



EUROPEAN COMMISSION

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C(2021) 5302 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...]</p>		<p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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Subject: State aid SA.57369 (2020/ N) – Portugal - Rescue aid to TAP SGPS

Dear Sir,

The European Commission ("the Commission") wishes to inform the Portuguese Republic that, having examined the information supplied by your authorities on the State aid referred to above, it has decided not to raise any objections, as it is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union ("TFEU").

The Commission has based its decision on the following considerations:

1. PROCEDURE

(1) Following pre-notification contacts that started on 15 May 2020¹, on 9 June 2020,

¹ The contacts involved, until the formal notification, various technical discussions in videoconferences, draft submissions and analyses of financial and business data in connection with different legal bases potentially applicable to Portugal's pre-notified plans to grant State aid.

S. Ex.^a o Ministro dos Negócios Estrangeiros
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Portugal notified to the Commission its plans to grant rescue aid under the Rescue and restructuring Guidelines (“R&R Guidelines”)² in favour of Transportes Aéreos Portugueses SGPS³ S.A. (“TAP SGPS” or “the beneficiary”).

- (2) On 10 June 2020, the Commission adopted a decision raising no objections to the rescue aid to TAP SGPS and finding that the aid was in line with the requirements of the R&R Guidelines (“the initial decision”).
- (3) As a result of an action instituted by Ryanair DAC, by a judgment of 19 May 2021 (hereinafter “the judgment”⁴) the General Court of the European Union (“the General Court”) annulled the initial decision. The General Court found that the Commission failed to state reasons to the requisite standard. In particular, the General Court found that the Commission (i) failed to indicate whether the beneficiary belonged to a group within the meaning of point 22 of the R&R Guidelines and to specify the relationship between the beneficiary and its shareholder companies. The General Court also found that the Commission had not provided a sufficient explanation as to why it considered that the second and third conditions laid down by point 22 of the Guidelines were met, namely that (ii) the beneficiary’s difficulties were intrinsic and were not the result of an arbitrary allocation of costs within the group and that (iii) the beneficiary’s difficulties were too serious to be dealt with by the group.⁵ By the same judgment, on the basis of Article 264(2) TFEU, the General Court maintained the effects of the annulled initial decision pending the adoption of a new decision by the Commission. In that regard, the General Court held that, if the Commission were to adopt that new decision without initiating the formal investigation procedure provided for in Article 108(2) TFEU, that suspension of the effects of the annulment would not exceed two months from the date of delivery of the judgment.
- (4) The Portuguese authorities submitted additional information on 4, 7 and 30 June 2021.
- (5) Pursuant to Article 266 TFEU, the Commission is required to take the necessary measures to comply with the judgment of the General Court. The Commission hereby adopts a new decision to address the inadequacy of the statement of reasons in the initial decision as to the proper level of assessment of the conditions set out in point 22 of the R&R Guidelines.
- (6) The Portuguese authorities agreed exceptionally to waive their rights deriving from Article 342 TFEU in conjunction with Article 3 of EC Regulation 1/1958⁶ and to have the decision adopted and notified pursuant to Article 297 TFEU in English.

² Communication from the Commission - Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1).

³ “SGPS” stands for Sociedade Gestora de Participações Sociais, which is a holding company under Portuguese law.

⁴ Judgment of 19 May 2021 in Case T-465/20, *Ryanair v Commission (TAP; Covid 19)*, EU:T:2021:284.

⁵ See paragraphs 42 to 53 of the judgment.

⁶ Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385, p. 58).

2. DESCRIPTION

2.1. The beneficiary

- (7) TAP SGPS is a holding company and a shareholder of Transportes Aéreos Portugueses, S.A. (“TAP Air Portugal”). TAP Air Portugal was created in 1945 as the Portuguese flagship airline. TAP SGPS was incorporated in 2003.
- (8) At the time of the notification, the beneficiary held full control of TAP Air Portugal with 100% of the shares thereof.⁷ TAP Air Portugal has been in turn the sole shareholder of TAP Logistics Solutions, S.A., a company incorporated on 30 December 2019, to operate in cargo and mail activities. TAP SGPS owns stakes in the following companies that are active in the provision of air transport-related services in Portugal and other countries:
- 100% in Portugália Airlines – Companhia Portuguesa de Transportes Aéreos, S.A. (“Portugalia”);
 - 100% in U.C.S. – Cuidados Integrados de Saúde, S.A., a company active in healthcare services, whose main client is also TAP Air Portugal;
 - 100% in TAPGER Sociedade de Gestão e Serviços, S.A. and 99,83% in Aeropar Participações, Lda, both acting as holding companies;
 - 78,72% in TAP Manutenção e Engenharia Brasil, S.A (“M&E Brasil”), active in aircraft maintenance for the relevant subsidiaries of TAP SGPS and for third parties;
 - 43,9% in SPdH–Serviços Portugueses de Handling, S.A. (“Groundforce”), a company operating in the airport handling sector in Portugal;
 - 51% in CATERINGPOR– Catering de Portugal, S.A., active in the provision of catering for aviation, whose main client is TAP Air Portugal.
- (9) In 2019, TAP Air Portugal operated a fleet of [...] aircraft (including aircraft operated under wet-lease agreements) and served [...] destinations in [...] countries, carried over [...] million passengers and operated over [...] flights. Those flights were on routes from airports such as Lisbon (main hub, with [...] % market share by capacity) or Porto and four islands in the Azores and Madeira to various international destinations, including [...] airports in Europe (outside Portugal), [...] destinations in Brazil, [...] in Africa and [...] in North America.⁸
- (10) Other airlines licensed in other Member States provide air passenger transport or cargo services to and from Portugal, such as Ryanair, the second-largest airline operating in Portugal, Lufthansa, Air France-KLM, Finnair, Brussels Airlines, Austrian Airlines, Vueling, Iberia (IAG) and others.

⁷ As of 24 May 2021, with the execution of the capital increase of EUR 462 million by the Portuguese State in TAP Air Portugal, the State Treasury (Direcção-Geral do Tesouro E Finanças (“DGTF”) meaning the Directorate General of Treasury and Finance) holds directly circa 92% of the share capital of TAP Air Portugal, the remaining circa 8% continuing being held by TAP SGPS.

⁸ Public disclosure (press release): “Corporate Presentation” by Transportes Aéreos Portugueses, S.A on 18.11.2019, pursuant to Regulation (EU) 596/2014 of 16 April 2014, p. 273.

