneficiary is qualitatively the same as that of Air France. That ratio is negative in 2021, turns positive in [...] ([4-5]) and decreases over the planning period to reach a value of [1-2] in [...]. Therefore, the Commission concludes that, also for the Beneficiary, the State recapitalisation is not higher than the amount needed to ensure the viability of the Beneficiary in 2021 and restore its access to capital markets from the year [...] onwards (when its net debt-to-EBITDA ratio is expected to fall below the critical threshold as defined in recital (161)).
- (164) With regard to test c), the Commission compared the forecasted equity-to-asset ratios of Air France and the Beneficiary, taking into account the State recapitalisation, to the 15% threshold as defined in recital (143)(c).
- (165) On 31 December 2021, that ratio is negative for Air France, due to its negative equity position on that date. Therefore, it is significantly lower than 15%. The evolution of the equity-to-asset ratio also shows that the State recapitalisation does not exceed the minimum to ensure the viability of Air France, as it expects a negative equity until the end of the planning period, namely by the year [...].
- (166) The dynamics of the equity-to-asset ratio of the Beneficiary is qualitatively the same as that of Air France. On 31 December 2021, the Beneficiary also expects a negative equity position, which is significantly lower than 15%. In similar

manner, the evolution of the equity-to-asset ratio also shows that the State recapitalisation does not exceed the minimum to ensure the viability of the Beneficiary as it expects a negative equity until the end of the planning period.

- (167) Overall, based on the evidence from the net debt-to-equity, net debt-to-EBITDA and equity-to-assets ratios, the Commission concludes that the State recapitalisation does not exceed the minimum to ensure the viability of Air France and the Beneficiary and ensure their access to private capital markets in the year [...].

Sensitivity analysis

- (168) The Commission has also assessed the proportionality of the State recapitalisation under a sensitivity analysis. The rationale of that analysis is that the proportionality assessment relies on the financial projections of the Beneficiary that France provided and, in particular, on the forecasted losses. The Commission has determined what is the amount of losses for which, all else being equal, the State recapitalisation would no longer be proportionate on the basis of the capital structure of the Beneficiary at 31 December 2019 and the indicators in recitals (143) and (144). The calculation of the Commission assumes that, were the Beneficiary to incur lower losses, it would enjoy a one-to-one increase in their available cash and their EBITDA, which is a conservative assumption.⁷³
- (169) The results of the sensitivity analysis show that in terms of the net-debt-to-EBITDA ratio at December 2021, the Measure would still be proportionate and the ratio equal to 3.0, had the projected losses of Air France in 2021 been of EUR [...] instead of EUR [...]. Assuming that alternative amount of losses in 2021, the equity level of Air France would still be negative in 2021 and, therefore, so would be the net debt-to-equity and equity-to-assets ratios.
- (170) As regards the Beneficiary, the results of the sensitivity analysis are qualitatively the same as that of Air France. The State recapitalisation would still be proportionate had the losses of the Beneficiary been equal to EUR [...] instead of EUR [...]. This is calculated by simulating the value of losses such that the net debt-to-EBITDA ratio is equal to 3.0 under the conservative assumption as explained above. With that amount of losses, the equity level of the Beneficiary would still be negative in 2021 and, therefore, so would be the net debt-to-equity and equity-to-assets ratios.
- (171) Considering that the cumulated losses of Air France (and the Beneficiary) for the years 2020 and 2021 amount to EUR [...] (EUR [...]), that [60-70]% ([60-70]%) of those losses are already incurred in 2020, and that the financial projections for year 2021 are even more optimistic than industry forecasts from IATA (see recital

⁷³ This is a conservative assumption as for example not all losses have an impact on the cash position in the same period (instead of paying cash, one can recognise a payable to be settled at a later stage). In addition, losses might originate from cost items that are not included in EBITDA, such as financial costs. If losses do not equally affect cash (and therefore, net debt) and EBITDA, the net debt-to-equity and net debt-to-EBITDA ratios would be higher than under the assumptions of the Commission.

(149)) the Commission considers the buffer of EUR [...] ([...]) [...] ⁷⁴ as sufficient to make the proportionality assessment robust to alternative assumptions in the financial projections.

(172) As explained in recital (148), the Commission also acknowledges the commitment from France to submit a new aid notification in case the contribution of private investors to the recapitalisation of the Beneficiary (and potentially to that of Air France as indicated in recital (147)) is higher than the EUR [...] buffer. ⁷⁵

3.3.5. Remuneration and exit of the State

(173) According to the general principles of the remuneration and exit of the State outlined in points 55 to 59 of the Temporary Framework, the Member State must receive appropriate remuneration for the investment and must put a mechanism in place that gradually incentivises the exit of the State.

(174) According to point 57 of the Temporary Framework, “[t]he remuneration of the COVID-19 recapitalisation measure should be increased in order to converge with market prices to provide an incentive to the beneficiary and to the other shareholders to redeem the State recapitalisation measure and to minimise the risk of distortions of competition”. Point 58 of the Temporary Framework clarifies that the purpose of point 57 is that the recapitalisation measures “contain appropriate incentives for undertakings to redeem the recapitalisation and look for alternative capital when market conditions permit, by requiring a sufficiently high remuneration for the recapitalisation”.

(175) With particular regard to the remuneration, point 59 of the Temporary Framework allows Member States to “notify schemes or individual measures where the remuneration methodology is adapted in accordance with the features and seniority of the capital instrument provided they overall lead to a similar outcome with regard to the incentive effects on the exit of the State and a similar overall impact on the State's remuneration”.

(176) The Commission will assess compliance of the Measure with those general principles, taking into account the specific rules set out by the Temporary Framework depending on the type of recapitalisation instrument (notably points 60 to 64 of the Temporary Framework as regards equity instruments and points 65 to 70 of the Temporary Framework as regards the hybrid capital instruments).

3.3.5.1. The Hybrid Instrument

(177) In accordance with point 65 of the Temporary Framework, the Commission assesses the overall remuneration of the Hybrid Instrument by factoring in the

⁷⁴ That is the difference between the projected losses of Air France (the Beneficiary) in 2021, i.e. EUR [...] (EUR [...]), and the amount of losses such that the State recapitalisation is no longer proportionate, i.e. EUR [...] (EUR [...]).

⁷⁵ On a conservative basis, the Commission considers the lower bound of the identified buffer as part of the sensitivity analysis, in order to assess to which level of private contribution to the recapitalisation of the Beneficiary (and potentially to Air France) could rise while still satisfying the proportionality test.

characteristics of the instrument (recitals (59), (60) and (61)), its built-in incentives for exit and an appropriate interest rate.

- (178) According to point 66 of the Temporary Framework, hybrid capital instruments, until they are converted into equity-like instruments, must bear a minimum remuneration at least equal to the base rate (1-year IBOR or equivalent as published by the Commission)⁷⁶ plus the premium as set out in Table 4.

Table 4 – Remuneration of hybrid capital instruments: 1-year IBOR +

<i>Type of recipient</i>	<i>1st year</i>	<i>2nd year</i>	<i>3rd year</i>	<i>4th year</i>	<i>5th year</i>	<i>6th year</i>	<i>7th year</i>	<i>8th year and after</i>
<i>Large enterprises</i>	<i>250 bps</i>	<i>350 bps</i>	<i>350 bps</i>	<i>500 bps</i>	<i>500 bps</i>	<i>700 bps</i>	<i>700 bps</i>	<i>950 bps</i>

- (179) As explained in recital (63) and Table 2, the remuneration of the Hybrid Instrument will use the 1-year EURIBOR as base rate.
- (180) The Commission also notes that the Hybrid Instrument will be treated as equity under IFRS rules (recital (60)), as it exhibits many equity-like characteristics, resulting in a higher risk for investors.⁷⁷ Therefore, the higher remuneration above the minimum required under point 66 of the Temporary Framework ([...] bps) takes into account the additional risk borne by the State due to the fact that the Hybrid Instrument is close to equity in terms of seniority (recital (59))⁷⁸, is not convertible into shares (recital (61)), bears coupons only payable at the Beneficiary’s discretion (recital (60))⁷⁹, and is perpetual in duration (recital (59)).
- (181) To ensure that the coupons are ultimately paid, especially given that the Beneficiary has the option not to do so, there are several incentivising mechanisms: (i) interest on unpaid (deferred) coupons is compounded; (ii) coupons always accrue to the initial nominal amount of the Hybrid Instrument; and (iii) the behavioural requirements laid down in section 3.11.6 of the Temporary Framework will continue to apply until the nominal amount of the Hybrid Instrument and the accrued unpaid coupons (including compound interest) have been fully repaid by the company irrespective of a potential sale, unless the

⁷⁶ Base rates calculated in accordance with the Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.01.2008, p.6.), published on the website of DG Competition at https://ec.europa.eu/competition/state_aid/legislation/reference_rates.html.

⁷⁷ For example, the Hybrid Instrument is of perpetual nature and the payment of coupons could be deferred at the discretion of the Beneficiary.

⁷⁸ In case of insolvency, the Hybrid Instrument is senior to subscribed capital and to capital reserves.

⁷⁹ A risk-mitigating factor is the fact that unpaid coupons will accrue compound interests, although there is a time value effect as deferring coupons is likely to reduce the net present value of the State’s remuneration.

Hybrid Instrument is sold at par value or above including accrued unpaid coupons (including compound interest).⁸⁰

- (182) As regards the exit incentives for the State, the Hybrid Instrument includes a [...] increasing interest rate (together with compound interest in case of unpaid coupons) that makes them an increasingly costly source of funding for the Beneficiary. Moreover, in accordance with section 3.11.6 of the Temporary Framework, the Hybrid Instrument needs to be redeemed in order for the behavioural commitments imposed on the Beneficiary under this Decision to end. All those elements create strong incentives for the Beneficiary to repay or to refinance the Hybrid Instrument as soon as possible.
- (183) Taking into account the particular risk profile, characteristics and built-in exit incentives of the Hybrid Instrument, the Commission considers that a top-up of [...]bps over the minimum remuneration as defined by point 66 of the Temporary Framework (Table 4) is required to provide sufficient remuneration for the State.
- (184) Therefore, the remuneration of the Hybrid Instrument issued by the Beneficiary would be at least equal to the one as set out in Table 5 (recital (63)).