2.2. The ownership structure of the beneficiary and of its shareholders

- (11) At the time of the notification, TAP SGPS had two main shareholders, Parpública - Participações Públicas, SA ("Parpública") - which held 50% of the share capital of TAP SGPS, and the consortium Atlantic Gateway SGPS, Lda. ("AGW"), holding 45% of share capital. Parpública is a holding company, 100% owned by the Portuguese State. AGW had two individual shareholders: (i) David Neeleman, who controlled 50% of AGW shares via DGN Corporation (40%) and Global Azulair Projects, SGPS, SA (10%), (ii) and David Humberto Pedrosa, who held 50% of AGW, via HPGB, SGPS, SA ("HPGB"). According to Portugal, the AGW consortium was created for the purposes of the investment in TAP SGPS, at the time of its privatization in 2015. Other small shareholders hold the remainder of 5% of TAP SGPS.
- (12) The Portuguese authorities state that they have limited information on AGW's governance model and rules. They maintain that, based on the Shareholders agreement, Mr David Neeleman and Mr David Humberto Pedrosa had joint control over AGW, each of them having the possibility of exercising decisive influence over AGW and of blocking actions capable of determining the strategic behaviour of AGW. AGW is a Portuguese holding company ("SGPS"). It was incorporated as a joint stock company in 19 June 2015 (and changed into a private limited company soon after) for the sole purpose of participating in TAP SGPS' privatization process and therefore holding the shares corresponding to its shareholding in TAP SGPS. The shareholder structure of AGW has changed over time. Until 2017, HPGB and DGN held 51% and 49% of the total capital respectively. In July 2017, Hainan Airlines purchased a stake of 11,5% from other shareholders, which caused HPGB and DGN to decrease their shareholdings to 46.5% and 42% respectively. On July 2019, Hainan Airlines exited the company and the shareholder structure was reshaped: HPGB, holding 50%, DGN holding, 40% and Global Azulair holding 10%.
- (13) Portugal states that HPGB was incorporated in 1993 and, similarly to AGW, it is a SGPS. It holds stakes directly in 6 sub-holdings, and indirectly in more than 60 companies. According to HPGB's 2019 financial statements, HPGB recognizes that it controls AGW.
- (14) According to Portugal, AGW is a "vehicle entity" for the purpose of holding the share capital in TAP SGPS and its corporate purpose corresponds to the mandatory purpose of Portuguese holding companies set forth by Portuguese law. Portugal explains that it is for this reason that AGW can only exercise an economic activity by means of holding its shares. AGW's financial statements of 2019 show that its assets were composed solely of shares of TAP SGPS. Accordingly, AGW is not engaged in any economic activity directly or indirectly, other than holding the stake in TAP SGPS. According to the bylaws of AGW, resolutions are approved by the majority of its shareholders, unless otherwise provided for in the law or the bylaws. HPGB, with 50% of the capital cannot by itself pass resolutions, but it can block any decisions that DGN or Global Azulair want to approve.
- (15) Each of the two natural persons holding shares in AGW through their companies

run their own different businesses, which is air transport for Mr Neeleman and land transport for Mr Pedrosa. According to Portugal, to the best of their authorities' knowledge TAP SGPS has been the sole company in which AGW holds a stake.

2.3. The rights under the Shareholders agreement

- (16) Referring to the Shareholders agreement between Parpública and AGW [...] (“the Shareholders agreement”), the Portuguese authorities explain that, initially under that agreement, Parpública and AGW had joint control over TAP SGPS by each of them having had the possibility to exercise decisive influence over TAP SGPS and to block any action capable of determining the strategic behaviour of TAP SGPS. However, after the initial decision was adopted and the rescue aid granted, significant changes in this control over TAP SGPS had occurred.
- (17) First, as regards control under the Shareholders agreement, according to Portugal, the exercise of control over TAP SGPS, as it was mandated by this agreement before it was changed on [...], was analysed in more detail by the Portuguese Competition Authority (“PCA”), in its decision on the privatisation of TAP SGPS, through the acquisition of up to 66% of TAP SGPS’ share capital.⁹ The PCA concluded that decisive influence over TAP SGPS was exercised by both HPGB and DGN, via AGW, in view of the main aspects set forth in AGW Shareholders’ agreement and bylaws. At the time of the PCA decision, HPGB, which was wholly owned by Mr David Humberto Pedrosa, held 51% of the share capital of AGW and DGN Corporation, wholly owned by Mr David Neeleman, held 49%. Following the implementation of the acquisition, AGW acquired 61% of the share capital of TAP SGPS, the remainder being held by the Portuguese Republic, via Parpública.
- (18) Portugal explains that following this Memorandum of Understanding entered into between the Portuguese Republic and AGW on [...], Parpública acquired 50% of the share capital of TAP SGPS, AGW maintained a stake of 45% and the remaining 5% were acquired by employees of TAP SGPS’ subsidiaries. Based on the analysis of the main features of the Shareholders agreement of TAP SGPS, the PCA concluded that TAP SGPS was jointly controlled by Parpública and, via AGW, by HPGB and DGN.¹⁰
- (19) The Portuguese authorities add that under the Shareholders agreement, Parpública and AGW had in relation to TAP SGPS [...]. Portugal explains that despite such joint arrangements, none of the shareholders consolidated their accounts together with TAP SGPS. Portugal states that the joint control was acknowledged by the Portuguese Competition Authority in two decisions: (i) decision on the concentration Ccent. 31/2016 Parpública*Atlantic Gateway / TAP¹¹; (ii) decision Ccent/2020/20 - República Portuguesa / TAP SGPS¹² At the time of the initial

⁹ Decision of 1 of October 2015 in case Ccent. 41/2015 Atlantic Gateway/TAP (“Decision AGW/TAP”).

¹⁰ Decision of 25 of August 2016, Ccent. 31/2016 – Parpública*Atlantic Gateway / TAP.

¹¹ Decision of 25.08.2016, available at: http://www.concorrenca.pt/FILES_TMP/2016_31_final_net.pdf.

¹² Decision of 20.10.2020, available at: http://concorrenca.pt/FILES_TMP/2020_20_final_net.pdf.

decision, the share capital of AGW was held by HPGB (50%), DGN (40%), and Global Azulair Projects, SGPS, S.A. (“Global Azulair”) (10%), the latter being ultimately also held by Mr David Neeleman, as demonstrated in TAP SGPS shareholder structure (Chart 1).