Table 5 – Remuneration of the Hybrid Instrument: 1-year EURIBOR + margin

<i>Hybrid Instrument</i>	<i>1st year</i>	<i>2nd year</i>	<i>3rd year</i>	<i>4th year</i>	<i>5th year</i>	<i>6th year</i>	<i>7th year</i>	<i>8th year and after</i>
<i>Minimum margin</i>	<i>[>250] bps</i>	<i>[>350] bps</i>	<i>[>350] bps</i>	<i>[>500] bps</i>	<i>[>500] bps</i>	<i>[>700] bps</i>	<i>[>700] bps</i>	<i>[>950] bps</i>

Note: The coupon rates in certain years may increase above the minimum margin for the Hybrid Instrument as part of the alternative approach for compliance of the Share Capital Increase with point 60 of the Temporary Framework.

- (185) For the above reasons, the Commission concludes that for the Hybrid Instrument the remuneration for the State and the exit incentives comply with the principles set out in points 65 to 70 of the Temporary Framework.

3.3.5.2. The Equity Participation

- (186) The Commission notes that, according to point 60 of the Temporary Framework, a share capital injection by the State must be conducted at a price that does not exceed the average share price of the beneficiary over the 15 days preceding the request for the capital injection (recital (54)).
- (187) France will ensure that the Equity Participation will comply with point 60 of the Temporary Framework. Points 59 and 62 of the Temporary Framework allow for a certain degree of flexibility provided that the proposed alternative mechanism overall leads to a similar outcome as foreseen under point 60, in particular with regard to the incentive effects on the exit of the State and the overall impact on the State's remuneration.

⁸⁰ The Commission considers it to be appropriate to include the additional remuneration under the alternative approach for compliance with point 60 of the Temporary Framework in the form of increased coupon rates on the Hybrid Instrument (if any).

- (188) Pursuant to French law applicable to capital increases with a priority subscription period, France is not able to commit to strict compliance with the Entry Price Limit (recital (53)). As explained in recital (56), France proposed an alternative approach to deal with any potential scenario in which the actual subscription price of the Equity Participation would exceed the Entry Price Limit. In such a case, the Beneficiary commits to pay to the State an additional remuneration based on a comparison of the actual share capital injection and a counterfactual scenario of strict compliance with point 60. In that setting, the Required Compensation would be equal to the difference between the actual subscription price and the Entry Price Limit, multiplied by the number of newly acquired shares.⁸¹ If the actual subscription price remains under the Entry Price Limit, there will be no need for Required Compensation.
- (189) As explained in recital (62)(b), France relies on an alternative approach for compliance with point 60 of the Temporary Framework by increasing the coupon rates on the Hybrid Instrument to offer the State additional remuneration if the actual subscription price of the Equity Participation exceeds the Entry Price Limit.⁸² In such a case, France commits that the Beneficiary will adjust the remuneration profile on the Hybrid Instrument to ensure that the present value of the resulting additional remuneration⁸³ would be equal to or exceed the Required Compensation.⁸⁴ To accommodate that alternative approach, the issuance of the Hybrid Instrument establishing the additional remuneration will only take place following the planned Share Capital Increase and the determination of the actual subscription price. In addition, France commits to provide this additional remuneration through adjusting the remuneration profile on the Hybrid Instrument from the moment of its issuance until the first call dates that apply to each of its tranches, thereby ensuring that the present value of this additional remuneration will be sufficient. Finally, France commits that the Beneficiary will make a cash payment to the State to ensure compliance with point 60 of the Temporary Framework in case the additional remuneration would not be sufficient *ex post* (for instance, in case of an early repayment of the Hybrid Instrument).⁸⁵

⁸¹ For instance, assume that France subscribes to 100 million shares at a subscription price of EUR 6, while the Entry Price Limit would be EUR 5. The amount of the Equity Participation would then be equal to EUR 600 million. In that case, the Required Compensation to the State would amount to EUR 100 million.

⁸² The Commission has validated the calculation method to adjust the coupon rates on the Hybrid Instrument under different hypothetical scenarios simulating different levels of Required Compensation in order to ensure compliance with point 60 of the Temporary Framework. For instance, assume that France subscribes to 100 million shares at a subscription price of EUR 6, while the Entry Price Limit would be EUR 5. The amount of the Equity Participation would then be equal to EUR 600 million. In that case, the Required Compensation to the State would amount to EUR 100 million. The Beneficiary will provide the Required Compensation through additional remuneration on the Hybrid Instrument by increasing its coupon rates in certain years.

⁸³ The present value is calculated by discounting the additional remuneration over time at the minimum coupon rates on the Hybrid Instrument (as set out in Table 2).

⁸⁴ In case unpaid coupons are deferred, they are capitalised with compound interest.

⁸⁵ Until the end of the Mandate, the Monitoring Trustee shall monitor the accrued additional remuneration to the State on a yearly basis, and instruct a payment in cash in case of insufficient

- (190) The Commission considers that the alternative approach as proposed by France leads to a similar overall impact on the State's remuneration.⁸⁶ This is for the following reasons. First, the proposed mechanism mirrors the counterfactual scenario of strict compliance with point 60 of the Temporary Framework by ensuring that the present value of the additional remuneration on the Hybrid Instrument will be equal to or exceed the Required Compensation (recital (189)). Second, the additional remuneration on the Hybrid Instrument is fully equivalent to the present value of a theoretical hybrid instrument with a face value that is equal to the Required Compensation assuming that the State accrues coupons at the same rate as the Hybrid Instrument.⁸⁷ By that logic, the alternative approach is equivalent to a scenario in which the State would inject equity at the Entry Price Limit (and hence, ensures strict compliance with point 60 of the Temporary Framework) in addition to buying an additional hybrid instrument with the same characteristics as the Hybrid Instrument from the Beneficiary at a face value equal to the Required Compensation. In this scenario, France would grant the same amount of aid as in the Equity Participation, but part of the aid amount would take the form of a hybrid instrument instead of share capital.⁸⁸ Since the total amount of aid to the Beneficiary does not change, as only the aid instrument would be different, the Commission notes that the proportionality assessment in section 3.3.4 remains valid in the equivalent scenario.
- (191) In addition, the Commission considers that the alternative approach as proposed by France overall leads to a similar outcome with regard to the incentive effects on the exit of the State.⁸⁹ To allow for the exit of the State from its Equity Participation, the Temporary Framework provides for two options, namely through a buy-back of the newly acquired shares as defined by point 63 or through alternative exit mechanisms as defined by points 64, 64bis and 64ter. While point 64bis is not applicable in the present case (since the French State is not the only existing shareholder), for the options set out by points 64 and 64ter, France and the Beneficiary commit to comply with the conditions as set out by the Temporary Framework. For the purpose of the determination of the minimum buy-back price in point 63 and for the implementation of point 64ter a), the Commission considers it to be appropriate to use the amount of the Equity Participation determined on the basis of point 60 of the Temporary Framework

compensation (at the latest at full redemption of the Hybrid Instrument). In the latter case, the Beneficiary will be required to pay the difference in cash together with accrued compound interest (within three months of the request).

⁸⁶ See points 59 and 62 of the Temporary Framework.

⁸⁷ The present value is calculated by discounting the (deferred) coupons on the hypothetical hybrid instrument over time at the minimum coupon rates on the Hybrid Instrument (as set out in Table 2).

⁸⁸ In the previous hypothetical example, the actual equity injection amounting to EUR 600 million is equivalent to a scenario where the State subscribes to shares at the Entry Price Limit, thereby injecting EUR 500 million of equity, in addition to buying an additional hybrid instrument with the same characteristics as the Hybrid Instrument at a face value equal to the Required Compensation of EUR 100 million.

⁸⁹ See points 59 and 62 of the Temporary Framework.

instead of the actual amount of the Equity Participation⁹⁰ (in line with recital (190)) while taking into consideration the impact of the alternative approach on the incentive effects for the exit of the State for the Hybrid Instrument (as explained in recital (181)).

- (192) According to points 61 and 62 of the Temporary Framework, equity instruments are to include a step-up mechanism increasing the remuneration of the State to incentivise the Beneficiary to buy back the State capital injections. The Commission acknowledges the commitment of France to implement the step-up mechanism as described in point 61 of the Temporary Framework. As described in recitals (65) to (69), France will receive a remuneration equivalent to an additional 10% shareholding after 4 and 6 years from the State recapitalisation if, at those dates, 40% and 100% of the Equity Participation, respectively, have not been redeemed by the beneficiary or sold by the State. This step-up remuneration is equal to the market value of the shares that are necessary to achieve a 10% increase of the COVID-19 capital injection still outstanding at years 4 and 6 after the State recapitalisation.
- (193) The Beneficiary commits to pay the step-up remuneration either in additional shares, a corresponding amount of cash or in the form of a hybrid instrument for the same value in line with market conditions⁹¹ at its own discretion. The Step-up Hybrid will have the same characteristics as the Hybrid Instrument as part of the Measure (e.g. perpetual maturity, deferrable coupons at the discretion of the issuer, deeply subordinated), except for the remuneration. To ensure that the nominal value of the Step-up Hybrid is equivalent to the alternative step-up payment options in the form of cash or additional shares, the remuneration of the Step-up Hybrid will be set in line with the market conditions at the time of issuance for similar instruments (in terms of maturity, level of subordination, conditions on coupon payments, etc.) and for issuers with a similar credit quality as the Beneficiary. France commits to inform the Commission on the level of the Step-up Hybrid remuneration and the methodology used for its determination in view of obtaining approval by the Commission.
- (194) To incentivise the Beneficiary to pay the coupons on the Step-up Hybrid and ensure the State receives adequate step-up remuneration, France commits to comply with the following conditions: (1) the Beneficiary will make a coupon payment on the Step-up Hybrid in case it pays a dividend or makes a non-mandatory coupon payment or another hybrid instrument⁹²; (2) the behavioural requirements laid down in section 3.11.6 of the Temporary Framework will continue to apply until the nominal amount of the Step-up Hybrid Instrument and the accrued unpaid coupons (including compound interest) have been fully repaid by the company irrespective of a potential sale, unless the Step-up Hybrid is sold

⁹⁰ For instance, assume that France subscribes to 100 million shares at a subscription price of EUR 6, while the Entry Price Limit would be EUR 5. The amount of the Equity Participation determined on the basis of point 60 of the Temporary Framework would then be equal to EUR 500 million (instead of EUR 600 million).

⁹¹ Defined as the Step-up Hybrid.

⁹² This condition would apply after the governance conditions under point 77 of the Temporary Framework were to be lifted after the COVID-19 recapitalisation measures have been fully redeemed.

at par value or above including accrued unpaid coupons (including compound interest).

- (195) For the above reasons, the Commission concludes that for the Equity Participation, the remuneration for the State and the exit incentives comply with the principles set out in points 60 to 64 of the Temporary Framework.

3.3.6. *Governance and prevention of undue distortions of competition*

- (196) As detailed in this section, the Beneficiary (i.e. the Holding and their subsidiaries with the exception of KLM and its subsidiaries) will respect the conditions referred to in section 3.11.6 of the Temporary Framework (“Governance and prevention of undue distortions of competition”).

3.3.6.1. Measures to preserve effective competition in situations of significant market power

- (197) According to point 72 of the Temporary Framework, if the beneficiary of a COVID-19 recapitalisation measure above EUR 250 million is an undertaking with significant market power on at least one of the relevant markets in which it operates, Member States must propose additional measures to preserve effective competition in those markets. The Measure concerns an up to EUR 4 billion recapitalisation in favour of the Beneficiary. As the recapitalisation amount exceeds EUR 250 million, the Commission will assess whether the Beneficiary has significant market power for the purposes of point 72 of the Temporary Framework.

(a) Identification of the relevant markets

- (198) Considering the Commission decisional practice,⁹³ the markets in which the Beneficiary operates relevant for the purposes of assessing the distortive effects of the measure on competition are the markets for the provision of passenger air transport services to and from the airports served by the Beneficiary.
- (199) The Measure aims at preserving the overall ability of the Beneficiary to operate air transport services, notably ensuring the preservation of its assets and its rights to operate in the medium/long term. Those assets and rights are not assigned, in principle, to any particular route. This is particularly true for slots at a coordinated airport,⁹⁴ which may be highly valuable and may be used on any route to and from the airport.
- (200) The Measure supports the operations of the Beneficiary and may therefore potentially affect competition on all routes originating and arriving at an airport at which the Beneficiary holds slots, regardless of the specific competitive position of the Beneficiary on any of those routes. It is thus not appropriate to analyse the impact of the measure on each of those routes separately. Instead, for the

⁹³ See notably Case SA.57153 – *Germany – COVID-19 – Aid to Lufthansa*, recitals (165) to (170), and cases referred to therein.

⁹⁴ According to Article 2 of the “Slot Regulation”, a “coordinated airport” means “an airport where a coordinator has been appointed to facilitate the operations of air carriers operating or intending to operate at that airport”.

purposes of the applying point 72 of the Temporary Framework, it is appropriate to define as relevant markets the airports at which the beneficiary supplies passenger air transport services. The beneficiary's power on such relevant markets will be assessed *inter alia* on the basis of the level of congestion of the airports and the Beneficiary's shares of airport infrastructure capacity that it has the permission to use for its operations (i.e. shares of slots).⁹⁵

(b) Overview of the relevant airports for the Beneficiary

- (201) In its notes of 8 and 10 December 2020, France explained that the Beneficiary operated a base at 12 airports in the EU during the Summer 2019 IATA Season or Winter 2019/2020 IATA Season.^{96, 97} Of those 12 airports, three are coordinated airports.⁹⁸ For the purposes of assessing the Beneficiary's position at those coordinated airports, it is necessary to consider whether they are substitutable with other airports in view of their overlapping catchment areas.
- (202) The question of substitutability is relevant only for the two Paris airports, i.e. Paris-Charles-de-Gaulle (CDG) and Paris-Orly (ORY).
- (203) For the purposes of defining the geographic market relevant for the assessment of the distortive effects of the aid at the Paris airports, the substitutability of CDG and ORY should be assessed from the point of view of air carriers, acting as customers of airport infrastructure services. Air carriers' choice of airports depends not only on passengers' demand, but also on other criteria, such as the costs of operating from a particular airport, capacity constraints for slots and facilities, passenger volumes or the positioning of the airport.⁹⁹
- (204) The analysis of the above-mentioned indicators does not allow to reach a clear-cut conclusion as to the substitutability of CDG and ORY.¹⁰⁰
- (205) Indeed, on the one hand, there are a number of indicia supporting the substitutability of the two airports, in particular: (i) the catchment areas of the two

⁹⁵ See examples by analogy: Case M.8633 – *Lufthansa/Certain Air Berlin Assets*; Case M.8672 – *easyJet/Certain Air Berlin Assets*.

⁹⁶ As per the definition of the Beneficiary, only bases operated by Air France and its subsidiaries (and not by KLM or its subsidiaries) are taken into account.

⁹⁷ Those airports are: Paris-Charles-de-Gaulle, Paris-Orly, Lyon-Saint-Exupéry, Marseille-Provence, Lille-Lesquin, Nantes-Atlantique, Rennes-Bretagne, Toulouse-Blagnac, Strasbourg-Entzheim, Bordeaux-Mérignac (Summer 2019 IATA Season only), Montpellier-Méditerranée (Winter 2019/2020 IATA Season only), and Aéroport Guadeloupe – Pôle Caraïbes.

⁹⁸ Those airports are: Paris-Charles-de-Gaulle, Paris-Orly, and Lyon-Saint-Exupéry.

⁹⁹ Therefore, the geographic market definition under such an airport-by-airport approach (i.e. where every airport (or substitutable airports) is defined as a distinct market), which primarily relies on substitutability from the point of view of airlines, may deviate from the geographic market definition under the point of origin/point of destination city-pair approach (i.e. where every combination of an airport or city of origin to an airport or city of destination is defined as a distinct market). The latter primarily relies on substitutability from the point of view of passengers.

¹⁰⁰ By contrast, and for the sake of completeness, it can be concluded that neither CDG nor ORY are substitutable with Beauvais-Tillé airport.

airports largely overlap (for both airports, the distance and travelling time to Paris city centre are below the indicative benchmark of 100 km/1 hour driving time), although their gravity centres (at the north or south of Paris) slightly diverge; (ii) the structure of the airport charges (fee schedule for services rendered) is identical at the two airports;¹⁰¹ (iii) the infrastructures of the two airports can accommodate all types of traffic (e.g. short- and long-haul, point-to-point and connecting, business- and leisure-oriented traffic); and (iv) the two airports are coordinated.

- (206) On the other hand, there are a number of indicia supporting non-substitutability of the two airports, in particular: (i) the two airports have different and complementary positioning, with CDG being the reference hub and ORY focussing on point-to-point traffic, notably for passengers visiting friends and relatives (VFR) and leisure destinations; (ii) the manager of the two airports (Aéroports de Paris) did not consider that CDG and ORY are subject to the same competitive environment, with only CDG competing with other EU hubs and for intercontinental traffic, and only ORY being subject to intermodal competition;¹⁰² (iii) as a consequence, the weight of long-haul and connecting traffic varies substantially between the two airports. As the number of long-haul destinations at ORY is limited (mainly French overseas territories), the long-haul fleet at ORY is limited (approximately 10 aircraft), while it reaches approximately 100 aircraft at CDG, and connecting passengers at ORY represent 8% of the passengers at ORY, while they represent approximately 30% at CDG; (iv) the size of the two airports are materially different (76 million passengers and 498 175 movements at CDG in 2019; 32 million passengers and 218 349 movements at ORY in 2019); (v) the streamlined infrastructure at ORY allows shorter taxiing times, which, together with shorter flight times to Southern destinations at ORY, may have a material impact on the difference in the costs of operating French domestic flights from ORY and CDG; (vi) low-cost carriers are significantly more present at ORY (40% of the overall traffic) than at CDG (15% of the overall traffic); (v) importantly, despite being both coordinated airports, the congestion levels of the two airports are not comparable, since ORY is fully congested, while CDG is not as severely constrained.
- (207) In any case, for the purpose of this Decision, the question of whether ORY and CDG belong to the same geographic markets for passenger air transport can be left open, as the Structural Commitments proposed by France adequately preserve competition in the only plausible relevant market on which the Beneficiary would have significant market power (provision of passenger air transport services to and from ORY) (see recitals (244) to (245), and (272)).

¹⁰¹ Nevertheless, the charges at the two airports are regulated. Furthermore, the unit amounts of certain components (e.g. supplemental fees for check-in counters and boarding gates and origin/destination baggage handling) differ at the two airports, resulting in small but possibly significant differences in the overall amount of airport charges at the two airports.

¹⁰² See Base Document for the initial public offering of Aéroports de Paris (“*document de base*”, 2006), p. 8-9 : https://www.parisaeroport.fr/docs/default-source/groupe-fichiers/finance/rerelations-investisseurs/information-financiere/introduction-en-bourse/document-_de_base.pdf?sfvrsn=e93a0abd_2

(c) Assessment of the Beneficiary's market power at the relevant airports

(i) Conditions for the Beneficiary's significant market power at the relevant airports

- (208) To be able to provide passenger air transport services, an air carrier needs access to airport infrastructure. At congested airports, an air carrier must thus hold slots to operate routes to or from those airports.
- (209) Lack of access to slots is therefore a barrier to an air carrier's ability to compete for passengers on routes between an airport and the destinations served from the airport. An air carrier's slot holding at an airport and the latter's capacity constraints provide a measure of the air carrier's ability to compete on the passenger air transport market to or from that airport.
- (210) In light of the above and of the Commission decisional practice,¹⁰³ the Commission will assess the Beneficiary's market power at the relevant airports by taking account of three factors together: (i) the Beneficiary's slot holding at the airport or at substitutable airports being high, in particular at peak times;¹⁰⁴ (ii) the level of congestion at the airport or at the substitutable airports being high; and (iii) the Beneficiary's competitors' slot holdings being limited.

(ii) Methodology

- (211) A slot holding is defined as the ratio between the number of slots held by an air carrier (or the air carriers that are part of the same group)¹⁰⁵ at an airport and the total available slots at that airport (i.e., the airport capacity).
- (212) The Commission has used the qualification as a coordinated airport under the Slot Regulation as a first proxy of a high congestion level of an airport. Such a qualification means that, at those airports, the demand for airport infrastructure, in particular slots, significantly exceeds the airport's capacity and the expansion of airport infrastructure to meet demand is not possible in the short term.
- (213) For coordinated airports, the actual congestion rate is calculated by dividing the number of slots allocated to all airlines at the airport in the relevant IATA season by the total capacity of the airport (in terms of slots) in the relevant IATA season.

¹⁰³ See notably Case SA.57153 – *Germany – COVID-19 – Aid to Lufthansa*, section 3.3.6.3 and Case M.8633 – *Lufthansa/Certain Air Berlin assets* (2017), recitals 165-184.