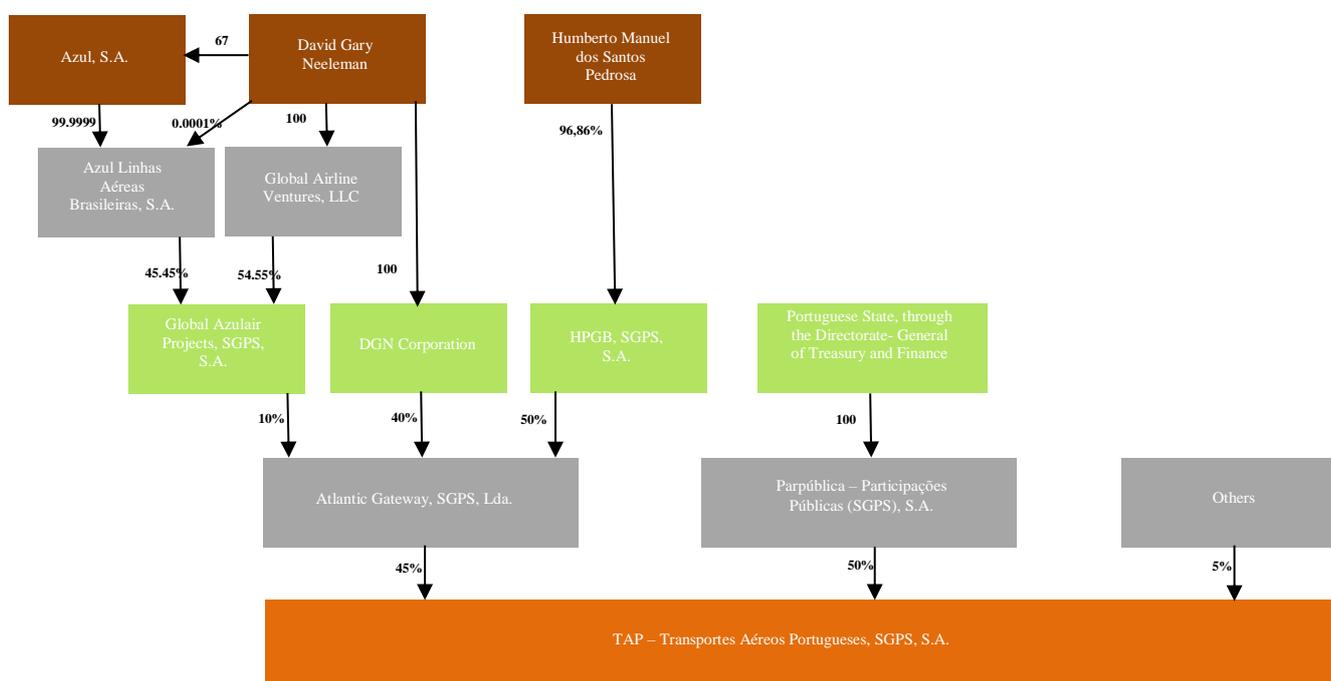
(20) Portugal explains that there was a change in control over TAP SGPS due to the implementation of the rescue loan and the conditions attached to the loan agreement (see recitals (37) to (45)). The reason for the introduction of the conditions which led to the change of the control was a deadlock in the negotiations of the loan agreement with AGW. [...] In order to avoid that scenario, the Portuguese authorities decided to implement an alternative pathway consisting of a private agreement with AGW’s shareholders which entailed the acquisition of sole control over TAP SGPS.

(21) That operation, resulting with a new shareholders agreement entered into by and between Parpública, the Portuguese Republic and HPGB on [...], was implemented by a series of instruments, copies of which were provided to the Commission and include:

- [...];
- [...];
- [...];
- [...];
- [...].

(22) Portugal explains that the declarations which in fact foresaw [...] enabled the implementation of the financing arrangements and of the rescue loan. For that reason, the Portuguese authorities had requested from the Portuguese Competition Authority a waiver with regard to the standstill obligation applicable to merger control which was granted on 8 July 2020.

Chart 1: TAP SGPS Shareholder Structure



2.4. The beneficiary as an autonomous entity

- (23) Portugal believes that TAP SGPS should not be regarded as forming a single economic unit or a single undertaking with either or both of its shareholders, or as belonging to the group of companies controlled by any of the shareholders. In support of their views, the Portuguese authorities contend that, despite the existence of investors holding 25% or more of the capital or voting rights, an enterprise may still be considered autonomous and not belonging to a larger group for the purposes of the R&R Guidelines. They argue that both shareholders, Parpública and AGW, jointly enjoyed decisive influence over TAP SGPS, but they have not consolidated their balance sheet nor shared any horizontal functions.
- (24) Portugal explains that, taking into consideration the bylaws of TAP SGPS and the Shareholders agreement, Parpública could not, unilaterally, provide support to TAP SGPS without this being approved by AGW and the shareholders of AGW (HPGB SGPS SA and DGN Corporation groups). And they were not willing to do this.

2.5. Financial situation of the beneficiary and effects of public measures

2.5.1. The intrinsic origin of the beneficiary's difficulties

- (25) In addition to explaining why they do not consider that TAP SGPS formed part of a larger business group, the Portuguese authorities set out the factors causing the difficulties for the TAP Group. In their view, the difficulties that led TAP SGPS to ask for State aid support were intrinsic to TAP SGPS and its subsidiaries and not the result of being connected to either Parpública or AGW.
- (26) According to public market information, on 2 December 2019, shortly before the closing of the annual audited accounts of the beneficiary, TAP Air Portugal closed an offering of EUR 375 million senior unsecured bonds with five-year maturity serving regular annual coupons of 5.625% and effective interest of 5.75%.¹³ The issuance was aimed at meeting general corporate expenditure and at partly repaying debt and extending its average maturity. The issuance attracted preliminary ratings of BB- (Standard & Poors) and B2 (Moody's), that is, below "investment grade" rating. A few months before, on 24 June 2019, TAP Air Portugal had issued EUR 50 million of bonds with four-year maturity serving regular annual coupons of 4.375%.¹⁴ Whilst the amounts and conditions of the two issuances in June and December 2019 differ, the interest shown in those issuances indicate the conditions on which the beneficiary could access finance on the market before the COVID-19 outbreak.
- (27) On 20 March 2020, in light of the unprecedented government travel restrictions

¹³ Statement: "TAP Announces the pricing of EUR 375 million 5.625% senior notes due 2024" on 22.11.2019. Demand from investors allowed the issuance to eventually raise more money (EUR 75 million over EUR 300 initial) and with lower pricing (20 bp) than initially envisaged.

¹⁴ Reference ISIN PTTAPBOM0007, TAP-SGPS 19/23.

and quarantine orders due to the COVID-19 outbreak, the rating agency Standard & Poors (S&P) lowered ratings for eight European airlines and stated it could lower them further. S&P assigned TAP Air Portugal a B- long-term rating, with an outlook on short-term liquidity rating of ccc+. In the same announcement, S&P assigned recovery prospects of 45% to the EUR 375 million bond issue of December 2019. On 19 March 2020, the rating agency Moody's had also downgraded the probability of default and corporate ratings of TAP Air Portugal to Caa1-PD and Caa1 respectively.

- (28) On 28 May 2020, the annual yield to maturity (December 2024) of the EUR 375 million senior bonds issued in December 2019 was [...] % on the secondary market. In other words, at that stage buyers of those bonds required a discount on the nominal value of the security, so as to obtain a return of [...] %, in return for holding them to maturity. [...].
- (29) The Portuguese authorities state that TAP SGPS has structured most of the group's debt issuances through debt issuances by TAP Air Portugal, as that company's operations represent around [...] % of TAP SGPS turnover. The proceeds obtained by TAP Air Portugal were transferred to TAP SGPS through intra-group loans.
- (30) According to the most recent certified accounts for TAP SGPS and TAP Air Portugal that were available at the time of the notification (which refer to 2019), the retained earnings and net income amounts show [...] . According to the Portuguese authorities, TAP SGPS' difficulties were caused by its solvency and liquidity problems. The outbreak of the COVID-19 pandemic caused an acute liquidity crisis for TAP SGPS and so drastically worsened already existing solvency and liquidity problems.
- (31) In Portugal's view, considering that TAP Air Portugal is responsible for around [...] % of the revenues of TAP SGPS, the air carrier's performance has a major impact in the group. Even though TAP Air Portugal had been on a growth trajectory in operational terms since the launch of the transformation process following the privatisation in 2015 (presenting [...] % revenue growth until 2019), it consistently presented lower profitability, driven by lower efficiency and extraordinary costs.
- (32) In view of the need to restructure its cost base, TAP SGPS started a transformation process which was targeted to [...], focusing on [...]. The actions pertaining to the transformation process [...]. On the operational side [...]. According to Portugal, the transformation process was interrupted as a result of the global pandemic of COVID- 19 and the economic crisis that followed. Therefore TAP SGPS had not yet been able to considerably reduce its costs when comparing with competitors, mainly with regards to low cost airlines. [...].
- (33) TAP SGPS has presented [...].

Chart 2: TAP SGPS' equity

[...]

- (34) Between 2006 and 2015, TAP SGPS accumulated [...].
- (35) TAP SGPS also incurred extraordinary operational disruption costs in recent years which hindered greater profitability and competitiveness. [...], driven by a high level of flight delays and cancellation, as well as very high foreign exchange exposure due to presence in Brazil and Angola.

(36) In that context Portugal contends that such a situation of acute liquidity crisis which led to the need for rescue State loan was rooted in difficulties that were intrinsic to TAP SGPS and aggravated by the outbreak of COVID-19 and were not due to an arbitrary allocation of costs within a hypothetical group with either Parpública or AGW or both. Moreover, the Portuguese authorities explain that taking into account Parpública and AGW having had a joint control over TAP SGPS, any cost allocation with either of them would be impossible. As Parpública and AGW had blocking veto rights on strategic matters, they both enjoyed sufficient influence in TAP SGPS and none of them could impose the agreement on any mechanisms allowing costs generated elsewhere in each of the shareholders' groups to be allocated to TAP SGPS.

2.5.2. *The beneficiary's difficulties are too serious to be dealt with by its shareholders*

2.5.2.1. Negotiations on the rescue loan agreement between the State and AGW

(37) Portugal puts forward that the beneficiary approached the Portuguese authorities for the first time in the context of the impact of the COVID-19 pandemic [...]. In order to meet the beneficiary's request, and after consulting with the Commission, the Portuguese authorities prepared a rescue aid notification with the identification of the liquidity needs of the beneficiary for a period of six months. At the end of May 2020, the Portuguese authorities, TAP SGPS, AGW and Parpública initiated the negotiation process envisaging State aid via a loan agreement. All parties agreed on the need for State support in order to maintain the viability of TAP SGPS.

(38) Portugal explains that [...].

(39) In the negotiations, there was a disagreement between the Portuguese Republic as lender and AGW [...]. Under the Shareholders agreement, [...].¹⁵

(40) The Portuguese authorities established a number of conditions for the granting of the loan, considering, inter alia: (i) the magnitude of the liquidity needs of TAP, estimated at EUR 1.2 billion; (ii) the impact of the aid for the Portuguese taxpayers; and (iii) the need to ensure an adequate implementation of the rescue aid and the drafting of a restructuring plan, which could require reinforced State (direct or indirect) control over certain management decisions.

(41) According to Portugal, the discussion of the terms of the financing arrangements were complex and long, [...]. Those meetings centred on discussions of the conditions sought by the Portuguese authorities, [...]. Other conditions required by the Portuguese authorities related to, among others: [...].

(42) Due to the rejection of those conditions [...].

(43) Any measure implemented without the [...]. Therefore, the Portuguese authorities opted to reach an agreement with AGW's shareholders on [...] in order to avoid

¹⁵ [...].

[...].

(44) The purpose of that agreement was the acquisition from AGW by the Portuguese Republic, via DGTF, of (i) 22,5% of the share capital of TAP SGPS; (ii) 67,5% of the economic rights over TAP SGPS; and (iii) the total amount of the supplementary capital contributions, for the overall price of EUR 55 million. That agreement with AGW also guaranteed [...]. The operation resulted in the buy-out of DGN's and Global Azular's indirect participation in TAP SGPS, leading Humberto Pedrosa, via HPGb, to directly enter the share capital of TAP SGPS. This operation allowed the Portuguese authorities to overcome the deadlock in relation to the loan agreement.

(45) As an intermediate step, [...].

2.5.2.2. Urgent liquidity needs of the beneficiary and shareholders' inability to provide for them

(46) As regards the financial ability of the beneficiary's shareholders to provide the liquidity urgently needed by the beneficiary, in Portugal's view, the magnitude of the liquidity needs of TAP SGPS was too serious to be dealt by either Parpública or AGW.

(47) Portugal underlines that Parpública is a company entirely owned by the Portuguese Republic, which holds stakes in 22 enterprises operating in various markets (12 of them above 50% shareholding). Pursuant to the legal framework applicable to State-owned enterprises, each of those companies have its own budget and business plan, which are approved annually by the Ministry of Finance, the Ministry of the relevant industry of the enterprise (e.g. transport and infrastructure) and by the respective shareholders (General Shareholders Meeting).

(48) Portugal argues that given the rules applicable to the shareholdings of the Portuguese State, Parpública has a very limited ability to provide ad hoc financial support to any of the undertakings it controls solely or jointly. Moreover, the more urgent the support is, the less probable it is that Parpública will be able to intervene. Any financial responsibilities that exceed the annual budget, or that do not result from the business plan, of the enterprise concerned exposes the Directors of State-owned enterprises to civil, criminal and financial liability, under the terms of the law.

(49) In addition, Portugal reiterates that Parpública being a holding company that is 100% State controlled, any amounts to be granted to TAP SGPS under any form would be considered as State aid unless provided *pari passu* with AGW or otherwise justified as an investment that could have been decided by a comparably situated private investor under normal market conditions.

(50) In relation to AGW, Portugal states that it constituted a vehicle company created in the context of the privatisation of TAP SGPS and a sort of consortium partnership set up by two individual shareholders, Mr David Neeleman and Mr David Humberto Pedrosa, for the purposes of holding share capital in TAP SGPS. AGW has no other holdings than the shares in TAP SGPS and therefore has no other economic activity capable of generating financing further funding capacity.

(51) Portugal explains that [...].