¹⁰⁴ The Commission qualifies as "peak times" the hour bands for which the congestion rate at a given airport is very high, and therefore very limited, or no, capacity for entry or expansion is left.

¹⁰⁵ As per the definition of the Beneficiary, the Beneficiary's slot holding is calculated on the basis of slots held by Air France and its subsidiaries (Air France, HOP! and Transavia France). The Commission notes that the addition of the slots held by KLM and its subsidiary Transavia Netherlands would not affect materially the Beneficiary's slot holdings at the relevant airports and would not change the Commission's finding as to the Beneficiary's significant market power at ORY only (where taking account of KLM and its subsidiaries would have no impact, as KLM or its subsidiaries did not hold slots at ORY during the reference IATA seasons).

An average congestion rate during the operating hours of less than 60% would not be *prima facie* problematic.¹⁰⁶

- (214) France has provided data on the Beneficiary’s slot holding at the relevant airports and on the congestion rates at those airports. For the Beneficiary’s competitors, France has provided the number of slots allocated to them at ORY and CDG, as well as an estimation of the number of aircraft they base at the relevant airports. The Commission has checked the overall accuracy of the data submitted by France based on data reported by COHOR, the French slot coordinator.¹⁰⁷

(d) Airport-by-airport assessment

- (215) The Beneficiary had a base in the EU during the Summer 2019 IATA Season or Winter 2019/2020 IATA Season at three coordinated airports: CDG, ORY and Lyon-Saint-Exupéry. In accordance with recital (207), with regard to CDG and ORY, the Commission will assess whether the Beneficiary has significant market power if the relevant geographic markets are defined as CDG and ORY separately, or if the relevant geographic market is defined as CDG and ORY together.

(i) Paris-Charles de Gaulle airport (CDG)

IATA Season	Beneficiary’s average slot holding	Beneficiary’s three highest slot holdings	Airport’s average congestion rate	Airport’s three highest congestion rates
Summer 2019	[30-40]%	[50-60]% (hour band: 6:00-6:59 UTC) [50-60]% (hour band: 5:00-5:59 UTC) [40-50]% (hour band: 10:00-10:59 UTC)	[70-80]%	[90-100]% (hour band: 8:00-8:59 UTC) [80-90]% (hour band: 10:00-10:59 UTC) [80-90]% (hour band: 19:00-19:59 UTC)
Winter 2019/2020	[30-40]	[50-60]% (hour band: 7:00-7:59 UTC) [40-50]% (hour band:)	[60-70]%	[70-80]% (hour band: 8:00-8:59 UTC) [70-80]% (hour band:)

¹⁰⁶ The conditions of operation at the relevant airports may differ due to, notably, different opening hours, night-flight bans and movement restrictions. For the sake of comparability, considering the night curfew at ORY between 23:30 and 6:00 local time, the Commission has considered the Beneficiary’s slot holding and airport congestion rate at CDG between 6:00 and 23:59 local time (i.e. between 4:00 and 21:59 UTC during IATA Summer Season and between 5:00 and 22:59 UTC during IATA Winter Season).

¹⁰⁷ The coordinator is the person responsible for the allocation of slots (Article 4(5) of the Slot Regulation).

		11:00-11:59 UTC) [30-40]% (hour band: 6:00- 6:59 UTC)		11:00-11:59 UTC) [70-80]% (hour band: 7:00- 7:59 UTC)
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The Beneficiary's slot holding

- (216) In Summer 2019 IATA Season and Winter 2019/2020 IATA Season, France estimates that the Beneficiary's share in slot holding at CDG was respectively [30-40]% and [30-40]%. Consequently, the Beneficiary's operations represented a significant share of the airport capacity during that airport's opening hours.
- (217) In addition, in Summer 2019 IATA Season, the Beneficiary's highest share during any specific hour band at CDG reached [50-60]%. That hour band nevertheless does not correspond to any of the three most congested hour bands at CDG. In Winter 2019/2020 IATA Season, the Beneficiary's highest share during any specific hour band at CDG reached [50-60]%. That hour band corresponds to the third most congested hour band at CDG. At peak times, the Beneficiary's slot holding at CDG represents at most [50-60]% of the available capacity at that airport.

Airport's congestion

- (218) In Summer 2019 IATA Season and Winter 2019/2020 IATA Season, France estimates that the average congestion rate during the relevant opening hours of CDG amounted to respectively [70-80]% and [60-70]%.
- (219) In Summer IATA Season and Winter IATA Season, although CDG is coordinated, there are still available slots for entry or expansion at the airport. However, there is limited capacity available during peak times in Summer IATA Season (below 15%).

The Beneficiary's competitors' slot holdings

- (220) In Summer 2019 IATA Season, the second- and third-largest slot holders at CDG were respectively easyJet (with a share in slot holding of approximately 5%) and IAG (with a share in slot holding of approximately 4%). In Winter 2019/2020 IATA Season, the second- and third-largest slot holders at CDG were respectively easyJet (with a share in slot holding of approximately 4%) and Lufthansa (with a share in slot holding of approximately 3%).
- (221) In addition, the Beneficiary deployed by far the largest fleet at the airport with [150-200] aircraft in 2019. According to France's estimates, the second-largest carrier operating a base at CDG was easyJet with 9 aircraft, followed by ASL Airlines (7 aircraft).

Conclusion on the Beneficiary's market power

- (222) Considering that (i) the Beneficiary's average slot holding was only [30-40]% in Summer 2019 IATA Season (and only [30-40]% in the Winter 2019/2020 IATA Season), and its highest slot holding does not exceed [50-60]% at any hour band,

and (ii) there are still slots available at CDG, the Commission considers that it is possible for the Beneficiary's competitors to build up a substantial slot portfolio using the airport capacity not allocated to the Beneficiary.

(223) Therefore, the Commission finds that, for the purposes of this Decision, the Beneficiary does not have significant market power on the market for the provision of passenger air transport services to and from CDG.

(ii) Paris-Orly airport (ORY)

(224) ORY is subject to an administrative cap for environmental and noise restriction reasons. Pursuant to this cap, the maximum number of slots that can be allocated at ORY is 250 000 per year (Summer and Winter IATA Seasons), which is not broken down per season or hour band. In addition, ORY is subject to a night curfew between 23:30 and 6:00 (local time) and the number of movements authorised between 6:00 and 7:00 and between 22:00 and 23:00 (local time) is limited.¹⁰⁸

(225) Those regulatory constraints are the main source of congestion at ORY, as the airport infrastructure would allow approximately 400 000 movements per year. The following ratios are thus calculated on the basis of the above-mentioned caps.¹⁰⁹

IATA Season	Beneficiary's average slot holding¹¹⁰	Airport's average congestion rate	Rate of use of the early morning departure capacity and late evening arrival capacity	Beneficiary's average early morning departure slot holdings and late evening arrival slot holdings
Summer 2019	[50-60]%	[90-100]%	[90-100]% of departure capacity (4:00-4:59 UTC in Summer and 5:00-5:59 UTC in Winter)	[60-70]% of departure capacity (4:00-4:59 UTC in Summer and 5:00-5:59 UTC in Winter)

¹⁰⁸ Maximum 25 departures and 30 movements between 6:00 and 7:00 (local time) and maximum 39 arrivals and 51 movements between 22:00 and 23:30 (local time).

¹⁰⁹ In addition, the slots reserved by the French Civil Aviation Authority for Public Service Obligations routes are excluded from the total number of slots available at ORY and the number of slots held by the Beneficiary, as these slots are subject to specific allocation rules and are conditioned to the operations of specific routes.

¹¹⁰ The slot holdings of the Beneficiary and its competitors at ORY are based on their position at ORY prior to the reallocation of the slots held by bankrupt Aigle Azur in December 2019. Their slot holdings would not be materially affected if slots reallocated from Aigle Azur were taken into account. The conclusions reached in this Decision would not be affected.

Winter 2019/2020	[50-60]%	[90-100]%	[85-100]% of arrival capacity (20:00-21:30 UTC in Summer and 21:00-22:30 UTC in Winter)	[50-60]% of arrival capacity (20:00-21:30 UTC in Summer and 21:00-22:30 UTC in Winter)
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The Beneficiary’s slot holding

- (226) In Summer 2019 IATA Season and Winter 2019/2020 IATA Season, France estimates that the Beneficiary’s share in slot holding at ORY was respectively [50-60]%. Consequently, the Beneficiary’s operations represented a significant share of the airport capacity during that airport’s opening hours.
- (227) In addition, in 2019 (Summer 2019 and Winter 2019/2020 IATA Seasons), the Beneficiary’s share of departure capacity at ORY during the first morning hour band, to which access is particularly restricted, reached [60-70]%. Its share of arrival capacity at ORY during the latest evening hour bands, to which access is particularly restricted, reached [50-60]%. At peak times, the Beneficiary’s slot holding at ORY thus represent most of the available capacity at that airport.

Airport’s congestion

- (228) In Summer 2019 IATA Season and Winter 2019/2020 IATA Season, France estimates that the average congestion rate at ORY amounted to respectively [90-100]% and [90-100]%. In fact, the slot pool is structurally empty at ORY, which makes it impossible to enter or expand at the airport, except following exceptional circumstances e.g. the exit of an operator at ORY (e.g. following its bankruptcy).
- (229) In addition, independently of the administrative cap on the total number of slots that can be allocated per year, there are few, if any, available departure slots during the early morning hour and few, if any, available arrival slots during the late evening hours at ORY. This limits the ability of air carriers based at ORY to maximise their daily operating time, thus their operating efficiency.
- (230) As reflected by the actual levels of congestion and as a result of the administrative cap, ORY is a coordinated airport with no available capacity for entry or expansion during Summer or Winter IATA Seasons.

The Beneficiary’s competitors’ slot holdings

- (231) In Summer 2019 IATA Season, the second- and third-largest slot holders at ORY were respectively IAG (with a cumulated share in slot holding of approximately 10%) and easyJet (with a share in slot holding of approximately 8%). In Winter 2019/2020 IATA Season, the second- and third-largest slot holders at ORY were respectively easyJet (with a share in slot holding of approximately 18%) and IAG (with a cumulated share in slot holding of approximately 10%).

(232) In addition, the Beneficiary deployed by far the largest fleet at the airport with [50-100] aircraft in 2019.¹¹¹ According to France’s estimates, the second-largest airline group operating a base at ORY was the Dubreuil group (Air Caraïbes and French Bee) with 12 aircraft, followed by IAG and easyJet (6 aircraft each).

Conclusion on the Beneficiary’s market power

(233) Given (i) the Beneficiary's significant share of ORY capacity ([50-60]% in Summer and Winter IATA Seasons and up to [60-70]% at peak departure time), (ii) the structural shortage of available airport capacity at ORY, and (iii) the relative fragmentation of the capacity allocated to other carriers, the Commission finds that, for the purposes of this Decision, the Beneficiary has significant market power on the market for the provision of passenger air transport services to and from ORY.

(iii) Paris airports (CDG+ORY)

IATA Season	Beneficiary’s average slot holding	Airport’s average congestion rate	Average congestion rates at early morning and late evening hour bands	Beneficiary’s average slot holdings at early morning and late evening hour bands
Summer 2019	[30-40]%	[70-80]%	[70-80]% (hour band: 4:00-4:59 UTC) [70-80]% (hour band: 20:00-20:59 UTC) [50-60]% (hour band: 21:00-21:59 UTC)	[30-40]% (hour band: 4:00-4:59 UTC) [30-40]% (hour band: 20:00-20:59 UTC) [10-20]% (hour band: 21:00-21:59 UTC)
Winter 2019/2020	[30-40]%	[60-70]%	[60-70]% (hour band: 5:00-5:59 UTC) [50-60]% (hour band: 21:00-21:59 UTC) [30-40]% (hour band: 22:00-22:59 UTC)	[30-40]% (hour band: 5:00-5:59 UTC) [20-30]% (hour band: 21:00-21:59 UTC) [10-20]% (hour band: 22:00-22:59 UTC)

The Beneficiary’s slot holding

¹¹¹ See Annex I to France’s response to the first request for information dated 9 December 2020 and submitted on 10 December 2020).

- (234) In Summer 2019 IATA Season and Winter 2019/2020 IATA Season, France estimates that the Beneficiary's share in slot holding at the Paris airports was respectively [30-40]% and [30-40]%. Consequently, the Beneficiary's operations represented a significant share of the combined capacity of CDG and ORY.
- (235) In addition, in Summer 2019 IATA Season, the Beneficiary's highest share during the early morning and late evening hour bands (the most congested times at ORY) reached [30-40]%. In Winter 2019/2020 IATA Season, the Beneficiary's highest share during those hour bands reached [30-40]%.

Airports' congestion

- (236) In Summer 2019 IATA Season and Winter 2019/2020 IATA Season, France estimates that the average congestion rate at the Paris airports amounted to respectively [70-80]% and [60-70]%.
- (237) In Summer IATA Season and Winter IATA Season, although the two Paris airports are coordinated, there are still available slots for entry or expansion at the airports, although capacity is only available at CDG and, at CDG, the capacity available is limited during peak times in Summer IATA Season (below 15%).¹¹²

The Beneficiary's competitors' slot holdings

- (238) In each of the Summer 2019 and Winter 2019/2020 IATA Seasons, the second- and third-largest slot holders at the Paris airports were respectively easyJet (with a share in slot holding of approximately 6% in Summer and 7% in Winter) and IAG (with a share in slot holding of approximately 5% in Summer and 4% in Winter).
- (239) In addition, the Beneficiary deployed by far the largest fleet at the Paris airports with [250-300] aircraft in 2019. According to France's estimates, the second-largest carrier operating a base at the Paris airports was easyJet with 14 aircraft (based at CDG and ORY), followed by the Dubreuil group (Air Caraïbes and French Bee, 12 aircraft based at ORY) and IAG (9 aircraft based at CDG and ORY).

Conclusion on the Beneficiary's market power

- (240) Considering that (i) the Beneficiary's average slot holding at the Paris airports was only [30-40]% in Summer 2019 IATA Season (and only [30-40]% in the Winter 2019/2020 IATA Season), and (ii) there are still slots available at the Paris airports (thanks to the available capacity at CDG), the Commission considers that it is possible for the Beneficiary's competitors to build up a substantial slot portfolio using the airport capacity not allocated to the Beneficiary.
- (241) Therefore, the Commission finds that, for the purposes of this Decision, the Beneficiary does not have significant market power on the market for the provision of passenger air transport services to and from the Paris airports.

¹¹² The peak times at CDG do not correspond to the early morning and late evening hour bands, the access to which is particularly restricted at ORY.

(iv) Lyon-Saint Exupéry (LYS)

- (242) Based on data provided by France, the Beneficiary's share of frequencies at LYS reached [30-40]% in Summer 2019 IATA Season and [40-50]% in Winter 2019/2020 IATA Season.
- (243) Considering that the Beneficiary's share of frequencies is materially higher than its slot holding,¹¹³ the Commission finds that, for the purposes of this Decision, the Beneficiary does not have significant market power on the market for the provision of passenger air transport services to and from LYS.

(v) Conclusion

- (244) For those reasons, the Commission considers that, for the purposes of this Decision, the Beneficiary has significant market power on a relevant market defined as the provision of passenger air transport services to and from ORY. Therefore, in line with point 72 of the Temporary Framework and given that the Measure exceeds EUR 250 million, France has proposed additional measures to preserve effective competition at ORY.
- (245) For the other relevant airports (i.e., CDG, the two Paris airports taken together and LYS), considering the Beneficiary's lack of significant market power, the Commission considers that there is no requirement for France to propose additional measures in light of point 72 of the Temporary Framework.

(e) Assessment of the Structural Commitments

- (246) Under point 72 of the Temporary Framework, in proposing additional measures to preserve effective competition, Member States may in particular offer structural or behavioural commitments foreseen in the Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004. Under that Notice, commitments that are structural in nature, such as the commitment to divest a business unit, are, as a rule, preferable.¹¹⁴

(i) Scope of the Structural Commitments

- (247) On 31 March 2021, France proposed the Structural Commitments,¹¹⁵ by which the Beneficiary would undertake to make available to a remedy taker up to 18 daily slots at Orly airport by way of code-sharing¹¹⁶ and to definitively transfer

¹¹³ The share of frequencies is calculated on the basis of the total number of slots used, and not the total number of slots available according to the airport's capacity. In other terms, the share of frequencies does not factor in the congestion rate. In particular, France estimates that the average congestion rate at LYS was approximately [40-50]% in Summer 2019 IATA Season and approximately [30-40]% in Winter 2019/2020 IATA Season. The Beneficiary's slot holding would thus amount to approximately [10-20]% in each of the Summer 2019 in Winter 2019/2020 IATA Seasons.

¹¹⁴ Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1, recital 15.

¹¹⁵ See the Annex to this decision.

¹¹⁶ Under the Structural Commitments, code-sharing is used as a provisional solution until the slots are definitively transferred from Air France to the remedy taker.

the slots (without transferring staff or else) to the remedy taker on the later of: (i) the date on which the applicable legal framework allows the definitive transfer of slots (without any transfer of staff or other), and (ii) the expiry date of the period during which compliance of the remedy taker with the requirement to maintain a base at Orly airport is controlled (i.e. four years after the first cut-off date for the call for proposals implementing the code-sharing procedure). As further explained in recital (76), the remedy taker will be approved following a call for proposals published by the Monitoring Trustee, who will regularly set deadlines for the submission of proposals (cut-off dates).

- (248) The main purpose of the Structural Commitments is to ensure that the Beneficiary eventually transfers the slots (rights) necessary for the establishment or expansion of an operating base by a competitor at the congested airport where the Beneficiary holds significant market power (ORY) and to create conditions to sustain effective competition in the longer term at that airport. As further detailed below, the Commission considers that such a purpose is achieved, as the Structural Commitments combine (i) adequate conditions for the transfer of slots to a remedy taker (i.e. free and unconditional transfer after code-sharing), and (ii) a significant volume of slots (i.e. up to 18 daily slots, while no slot is normally available for entry or expansion at ORY).
- (249) France considers that the legal framework currently applicable to slot allocation at ORY does not allow for the definitive transfer of slots from the Beneficiary and the remedy taker in appropriate conditions. In particular, France argues that the specific wording of the administrative cap at ORY (referring to the maximum number of slots that can be allocated) makes it legally questionable to transfer slots by means of an exchange with additional slots specifically allocated for that purpose. In addition, the Commission confirmed with France and COHOR that the latter interprets restrictively the possibilities of transfer of slots under the Slot Regulation, notably as part of a partial take-over of an air carrier, reducing the attractiveness of the remedy slots, hence the effectiveness of such possible commitments. Conversely, France submits that code-sharing, i.e. a joint operation under Article 10(8) of the Slot Regulation, could be a provisional solution for the use by the remedy taker of slots held by Air France, provided that specific conditions are imposed on Air France, ensuring that the remedy taker can compete effectively with Air France.
- (250) In order to assess whether code-sharing, under the proposed conditions, could be an effective remedy, the Commission assessed whether the following two conditions were fulfilled: (i) the freedom of the remedy taker to use, under code-sharing, the slots held by Air France is not restricted to any material extent compared to the freedom to use slots that would have been transferred from Air France; and (ii) code-sharing under the proposed conditions is considered as a workable and attractive arrangement by potential remedy takers. The Commission considers that the first condition is fulfilled, as Air France has neither the ability¹¹⁷ nor the incentive¹¹⁸ to terminate the code-share agreement before the

¹¹⁷ Air France only has the right to terminate the code-share agreement in case of breach, by the remedy taker, of its obligation to maintain a base at ORY. It is up to the Commission to find such a breach. Furthermore, in such a case, a new code-sharing procedure is initiated.

transfer of the slots, and the transfer will automatically take place four years after the first cut-off date of the call for proposals (except if delayed by the applicable legal framework). In addition, as two additional explicit conditions that will be subject to monitoring, Air France can neither interfere in the operations of the remedy taker nor impede them. To the contrary, Air France, in its position of slot holder, must support the remedy taker in its position of slot user. With regard to the second condition, [...] ¹¹⁹ [...]. The Commission thus considers that code-sharing, under the proposed conditions, would not deter potential remedy takers.