- (52) Portugal explains that at the time of the initial decision, AGW's only relevant assets were: the shareholding in TAP SGPS, with a book value of EUR 10,000,000 in 2015 and 2016; that value was adjusted to the decrease of AGW's shareholding in TAP SGPS (initially 61%, then 45%, of the share capital in 2017) to EUR 7.377.049,18. AGW also held other financial assets such as supplementary capital contributions (*prestações acessórias*) made to TAP SGPS. AGW's equity value (assets less liabilities) was EUR 162,460,085 in 2015. In 2016 its equity value increased to EUR 231.780.030,66 and remained around EUR 231 million since then (as evidenced in AGW's financial statements, from 2015 to 2019). As regards Global Azulair, Portugal explains that the company deposited no financial statements with the Portuguese Commercial Register. Therefore, the Portuguese authorities had no means, under the applicable law, to obtain, in this specific case, financial information about the company. As for AGW's shareholder HPGB, its equity value was, in 2019, EUR 42.696.735.
- (53) According to Portugal, the individual shareholders hold business groups active in the transport sector. In the case of Mr David Neeleman this is air transport, and in the case of Mr David Humberto Pedrosa this is road transport. Both businesses were highly affected by the COVID-19 outbreak.
- (54) According to Portugal, bearing in mind that the individual shareholders of AGW faced difficulties in the companies of their own business groups, they had no capacity to cope with TAP SGPS' severe situation, whether in whole or in part. Portugal explains that prior to notifying the rescue aid the Portuguese authorities engaged in several discussions with AGW and its shareholders to assess their capacity to support the liquidity needs of TAP SGPS and to explore alternative options to State aid. It became clear that there was no capacity from those shareholders to meet the liquidity needs estimated at EUR 1.2 billion required for ensuring continuity of TAP SGPS for a period of six months and to further finance its restructuring.
- (55) The Portuguese authorities explain that the shareholders of AGW did not oppose the State intervention by means of a loan in favour of TAP SGPS in itself. Both shareholders of TAP SGPS, Parpública and AGW, agreed on the granting of the State aid in the form of a loan as both considered that State intervention was necessary to prevent failure of the company, in the context of the severe impact of the COVID-19 pandemic. They therefore supported the request for State aid from TAP SGPS to the Portuguese authorities. The main hurdle [...].
- (56) Finally, Portugal maintains that the implementation of the rescue aid became possible with the reaching of an agreement between the Portuguese Republic and AGW's shareholders.

2.6. Impact of public measures on operating results and liquidity prospects

- (57) Like most air carriers around the globe, TAP Air Portugal has been facing the effects of the legal and regulatory restrictions imposed on companies and individuals, either globally, nationally or specifically within the aviation sector since the beginning of the COVID-19 crisis in early 2020. TAP Air Portugal had, as of 31 May 2020, an amount of approximately EUR [...] of tickets issued and not flown (passengers that have a flight booked or a voucher to book a flight).

- (58) The public policy measures or recommendations taken on health grounds as from the first months of 2020 to address the COVID-19 outbreak in Portugal or other countries caused numerous flight cancellations and route suspensions.¹⁶ Faced with that unprecedented situation, on 19 March 2020 TAP Air Portugal announced a significant reduction of its flight operations.¹⁷ After that date, flights were only occasional, organised in liaison with the Ministry of Foreign Affairs to repatriate individuals in, among others, Cape Verde, Angola, Sao Tomé, Guinea and Mozambique, or to transport medical and humanitarian cargo.
- (59) That situation of nearly complete discontinuance of operations has also worsened the beneficiary's operating results and liquidity position in 2020. [...] Based on a progressive ramp-up of activity beginning in July 2020, and despite the measures taken to reduce or delay costs, in June 2020 the cumulated losses of TAP Air Portugal were expected to reach EUR [...] by 31 December 2020.
- (60) The situation resulting from policy measures or recommendations taken on health grounds as from the first months of 2020 had an immediate impact on the cash balance of the beneficiary. The liquidity plan drawn up by the Portuguese authorities in the context of the planned rescue intervention in the first half of 2020 showed a shortfall of EUR 1.2 billion in the six months until December 2020. Those projections were made in the context of uncertainty about future projections of the airline business. The cash forecasts were built on the expected operating revenues and costs, including [...].

2.7. Description of the notified rescue instrument

- (61) The notified measure is based on the Portuguese Budget Law for 2020 and has the form of a rescue loan, or of a combination of loan and loan guarantees, up to a maximum of EUR 1.2 billion granted by the Portuguese Republic to TAP SGPS, in order to address immediate liquidity needs considering an amount equivalent to the liquidity needs for a six-month period from July to December 2020.¹⁸ The parties to the loan agreement were Portugal as Lender, TAP Air Portugal as Borrower, TAP SGPS as Guarantor, and Portugalia as sister company of TAP Air Portugal.
- (62) At the time of the notification, it was planned that the first instalment of the aid would be granted via a loan, while the remaining instalments were planned to be granted via loan and/or loan guarantee (under the same conditions). The loan agreement entered into, among others, between Portugal and TAP Air Portugal contained several provisions regarding [...].
- (63) The rescue loan was planned to be repaid within six months of the date of

¹⁶ In Portugal a state of emergency was adopted under Decree no. 14-A/2020 of 18 March, having effect as of 19 March 2020, and was extended twice until 2 May 2020, by Decrees no. 17-A/2020 and 20-A/2020, being then succeeded by the statement of state of calamity, which was in force until 31 May 2020. The state of emergency was regulated by the Portuguese Government, under Decrees no. 2-A/2020, 2-B/2020 and 2-C/2020.

¹⁷ "TAP temporarily reduces its operations". Press release 19 March 2020, <https://www.tapairportugal.com/en/media/press-releases/Press-Release-841>.

¹⁸ Article 154 of the State Budget Law for 2020, empowers the Minister of Finance to authorize loans and other active credit operations up to an amount of EUR 4.7 billion.

disbursement of the first instalment, unless Portugal were to submit a restructuring plan for approval by the Commission before that date. On 10 December 2020, Portugal submitted to the Commission a draft restructuring plan currently being assessed by the Commission.¹⁹

- (64) Therefore, the repayment period was automatically extended until the Commission takes a final decision on the restructuring plan. [...].
- (65) The rescue loan bears interest at a rate corresponding to the higher of the following: (i) 12-month IBOR indexed rate plus a margin of [300-500] basis points; or (ii) annual fixed interest rate of [300-500] basis points] An increase of [30-50] basis points to the applicable rate was planned if the repayment period were to be extended. As noted in recital (62), part of the aid could have been granted in the form of guarantees. Nevertheless, that option was not exercised and the total rescue aid was granted as a loan, in the following instalments:

Chart 3: Rescue loan instalments

[...]

Description	Date	Actual values
Total		1,200,000,000.00

- (66) The amounts disbursed by the Portuguese Republic accrued interest [...].
- (67) Because Portugal presented to the Commission a draft restructuring plan within six months after the rescue aid loan had been authorised by the initial decision (recital (2)), Portugal did not have to communicate the proof within that same six-month period that the rescue loan had been repaid or to communicate within that period a liquidation plan setting out in a substantiated way the steps leading to the liquidation of the beneficiary.
- (68) Finally, the Portuguese authorities confirmed that neither the beneficiary, including its subsidiaries, nor any of its shareholders have received any rescue or restructuring aid in the ten years preceding the notification.