- (251) Therefore, considering that the commitments proposed by France contain sufficient safeguard measures to guarantee that the remedy taker can use the remedy slots freely and autonomously until their transfer, the Commission considers that the provisional recourse to code-sharing does not call into question the effectiveness of the commitments proposed by France.
- (252) According to the Explanatory Memorandum for the Commission Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports, ¹²⁰ *“the emergence of a strong competitor at a given airport requires it to build up a sustainable slot portfolio to allow it to compete effectively with the dominant carrier (usually the “home” carrier).”*
- (253) Lack of access to slots constitutes a significant barrier to entry or expansion at Europe’s busiest airports. ¹²¹ By virtue of the Slot Regulation, slots are essential for airlines’ operations as only air carriers holding slots are entitled to get access to the airport infrastructure services delivered by airport managers of coordinated airports and, consequently, to operate routes to or from these airports. Under the Slot Regulation, slots can only be exchanged or transferred between airlines in certain specified circumstances, subject to the explicit confirmation from the slot coordinator under the Slot Regulation.
- (254) The commitments consisting in making slots available at ORY (through code-sharing followed by a transfer) therefore remove the main barrier to entry and expansion of the Beneficiary’s competitors at that fully congested airport. The data collected from COHOR demonstrate that the requests for slots at ORY systematically exceeds the available capacity, ¹²² and that no or almost no request for new slots at ORY can be accommodated through the normal workings of the general slot allocation procedure, as the pool of unused slots at ORY is empty.

¹¹⁸ Air France cannot claim compensation from the remedy taker under any circumstances. Furthermore, in case of early termination of the code-share agreement by the remedy taker, Air France will return the slots to the pool and not claim them back through the general slot allocation procedure.

¹¹⁹ [...].

¹²⁰ COM/2011/827 final of 1 December 2011.

¹²¹ See e.g. Case SA.57153 – *Germany – COVID-19 – Aid to Lufthansa*, recital (224).

¹²² As an example, according to COHOR, the requests submitted by all airlines at ORY for the Summer 2020 IATA Season represented 232 658 slots, i.e. almost the annual volume at which the airport is limited (250 000 slots for both the Summer and Winter IATA Seasons, from which the number of slots reserved for Public Service Obligations routes is to be deducted).

The only exception consists in slots formerly held by a bankrupt carrier and that could not be sold as part of a partial or full take-over of that carrier. Even in those exceptional circumstances, only a minority of the requests for slots at ORY can be accommodated, and the fragmented allocation of the slot pool makes it unlikely to trigger the emergence of a strong competitor.¹²³

- (255) Based on its decisional practice in merger and antitrust cases in the aviation sector, the Commission finds that a commitment by the Beneficiary to transfer slots at the congested airport where it has significant market power, to allow competitors to set up a base, is the most effective competition measure in order to prevent undue distortions of competition.
- (256) The remedy is attractive from a competition standpoint because it will allow structural competition with the Beneficiary in the relevant market where the Beneficiary holds significant market power.
- (257) The Commission considers that the amount of 18 slots per day is sufficient for the remedy taker to establish or expand viably its based operations at ORY¹²⁴ by, for example, basing three aircraft and operating three rotations per day with each of them,¹²⁵ or basing two aircraft operating five and four rotations per day with each of them.¹²⁶ If the remedy taker is a long-haul carrier, the 18 slots per day would enable it to base a higher number of aircraft. As slots are not linked to any specific route, airlines can use them according to their business plan (i.e., on any route of their choice). This will allow the remedy taker to achieve economies of scale and scope and to compete more effectively with the Beneficiary. The Commission notes in that respect that the addition of two aircraft by Air France's two competitors basing the largest fleet at ORY after the Dubreuil group¹²⁷ (i.e. IAG and easyJet) would already increase their based fleet by a third, which brings substantial advantages at ORY, whose infrastructure is designed to maximise the operational efficiency of such air carriers.
- (258) France committed that, in case of early termination of the code-share agreement by the remedy taker, the Beneficiary would return the slots to the pool and not request them, with an effect similar to a non-reacquisition clause. For the

¹²³ As an example, following the bankruptcy of Aigle Azur, 9 868 slots (corresponding to approximately 27 daily slots) were reallocated in December 2019 on the basis of the requests on waiting list for the Summer 2020 IATA Season. No more than 1 460 slots (corresponding to four daily slots) were allocated to one air carrier (as two carriers of the Air France group were allocated slots, Air France received twice this volume of slots at group level).

¹²⁴ As explained in recital (270), in case of competing proposals, priority will be given to already based carriers at ORY.

¹²⁵ As is the case for e.g. Transavia France at ORY.

¹²⁶ As is the case for e.g. low cost carriers like easyJet at ORY.

¹²⁷ As mentioned in this recital, long-haul carriers like those belonging to the Dubreuil group operate fewer flights per day than carriers specialising in short-haul routes. Therefore, the amount of slots made available by Air France (18 slots) would enable them to base more aircraft than two or three. It is thus more difficult to compare the number of aircraft that an air carrier like those belonging to the Dubreuil group would base at ORY to its current based fleet (12 aircraft for the Dubreuil group).

avoidance of doubt, this does not prevent the Beneficiary from obtaining slots that the remedy taker would return to the pool after their definitive transfer.

- (259) The Commission concludes therefore that the scope of the Structural Commitments is appropriate and effective to preserve effective competition at ORY.

(ii) Duration of the Structural Commitments

- (260) The slots will be offered to potential remedy takers for a period of four years after the first cut-off date for the call for proposals implementing the code-sharing procedure. In other terms, the call for proposals will be open for four years after its first cut-off date, unless the Beneficiary and a remedy taker approved by the Commission enter into the code-share agreement before that expiry date.¹²⁸
- (261) The Commission [...].¹²⁹ It considers that [...], despite the currently adverse market conditions, competitors would be willing to take up the slots made available by the Beneficiary as soon as possible,¹³⁰ so that the Beneficiary and the remedy taker would enter into a code-share agreement well in advance of the expiry of the period referred to in recital (260).¹³¹ In any case, that time-frame is expected to be sufficiently long for the passenger air transport sector to recover from the COVID-19 crisis and for passenger air traffic to return to pre-crisis levels.
- (262) In addition, the period referred to in recital (260) during which the Beneficiary will offer code-sharing corresponds to the enforcement period of the obligation of the remedy taker to base at ORY the aircraft using the remedy slots, i.e. four years after the first cut-off date for the call for proposals implementing the code-sharing procedure.
- (263) Pursuant to the obligation to maintain a base at ORY, the number of aircraft based by the remedy taker at ORY to use the remedy slots will correspond during four years after the first cut-off date for the call for proposals to the number indicated by the remedy taker in its proposal. For that purpose, every potential remedy taker must indicate in its proposal the average number of aircraft that it will base at ORY to use the remedy slots during each IATA season covered by that period. That average number may be expressed as a +/- 20% range to account for operational contingencies during the season.

¹²⁸ The code-share agreement will in turn be in force until the transfer of the slots, which shall automatically and unconditionally take place on the later of: (i) the date on which the applicable legal framework allows it, and (ii) the expiry date of the period during which compliance of the remedy taker with the requirement to maintain a base at Orly airport is controlled (see recital (247)).

¹²⁹ See recital (250).

¹³⁰ [...].

¹³¹ Note that the signature of the code-share agreement does not mean that the operations of the remedy taker will start immediately after its entry into force. It is expected that the remedy taker will start its new or expanded based operations at ORY after a phase-in period following the signature of the code-share agreement.

- (264) On the one hand, that obligation ensures that the increased competition at ORY is maintained over a sufficiently long period and avoids opportunistic requests for slots without intention to translate them into viable and competitive additional operations. On the other hand, the Commission considers that that obligation is defined in the Structural Commitments in such a way that it does not unduly rigidify the operations of the remedy taker. Furthermore, the procedure for the control of the obligation does not result in a heavy, litigation-prone, administrative burden.¹³²
- (265) In light of all the above, the Commission concludes that the duration of the Structural Commitments is sufficient in order for the Structural Commitments to be effective. Additionally, given the fact that the creation or the expansion of a base by a competing carrier implies structural changes in the competitive landscape at ORY, the Commission acknowledges the structural nature of the Structural Commitments, in accordance with point 72 of the Temporary Framework.

(iii) Eligibility criteria for the remedy taker

- (266) As mentioned in recital (73), to be eligible to obtain the slots, a potential remedy taker must:
- (a) be an air carrier holding a valid operating licence issued by an EU/EEA Member State;
 - (b) be independent of Air France-KLM and unconnected with Air France-KLM at the time of signing of the code-share agreement;
 - (c) not be subject to competition remedies on account of having received a COVID-19 recapitalisation instrument of more than EUR 250 million;¹³³
 - (d) commit to comply with the applicable EU and national labour laws, as interpreted, in particular and as relevant, by the EU Courts (see e.g. Nogueira, Joined Cases C-168/16 and C-169/16); and
 - (e) have or establish an operating base at ORY in compliance with Article R. 330-2-1 of the French Civil Aviation Code, including all the aircraft using the remedy slots, except aircraft that the remedy taker cannot, for operational reasons, base at ORY using the remedy slots (the burden of proof rests on the remedy taker).¹³⁴

¹³² At the end of each IATA season covered by that period, the remedy taker will submit a report to the Monitoring Trustee on the average number of aircraft based at ORY to use the remedy slots over the season, accompanied by any appropriate supporting document (notably the list detailing, for each day of the season, the earliest departure and latest arrival remedy slots used by aircraft based at ORY).

¹³³ Under that criterion, the potential remedy takers that fulfil cumulatively the two following conditions are not eligible: (i) they have benefitted from a COVID-19 recapitalisation measure above EUR 250 million; and (ii) they are subject to additional measures to preserve effective competition in the relevant markets where they have significant market power for the purposes of point 72 of the Temporary Framework.

¹³⁴ This means that potential remedy takers must explain in their proposals why, from an operational point of view, the remedy slots that they request for inbound flying cannot be used for based operations.

- (267) The eligibility criterion relating to the operating licence is necessary to ensure that the remedy taker has the ability to operate domestic and intra-EU/EEA flights without restriction, thus guaranteeing connectivity at ORY, which is a key evaluation criteria by the Commission.
- (268) The exclusion criterion applying to beneficiaries of a large recapitalisation aid subject to competition remedies is necessary to avoid that companies that have been subject to additional measures aiming at restoring a level playing field, as referred to in point 72 of the Temporary Framework, can obtain a competitive advantage by the same mechanism.¹³⁵
- (269) As regards the final eligibility criterion, relating to the base, it is necessary to allow for effective competition, thus ensuring the effectiveness of these commitments. The Commission observes in that respect that the criterion effectively requires the remedy taker to maximise the number of based aircraft at ORY and to make use of the slots, thus ensuring that the overall volume of services at ORY is not reduced as a consequence of the Structural Commitments. Furthermore, it supports the entry or expansion of a viable competitor at ORY and puts the Beneficiary under the threat of competition on routes to/from the airport.
- (270) In case of competing proposals, the Commission will give priority to those submitted by potential remedy takers that already operate a base at ORY, and then those that offer in particular the greatest number of destinations served (connectivity) and the largest capacity deployed at the airport (in number of seats for the IATA Summer and Winter Seasons). The priority given to carriers already based at ORY in case of competing proposals is justified by the specific market structure at ORY, characterised by a relatively high number of carriers based at the airport that have no possibility to expand, due to the full congestion of the airport. Those carriers have a strong incentive to base at least two aircraft using the remedy slots, in order to get access to the maximum number of early morning departure slots and late evening arrival slots.¹³⁶ Therefore, the Commission considers it unlikely that already based carriers would request a number of slots and serve a number of destinations lower than non-based carriers (new entrants) would.¹³⁷
- (271) For all of the above, the Commission concludes that the eligibility criteria for the potential remedy takers are appropriate, as they (i) allow a sufficient number of airlines that may be interested in the available slots to participate in the call for proposals, and (ii) ensure proportionate requirements to access the slots, thus facilitating the activation of the measures to preserve effective competition.

¹³⁵ As the number of potential remedy takers subject to competition remedies is expected to be limited, that exclusion criterion does not diminish the effectiveness of the Structural Commitments.

¹³⁶ Air France will make available one early morning departure slot and one late evening arrival slot to a remedy taker basing one aircraft at ORY to use the remedy slots, and up to two early morning departure slots and two late evening arrival slots to a remedy taker basing two or more aircraft at ORY to use the remedy slots.

¹³⁷ In addition, the Commission have the right to reject proposals that are not credible from an economic or operational point of view, regardless of whether the proposals are submitted by based or non-based carriers.

(iv) Conclusion on the Structural Commitments

(272) In light of all the above, the Commission concludes that the Structural Commitments proposed by France to preserve effective competition at ORY are in line with point 72 of the Temporary Framework.

3.3.6.2. Other governance conditions

(273) According to point 71 of the Temporary Framework, the beneficiary of a COVID-19 recapitalisation should not engage in aggressive commercial expansion and excessive risk taking. France confirmed that the Measure will contain a prohibition for the Beneficiary to engage in aggressive commercial expansion financed by State aid and excessive risk taking (see recital (89)).

(274) Point 73 of the Temporary Framework requires that: “Beneficiaries receiving a COVID-19 recapitalisation measures are prohibited from advertising it for commercial purposes”. This requirement is met, since France committed that the Beneficiary will not advertise the Measure for commercial purposes (see recital (90)).

(275) Point 74 of the Temporary Framework states that: “As long as at least 75% of the COVID-19 recapitalisation measures have not been redeemed, beneficiaries other than SMEs shall be prevented from acquiring a more than 10% stake in competitors or other operators in the same line of business, including upstream and downstream operations”. The Commission observes that France committed that the Beneficiary will respect this condition, taking into account the possible exception mentioned in point 75 of the Temporary Framework (see recital (91)).

(276) The Commission also notes that France confirmed that the Beneficiary will also abide by the terms and conditions set out in point 76 of the Temporary Framework regarding not to use the State aid to cross-subsidise economic activities of integrated undertakings that were in difficulty already on 31 December 2019 (see recital (92)). In this respect, France also confirmed that the Beneficiary was not in difficulty within the meaning of the GBER on 31 December 2019 (see recital (38)). France also committed that the compliance with this commitment will be subject to the monitoring by the Monitoring Trustee.

(277) Point 77 of the Temporary Framework states that: “As long as the COVID-19 recapitalisation measures have not been fully redeemed, beneficiaries cannot make dividend payments, nor non-mandatory coupon payments, nor buy back shares, other than in relation to the State”. The Commission observes that France commits that, as long as the Measure has not been fully redeemed, the Beneficiary cannot make dividend payments, nor non-mandatory coupon payments, nor buy back shares, other than in relation to the State (see recital (93)). The Commission also notes that the dividend ban does not apply to intra-group dividend payments made to the Holding or Air France by companies that are (directly or indirectly) fully owned by the Holding or Air France. Moreover, for companies in which the Holding or Air France hold less than 100% of the shares, the dividend ban shall not apply in case the Holding or Air France provide financial support to the company following the approval of the COVID-19 recapitalisation measures in favour of the Holding or Air France, by way of an equity injection or a loan, and all other shareholders provide at least the same support (pari-passu and pro-rated). The last exclusion is justified by the need not

to dissuade private investment into the subsidiaries of Air France and the Holding, as such private investment would allow also for a faster redemption of the Measure. In any event, the above exceptions should not be construed in a way that allows possible circumvention of the dividend ban. They will also be subject to the monitoring by the Monitoring Trustee.

- (278) Point 78 of the Temporary Framework states that “[a]s long as at least 75% of the COVID-19 recapitalisation measures has not been redeemed, the remuneration of each member of the beneficiaries’ management must not go beyond the fixed part of his/her remuneration on 31 December 2019. For persons becoming members of the management on or after the recapitalisation, the applicable limit is the lowest fixed remuneration of any of the members of the management on 31 December 2019. Under no circumstances, bonuses, other variable or comparable remuneration elements shall be paid”. The Commission observes that the management of the main companies of the Beneficiary (i.e. Air France-KLM S.A., Air France S.A. and Transavia France S.A.S.) will be subject to this condition (recital (94)). As those entities account for almost the entirety of the Beneficiary’s annual turnover, the Commission considers the commitment proportionate. Moreover, the Commission notes that, in order to avoid possible circumvention of this commitment, the remuneration cap and ban will apply to the members of management of all other entities of the Beneficiary who are also part of the management of Air France-KLM S.A., Air France S.A. et Transavia France S.A.S.

3.3.7. *Exit of the State from the participation resulting from the recapitalisation*

- (279) Pursuant to point 79 of the Temporary Framework, “beneficiaries other than SMEs that have received a COVID-19 recapitalisation of more than 25% of equity at the moment of intervention must demonstrate a credible exit strategy for the participation of the Member State, unless the State’s intervention is reduced below the level of 25% of equity within 12 months from the date of the granting of the aid”.¹³⁸ Pursuant to point 80 of the Temporary Framework, the exit strategy must lay out the plan of the beneficiary on the continuation of its activity and the use of the funds invested by the State, including a repayment schedule and the measures that the beneficiary and the State will take to abide by the repayment schedule. Pursuant to point 81 of the Temporary Framework, the exit strategy should be prepared and submitted to the Member State within 12 months after aid is granted and must be endorsed by the Member State.
- (280) France confirmed that the Beneficiary will send, and that it will endorse, a credible exit strategy within 12 months after the aid is granted, unless the State’s intervention is reduced below the level of 25% of equity by that deadline, as explained in recital (95). The Commission concludes that the conditions set out in points 79 to 81 of the Temporary Framework are satisfied.
- (281) In addition, France confirmed that the Beneficiary will report to France on the progress in the implementation of the repayment schedule in compliance with

¹³⁸ In line with footnote 52 of the Temporary Framework, hybrid instruments granted by the State should be counted as equity.

point 82 of the Temporary Framework. The Beneficiary and France will also comply respectively with the publication and reporting obligations set out in points 83 to 84 the Temporary Framework (see recitals (107) and (108)).

- (282) Finally, in line with point 85 of the Temporary Framework, France committed to notify a restructuring plan to the Commission for approval if, within 6 years after the recapitalisation, France's intervention has not been reduced below 15% of the Holding's equity (see recital (108)(b)).

3.3.8. Section 4 of the Temporary Framework

- (283) France confirmed that it will comply with the reporting and monitoring obligations contained in section 4 of the Temporary Framework, as explained in recital (106).

- (284) In particular, France commits that:

- (a) it will publish relevant information on the recapitalisation granted to the Beneficiary on the comprehensive State aid website or Commission's IT tool within three months from the moment of granting in line with point 88 of the Temporary Framework;¹³⁹
- (b) it will submit annual reports to the Commission, in line with point 89 of the Temporary Framework; and
- (c) it will ensure that detailed records regarding the granting of aid under the Measure (including all information necessary to establish that the necessary conditions have been observed) are maintained for ten years upon granting of the aid and are provided to the Commission upon request, in line with point 91 of the Temporary Framework.

3.3.9. Conclusion on compliance with the Temporary Framework

- (285) It follows from the above elements that the Measure is in line with sections 3.11 and 4 of the Temporary Framework.

3.4. Conclusion on the assessment of the Measure

- (286) The Commission considers that the Measure complies with the conditions set out in the Temporary Framework and is designed in a way that limits its negative effects on competition and trade between Member States, and such negative effects are in any event outweighed by the positive effects of the Measure. The Measure in favour of the Beneficiary will have positive effects for the connectivity needs within, and to and from France and the recovery of the French economy after the COVID-19 outbreak. The cumulated effects of the overall transaction are proportional and appropriate to meet those objectives.
- (287) On the basis of the scenario currently contemplated by France, in light particularly of the commitments made by the French government, and considering the conditions and terms of the planned Measure described under section 2, the

¹³⁹ Referring to information required in Annex III to Commission Regulation (EU) No 651/2014.

Commission therefore concludes that the Measure is necessary, appropriate and proportionate to remedy a serious disturbance in the economy of a Member State pursuant to Article 107(3)(b) TFEU, as applied by the Commission under section 3.11 of the Temporary Framework.