2.8. Counterfactual to the measure

- (69) The Portuguese authorities explained in the notification that the liquidity situation and financing needs of TAP SGPS derived from the almost complete suspension of the operation of TAP Air Portugal due to the COVID-19 outbreak and were not the result of an arbitrary allocation of costs within the group.
- (70) Portugal claimed that the beneficiary would fail to meet immediate and significant payments falling due in the absence of the rescue loan. In that respect, the Portuguese authorities also indicated there was a risk of disruption to an important

¹⁹ The submission was accompanied by an updated version of the restructuring plan and other additional documents.

service which is hard to replicate and where it would be difficult for any competitor to step in quickly. TAP Air Portugal is also responsible for providing important links between the country's largest cities as a key provider of services in the mobility of people and cargo, both in the mainland and the Autonomous Regions of Madeira and Azores, as well as with Portuguese-speaking countries and diaspora.

- (71) In the notification, the Portuguese authorities added that TAP Air Portugal has an important systemic role for the whole of the Portuguese territory and its exit would have severe negative consequences in Portugal. The company supports the growth of Portuguese tourism, one of the Member State's most important sectors, which accounted for 14.6% of Portugal's GDP in 2018. That sector was of paramount importance for the Portuguese economic recovery from the financial and sovereign debt crisis.
- (72) An important group of Portuguese companies - namely hotels, restaurants, social and cultural events, retail shops and other tourism-related activities (especially concentrated in the largest regions of Lisbon and Porto and in Algarve) - would have further difficulties surviving the crisis without support from the operations of TAP Air Portugal in bringing tourists. Most of those companies that may survive COVID-19 crisis only due to support of the Portuguese government through temporary subsidized work and measures which allow them to defer due payments, need tourism to ramp up.

3. ASSESSMENT OF THE MEASURE

- (73) The Commission first assesses whether the rescue loan under scrutiny entails State aid to the beneficiary under Article 107(1) TFEU, and then whether such aid is lawful and compatible with the internal market.

3.1. Existence of State aid

- (74) According to Article 107(1) TFEU, "[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".
- (75) The qualification of a measure as aid within the meaning of that provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.
- (76) Prior to examining whether the rescue loan involves State aid pursuant to Article 107(1) TFEU, the Commission notes that Portugal has notified it as constituting State aid. That declaration does not discharge the Commission from examining itself whether the notified rescue loan involves State aid and, in particular, whether it favours the beneficiary in that a market operator holding shares in a situation as close as possible to that of Portugal would not take a similar decision and grant the same loan at the same conditions, leaving aside any benefits expected in its

situation as public authority.²⁰

- (77) The rescue loan is to be granted by Portugal with resources from its budget. Therefore, the rescue loan is a measure taken by the Portuguese State and it involves State resources.
- (78) In respect of the notified rescue, the immediate situation of the beneficiary since March 2020 and its prospects of operating results mean that it could not obtain from financial institutions the amount of the loan, at the same conditions. Indeed, the beneficiary, through its subsidiary TAP Air Portugal, had access to financial markets and obtained finance in December 2019 at conditions that were more expensive than the planned loan, albeit for longer maturities and lower amounts (see recital (26)).
- (79) Moreover, in the period following December 2019, the effect of the public measures affecting air traffic in connection with the COVID-19 outbreak have worsened the beneficiary's financial situation and prospects, as evidenced by the current and expected operating results until December 2020 (see recital (59)). The Commission notes the ability of TAP Air Portugal to raise funds in December 2019. However, at the time of the notification the circumstances had changed radically for TAP Air Portugal, and thus also for TAP SGPS. Compared with the situation in December 2019, credit rating agencies had increased the probability of default assigned to TAP Air Portugal, steeply reducing a rating that had already been below investment grade.
- (80) The remuneration at which at the time of the notification market investors were willing to purchase in the secondary market securities issued by the beneficiary is also evidence that market conditions for the beneficiary to obtain finance had also worsened and were tighter than in December 2019 (see recital (27)). [...].
- (81) The conclusion that the loan provides an advantage to the beneficiary in comparison with the treatment it would receive under market conditions is not contradicted by the assessment of whether a market operator in a situation as close as possible to that of the Portuguese State, alone or through Parpública (the holder of the State's shareholding in the beneficiary), would take a similar decision and grant the same loan at the same conditions. First, there is no prima facie evidence that the grant of the rescue loan can be ascribed to behaviour and decisions which a market shareholder would follow. In that regard, for the assessment of the rescue loan, the Portuguese authorities only put forward reasons which would be irrelevant for a market shareholder. Second, the Portuguese authorities do not assess the grant of the loan as being necessary to preserve or increase the value of and/or return from their holding in the beneficiary, based on a financial assessment of the expected returns thereof. Third, [...]. This provides another indication that the Portuguese State is not providing finance in expectation of sufficient returns from or preservation of the value of Parpública's holding in the beneficiary in the then present market circumstances, [...].
- (82) It is obvious that, that given the constraints under which TAP Air Portugal was operating during the period, the beneficiary had no realistic prospect of accessing

²⁰ Case C-300/16 P *Commission v Frucona Košice*, EU:C:2017:706, paragraph 59; and Case C-124/10 P *Commission v EDF*, EU:C:2012:318, paragraphs 78, 79 and 103.

private funding. In any case, the rescue loan would not be provided by a market operator in a situation as close as possible to that of the Portuguese State and thus provides an economic advantage to the beneficiary.

- (83) Therefore, the EUR 1.2 billion rescue loan provides funding at a lower cost than the beneficiary can or could obtain on the market, thereby providing it with an economic advantage.
- (84) The rescue loan is to be granted through the exercise of discretion in favour of the beneficiary for an ad hoc amount determined by reference to its specific liquidity needs. The loan is not part of a broader, general, economic policy measure to provide support to undertakings in a comparable legal and economic situation. As the Court has stated, where individual aid is at issue, the identification of the economic advantage is, in principle, sufficient to support the presumption that a measure is selective²¹. This is so regardless of whether there are operators on the relevant markets that are in a comparable factual and legal situation. Therefore, the Commission concludes that this loan is selective within the meaning of Article 107(1) TFEU.
- (85) The air passenger transport and cargo services sector in which the beneficiary is active is open to competition and trade between Member States. Many other undertakings such as Ryanair, Air-France-KLM, Iberia or Lufthansa among others provide such services in Portugal and throughout the Union. Likewise, the beneficiary provides air passenger transport and cargo services in Portugal and in the other Member States where it operates flights. Therefore, the aid is liable to affect trade between Member States.
- (86) By granting access to funding at conditions which it would not otherwise obtain on the market, the rescue loan is liable to improve the position of the beneficiary in relation to other competing undertakings active within the internal market that have not had access to similar State support and/or that have to finance their operations at market conditions. The rescue loan consequently distorts or threatens to distort competition and affect trade between Member States.

3.2. Conclusion on the existence of aid

- (87) In light of the above, the Commission concludes that the rescue loan in favour of TAP SGPS involves State aid under Article 107(1) TFEU and will therefore assess its compatibility with the internal market.

3.3. Compatibility of the aid

- (88) Under Article 107(3)c) TFEU, the Commission can authorise aid if it is granted to promote the development of certain economic sectors and if that aid does not adversely affect trading conditions to an extent contrary to the common interest. In view of the nature and aims of the State aid at stake and the claims of the Portuguese authorities in the notification, the Commission will assess whether the rescue loan complies with the provisions on rescue aid laid down in the R&R Guidelines
- (89) Rescue aid is by nature urgent and temporary assistance for the short time needed

²¹ See judgment of 4 June 2015 *Commission v MOL*, Case C-15/14 P, EU:C:2015:362, paragraph 60.

to work out a restructuring plan after analysing the circumstances which gave rise to the difficulties and develop an appropriate plan to remedy those difficulties (R&R Guidelines, point 26). The notified rescue aid adheres to that general principle as it arises in a situation of particular urgency in the airline sector that affects the beneficiary's ability to meet its payment and financial obligations.

3.3.1. Eligibility

3.3.1.1. Undertaking in difficulty

- (90) In order to be eligible for rescue aid, an undertaking must qualify as an undertaking in difficulty for the purposes of section 2.2 of the R&R Guidelines. In particular, point 20 of the R&R Guidelines explains that an undertaking is considered to be in difficulty when, without intervention by the State, it will almost certainly be condemned to going out of business in the short or medium term. This would be the case when at least one of the circumstances described in letters a) to d) of point 20 of the R&R Guidelines occurs.
- (91) As explained in recital (69), TAP SGPS presented [...] in 2019, which shows that at least half of its subscribed share capital has disappeared. Moreover, according to the data provided by Portugal, TAP SGPS presented negative equity since 2007 (recital (33)). Therefore TAP SGPS qualifies as an undertaking in difficulty pursuant to point 20(a) of the R&R Guidelines.

3.3.1.2. Not a newly created undertaking

- (92) According to point 21 of the R&R Guidelines, a newly created undertaking is not eligible for rescue aid. The beneficiary is not a newly created undertaking for the purposes of the R&R Guidelines since it was established more than three years ago (see recital (7)).

3.3.1.3. Beneficiary as a part of a larger business group

- (93) According to point 22 of the R&R Guidelines, a company belonging to or being taken over by a larger business group is normally not eligible for rescue aid, except where it can be demonstrated that the company's difficulties are intrinsic, are not the result of an arbitrary allocation of costs within the group, and that they are too serious to be dealt with by the group itself. Therefore the first step is to identify if the aid beneficiary is or was part of a larger group during the period when its difficulties arose.
- (94) The General Court recalls in the judgment that the concept of a "larger business group" for the purposes of R&R Guidelines relies at point 21(b) on the definition set in the annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises ("the Annex").²² According to footnote 28 of the R&R Guidelines, to determine whether a company is independent or forms part of a group, the criteria laid down in the Annex will be taken into account.
- (95) As a first step, the Commission will verify whether the beneficiary is an autonomous enterprise or could be classified as partner or linked enterprise within

²² OJ L 124, 20.5.2003, p. 36.

the meaning of Article 3(3) of the Annex. An “autonomous enterprise” is any enterprise which is not classified as a partner enterprise within the meaning of Article 3(2) or as a linked enterprise within the meaning of Article 3(3) of the Annex. Article 3(2) of the Annex provides that partner enterprises are all enterprises which are not linked enterprises and between which there is the following relationship: an enterprise (upstream enterprise) holds, either solely or jointly with one or more linked enterprises within the meaning of Article 3(3), 25 % or more of the capital or voting rights of another enterprise (downstream enterprise).

- (96) The enterprises having a majority of the shareholders’ or members’ voting rights in another enterprise are considered as linked enterprises. In its fourth and fifth subparagraphs, Article 3 of the Annex also provides that enterprises which have relationships through a natural person or natural persons acting jointly may be considered linked enterprises if they engage in their activity in the same relevant or adjacent markets. Given that at the time of the notification TAP SGPS was owned by the minority shareholders holding 5% and two shareholders holding more than 25% of its shares (recital 11), the Commission first examined whether those shareholders holding more than 25% of TAP SGPS could be either partner or linked enterprises within the meaning of the Annex.
- (97) Linked enterprises have links through the direct or indirect control of the majority of voting rights of an enterprise by another or through the ability to exercise a dominant influence on an enterprise. According to Article 3(3) of the Annex, “linked enterprises” are enterprises which have any of the following relationships with each other: (a) an enterprise has a majority of the shareholders' or members' voting rights in another enterprise; (b) an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise; (c) an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association; (d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise.
- (98) For the purpose of establishing the nature of the links between the beneficiary and its shareholders, it first necessary to analyse the circumstances of ownership i.e. control over TAP SGPS by its principal shareholders, Parpública and the AGW consortium. As the other shareholders are holding 5% of the stake in TAP SGPS, they are not subject to the assessment of being a partner or linked enterprise with TAP SGPS in the light of the limit of a 25% holding below which an enterprise is considered autonomous as set by the Annex²³.
- (99) As regards the ownership structure, the Commission notes that one shareholder, Parpública, directly held 50% of the stake in TAP SGPS. Parpública is a 100% State-owned holding company. The second biggest shareholder in TAP SGPS was the AGW consortium, which held 45% of the stake in TAP SGPS.
- (100) As explained further below (recital (103) and recital (104)), because AGW, as TAP SGPS’ direct shareholder, holds joint control over it, it is not necessary to

²³ Point (9) and Article 3 (1) of the Annex.

widen the assessment further to consider the relationship with TAP SGPS of AGW's two individual shareholders, who could be classified as partner enterprises of TAP SGPS under Article 3(2) of the Annex. These individual shareholders are:
(i) David Neeleman, who controlled 50% of AGW shares via DGN Corporation (40%) and Global Azulaire Projects, SGPS, SA (10%)
(ii) Humberto Pedrosa, who held 50% of AGW, via HPGB, SGPS, SA.