4. CONCLUSION

The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(3)(b) of the Treaty on the Functioning of the European Union.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

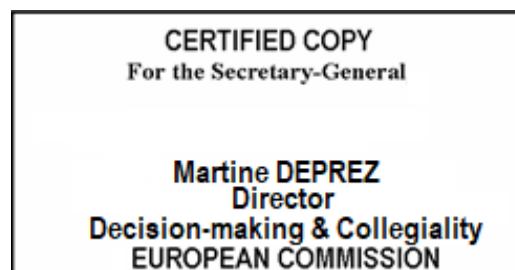
Your request should be sent electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully,

For the Commission

Margrethe VESTAGER
Executive Vice-President



Annex Engagements des autorités françaises - remèdes

- 1.1 Volume : jusqu'à 18 créneaux cédés sur Orly à un bénéficiaire des remèdes
- 1.2 Bénéficiaire :

Pour être éligible, un demandeur doit :

- Être un transporteur aérien titulaire d'une licence d'exploitation valable délivrée par un État membre de l'UE/EEE ;
- Être indépendant d'Air France-KLM et sans lien avec Air France-KLM à la date d'entrée en vigueur de l'accord de partage de code ;
- Ne pas être soumis à des remèdes concurrentiels dans le cadre d'un instrument de recapitalisation de plus de 250 millions d'euros dans le contexte de la Covid-19 ; et
- S'engager à respecter le droit du travail national et de l'UE applicable, tel qu'interprété notamment, le cas échéant, par les tribunaux européens (cf. par exemple Nogueira, Affaires jointes C-168/16 et C-169/16).
- Disposer ou installer une base d'exploitation à Orly incluant tous les avions utilisant les créneaux concernés, à l'exception de ceux pour lesquels les créneaux ne permettent pas opérationnellement cette installation (la preuve de cette impossibilité incombant au bénéficiaire), dans le respect de l'article R. 330-2-1 du code de l'aviation civile. Une base signifie que les avions du demandeur susmentionnés stationnent durant la nuit à l'aéroport d'Orly et sont utilisés pour exploiter plusieurs liaisons depuis cet aéroport et que les équipages qui exploitent lesdits avions prennent et terminent leurs services de manière habituelle à l'aéroport d'Orly. Le nombre d'avions basés pour exploiter les créneaux constitutifs des remèdes est explicité par le candidat dans sa candidature.

Le monitoring trustee désigné par Air France après avis conforme de la Commission contrôle ce dernier critère de maintien d'une base à Orly pour une durée de 4 années à compter de la première date butoir de l'appel à propositions.

Dans ce cadre, le monitoring trustee contrôle que le nombre d'avions basés à Orly pour l'exploitation des créneaux constitutifs des remèdes pendant cette période correspond à celui indiqué par le bénéficiaire des remèdes dans sa candidature pour l'exploitation des créneaux constitutifs des remèdes.¹⁴⁰ Si les autorités françaises disposent d'éléments

¹⁴⁰ Chaque demandeur indique dans sa candidature le nombre moyen d'avions qu'il basera à Orly pour l'exploitation des créneaux constitutifs des remèdes pendant chaque saison IATA couverte par la période de contrôle du critère de maintien d'une base à Orly. Ce nombre moyen peut être exprimé par une fourchette de +/- 20%, de façon à prendre en compte les aléas opérationnels en cours de saison. A la fin de chaque saison IATA couverte par cette période, le bénéficiaire des remèdes soumet un rapport au monitoring trustee sur le nombre moyen d'avions qu'il a basés à Orly pour l'exploitation des créneaux constitutifs des remèdes durant la saison IATA échue, accompagné de toute pièce justificative appropriée (notamment la liste détaillant sur chaque jour de la saison IATA échue les premiers créneaux de départ et les derniers créneaux d'arrivée obtenus par le bénéficiaire grâce aux remèdes et utilisés par les avions qu'il a basés à Orly).

démontrant que le bénéficiaire des remèdes enfreint son obligation de maintien d'une base à Orly, elles peuvent les transmettre au monitoring trustee et à la Commission. Le monitoring trustee ou la Commission prend en compte ces éléments dans l'analyse de la situation. Si la Commission, sur avis motivé du monitoring trustee, constate que le bénéficiaire des remèdes enfreint son obligation de maintien d'une base à Orly et considère que la situation n'est pas justifiée, à titre exceptionnel, par des circonstances ayant un impact significatif sur les conditions de marché, le monitoring trustee doit en informer le bénéficiaire des remèdes et Air France. Le bénéficiaire des remèdes doit alors remédier à la situation dans les trois mois suivant l'information du monitoring trustee.

Si le monitoring trustee constate que l'infraction persiste après ces trois mois, Air France a le droit de résilier le contrat de partage de code. Dans ce cas, une nouvelle procédure de désignation d'un bénéficiaire de l'ensemble des remèdes (à laquelle le précédent bénéficiaire ne pourra participer) sera lancée, à l'issue de laquelle Air France conclura, si un nouveau bénéficiaire est sélectionné, un nouveau partage de code avec engagement de transfert définitif des créneaux horaires (sans transfert du personnel ou autre) à la dernière de ces deux dates : (i) la date à laquelle le cadre juridique permet le transfert définitif des créneaux horaires (sans transfert du personnel ou autre), et (ii) l'expiration de la période de contrôle du critère de maintien d'une base à Orly.

- 1.3 Mise en œuvre :

- Partage de code avec engagement de transfert définitif des créneaux horaires (sans transfert du personnel ou autre) à la dernière de ces deux dates : (i) la date à laquelle le cadre juridique permet le transfert définitif des créneaux horaires (sans transfert du personnel ou autre), et (ii) l'expiration de la période de contrôle du critère de maintien d'une base à Orly;
- Les créneaux mis à disposition du bénéficiaire par Air France au moment de la conclusion du contrat de partage de code devront correspondre aux horaires demandés par le bénéficiaire à +/- 10 minutes pour des vols court-courrier et +/- 30 minutes pour des vols long-courrier. Par exception, Air France ne sera pas obligée de donner plus d'un créneau de départ entre 6h et 7h (heure locale) et plus d'un créneau d'arrivée entre 22h et 23h30 (heure locale) par avion basé par le bénéficiaire des remèdes pour exploiter les créneaux constitutifs des remèdes, dans la limite de deux créneaux de départ entre 6h et 7h (heure locale) et deux créneaux d'arrivée entre 22h et 23h30 (heure locale). Il est entendu que pour ces créneaux, Air France ne pourra proposer des créneaux après 7h ou avant 22h (heure locale) si les horaires demandés par le bénéficiaire sont avant 7h ou après 22h (heure locale). Les créneaux mis à disposition par Air France au moment de la conclusion du contrat de partage de code doivent permettre au bénéficiaire des remèdes d'effectuer les rotations prévues sur la base des horaires demandés par le bénéficiaire. Si le bénéficiaire des remèdes considère que les créneaux proposés par Air France ne lui permettent pas d'effectuer les rotations prévues, il peut en informer le monitoring trustee, qui transmettra un avis motivé à la Commission. Si la Commission confirme que les créneaux proposés par Air France ne permettent pas au bénéficiaire des remèdes d'effectuer les rotations prévues, Air France devra proposer au bénéficiaire des remèdes et à la Commission un choix alternatif, soumis à la validation de la Commission. En l'absence de validation de la

Commission, Air France devra mettre à disposition du bénéficiaire les créneaux aux horaires demandés par le bénéficiaire. Cette disposition ne doit cependant pas conduire Air France à devoir céder plus de créneaux entre 6h et 7h et 22h et 23h30 que les seuils précisés supra ;

- Renouvellement tacite du contrat de partage de code en l'absence de transfert définitif des créneaux horaires au bénéficiaire des remèdes (sans transfert du personnel ou autre) ; seul le bénéficiaire des remèdes peut décider de mettre un terme à l'accord, sans pénalité financière ; Air France ne dispose d'aucun droit de résiliation unilatérale autre que celui relatif à l'infraction de l'obligation de maintien d'une base précitée, y compris en cas de changement de contrôle sur le bénéficiaire des remèdes ou de partenariat commercial conclu par ce dernier avec des compagnies tierces ;
- Air France ne peut prétendre à aucune compensation financière, même si les créneaux ne sont pas utilisés en conformité avec le règlement sur les créneaux horaires, notamment avec la règle « créneau utilisé ou perdu » ;
- Solution structurelle et pérenne : créneaux non exploitables par Air France, puis transférés si juridiquement possible à l'avenir ;
- Les créneaux horaires sujets de l'accord de partage de code sont retournés au pool par Air France en cas de résiliation anticipée par le bénéficiaire des remèdes. Dans ce cas, Air France ne demandera pas ces créneaux via cette remise au pool. Pour lever toute ambiguïté, cet engagement ne s'applique pas aux créneaux que le bénéficiaire des remèdes retournerait au pool après le transfert définitif des slots au bénéficiaire.
- Le bénéficiaire des remèdes sera approuvé par la Commission à l'issue d'une procédure de sélection transparente et non-discriminatoire. L'appel à propositions correspondant sera ouvert en permanence à compter de sa date de publication par le monitoring trustee, qui fixera régulièrement des dates butoirs pour la réception des propositions. La Commission, aidée par le monitoring trustee, évaluera les propositions reçues.
- La Commission pourra rejeter les propositions qui ne sont pas crédibles d'un point de vue économique ou opérationnel, ou du respect du droit européen de la concurrence.
- En cas de propositions concurrentes, elle devra donner priorité aux demandeurs ayant déjà une base à l'aéroport d'Orly, puis à ceux offrant notamment le plus grand nombre de destinations (connectivité) et déployant la plus grande capacité à l'aéroport (en nombre de sièges pendant les saisons IATA été et hiver).
- Si la Commission donne une évaluation identique à plusieurs propositions concurrentes (égalité des propositions), elle devra permettre à Air France de classer ces propositions selon les critères transparents de son choix, par exemple le niveau des aides d'État reçues par les demandeurs ou leur respect de normes sociales, et donner priorité à la proposition la mieux classée par Air France.
- La mise à disposition des créneaux sera opérée par Air France à titre gratuit, sous le contrôle du monitoring trustee.
- Air France ne disposera d'aucun droit relatif à la capacité déployée par le bénéficiaire des remèdes. Le bénéficiaire du remède disposera d'une indépendance commerciale et opérationnelle totale, et Air France n'aura aucun pouvoir de contrôle commercial ou opérationnel sur les opérations

du bénéficiaire des remèdes (choix des destinations, des types d'appareils, des tarifs, etc.).

- Air France s'engage à mettre tout en œuvre pour faciliter les opérations du bénéficiaire des remèdes, y compris l'obtention, le cas échéant, des droits de trafic par Air France (sans préjudice des droits de trafic que le bénéficiaire des remèdes devrait éventuellement obtenir) si certaines dessertes envisagées par le bénéficiaire des remèdes le nécessitent, ainsi que le cas échéant, le retiming des créneaux et/ou les changements y afférant (conversion de créneaux de départ/arrivée, changements de destinations, d'avions, etc.).
- Ce remède est d'application à compter de la date d'adoption de la décision et doit être proposé pendant 4 années à compter de la première date butoir de l'appel à propositions. Quelles que soient les circonstances, aucun appel à propositions ne pourra être organisé au-delà de cette échéance.