- (101) Second, when it comes to the character of control over TAP SGPS, the Commission assessed the rights conferred on Parpública and AGW in their Shareholders agreement. According to the Shareholders agreement (recital (16)), the rights to appoint the members of TAP SGPS' Board of Directors are equally divided among the shareholders who are party to the agreement. Six are appointed by Parpública and six by AGW, with Parpública having the right to appoint the chairman with a casting vote. When it comes to day to day management of TAP SGPS, there is an Executive Committee [...]. The members of the boards of directors of the subsidiaries of TAP SGPS were chosen by the Board of Directors of TAP SGPS [...]. The voting majority of 67% in the General Assembly was required in order to, amongst others, [...]. When it comes to operational business decisions, [...], a qualified majority of 8 over 12 members of its Board of Directors was required.
- (102) In case of a blocking situation, [...]. The Articles of Association of TAP SGPS and the Shareholders agreement require supermajorities for resolutions on strategic matters ("reserved matters"), [...].
- (103) Consequently, considering the TAP SGPS' shareholder structure with two shareholders holding 95% of the ownership, the relevant provisions of the Shareholders' agreement on the appointments of the Executive Committee and the Board of Directors as well as its governance model, the Commission concludes that both biggest shareholders, Parpública and AGW, enjoyed joint decisive influence over TAP SGPS, [...]. The joint control of AGW and Parpública existed from 30 June 2017, the date of the entry into force of the Shareholders Agreement, [...], the date of transfer of shares of representing 22.5% of the share capital of TAP SGPS from AGW to DGTF, and entry into force of the new shareholders agreement between the Portuguese Republic and HPGB. As described in recital (16), given that the terms of the agreement with AGW were only agreed [...], the Commission concludes that the Portuguese Republic did not have sole control over TAP SPGS on 10 June 2020 i.e. at the time of the adoption of the initial decision.
- (104) Considering the fact that a joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking, meaning have the power to block actions which determine the strategic commercial behaviour of an undertaking²⁴ and in view of the then existing constellation under the Shareholders agreement, the Commission

²⁴ Unlike sole control, which confers upon a specific shareholder the power to determine the strategic decisions in an undertaking, joint control is characterized by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions. It follows, therefore, that these shareholders must reach a common understanding in determining the commercial policy of the joint venture and that they are required to cooperate (recital (62) of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p. 1).

concludes that it is evident from information provided by Portugal that Parpública and AGW had joint control over TAP SGPS at the time of the notification. Furthermore, for the same reasons, namely Parpública holding 50% and AGW holding 45% of the stake in TAP SGPS and both being entitled to jointly exercise their influence over TAP SGPS, the three entities Parpública, AGW and TAP SGPS form linked enterprises under points a) to d) of Article 3(3) of the Annex.

- (105) Finally, the Commission will address the question whether TAP SGPS could form a larger business group (with Parpública and AGW) within the meaning of R&R Guidelines. For that purpose a set of circumstances based on the criteria of the Annex must be examined. At the outset, it is observed that the R&R Guidelines do not delineate the concept of a group²⁵ in a single abstract definition, except for referring to the Annex in footnote 28.²⁶ The Annex, while it provides the definitions of an autonomous, partner and linked enterprises, does not define “a group”. It is therefore useful to recall the case law interpreting the meaning of linked enterprises under the SME Recommendation in the light of the concept of one economic unit i.e. a group.²⁷
- (106) That case law provides more guidance explaining the functional concept of linked enterprises as a group in a manner appropriate for the purposes of the R&R Guidelines. In *HaTeFo* ruling²⁸ the Court concluded that the fourth subparagraph of Article 3(3) of the Annex must be interpreted in the light of its objective, so that enterprises that do not formally have relationships, but which, because of the role played by a natural person or group of natural persons acting jointly, nevertheless constitute a single economic unit and must also be regarded as linked enterprises for the purposes of that provision, since they engage in their activities or in part of their activities in the same relevant market or in adjacent markets.²⁹

²⁵ Historically, there has been an evolution in terminology from 2004 Rescue and restructuring guidelines to 2014 R&R Guidelines. The R&R Guidelines from 2004 used the term “firm in difficulty” whereas the 2014 R&R Guidelines changed the terminology in point 22 by referring to “a company” being part of “a larger business group” but the meaning of the terminology used has not changed. In other words by “a company” it is meant “a firm in difficulties” as a single entity that may be part of a group.

²⁶ According to footnote 28 of R&R Guidelines “to determine whether a company is independent or forms part of a group, the criteria laid down in [Annex] to Recommendation 2003/361/EC will be taken into account”.

²⁷ The Commission “User Guide for SME Definition” defines the linked enterprises as those that form a group through the direct or indirect control of the majority of voting rights of an enterprise by another or through the ability to exercise a dominant influence on an enterprise. Available at https://ec.europa.eu/regional_policy/sources/conferences/state-aid/sme/smedefinitionguide_en.pdf

²⁸ C-110/13, *HaTeFo*, EU:C:2014:114, paragraphs 34 and 39.

²⁹ Along the same lines, the General Court repeated in T-137/02, *Pollmeier v Commission*, EU:T:2004:304, at paragraphs 61 and 62, that Article 1(3) and (4) of the Annex must be interpreted in the light of its purpose, so that the data for an enterprise, even one which is owned as to less than 25% by another enterprise, must be taken into consideration in calculating the thresholds mentioned in paragraph 1 of the same article where those enterprises, even though formally distinct, constitute an economic unit. For the notion of “acting jointly” see also a final Commission decision (SA. 18184 (C 8/2005 (ex N 451/2004)) - *Aid to Nordbrandenburger Umesterungs Werke NUW*, (OJ L 353, 13.12.2006, p. 60).

- (107) In that context, it is also useful to recall the well-established jurisprudence on the consequences of joint control for an undertaking i.e. single economic unit, under EU antitrust rules. In *Dow Chemical*³⁰ and *DuPont*³¹ the General Court interpreted the concept of joint control under the Merger Regulation³². First, the General Court held it apparent from Article 3(3) of Regulation No 4064/89³³ that the concept of (joint) control must be understood as the possibility of exercising decisive influence over the activity of an undertaking, as a consequence of rights, contracts or any other means. The General Court recalled that the concept of joint control was clarified by the Commission in its Consolidated Jurisdictional Notice³⁴ on the basis of the case-law of the General Court in *Cementbouw Handel & Industrie v Commission*.³⁵ According to that concept, “joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive influence in this sense normally means the power to block actions which determine the strategic commercial behaviour of an undertaking. [...] [J]oint control is characterised by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions. It follows, therefore, that these shareholders must reach a common understanding in determining the commercial policy of the joint venture and that they are required to cooperate. [...] [T]he acquisition of joint control can [...] be established on a de jure or de facto basis. There is joint control if the shareholders (the parent companies) must reach agreement on major decisions concerning the controlled undertaking (the joint venture).”³⁶ Finally, the General Court concluded that as a result of economic, legal and organisational links between the parent companies and the joint venture under joint control, they form a single undertaking for the purposes of Article 101 TFEU.³⁷
- (108) Contrary to what Portugal argues, namely that TAP SGPS is an autonomous enterprise within the meaning of Article 3(1) of the Annex (recital (95)) and recital (96)), the Commission concludes that TAP SGPS’ two principal shareholders, Parública and AGW, form together with TAP SGPS an economic unit, meaning a

³⁰ Case T-77/08, *Dow Chemical v Commission*, EU:T:2012:47 and C-179/12 P, *Dow Chemical v Commission*, EU:C:2013:605.

³¹ Case T-76/08, *EI du Pont de Nemours v Commission*, EU:T:2012:46, and C-172/12 P, *EI du Pont de Nemours v Commission*, EU:C:2013:601.

³² Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1) replaced by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

³³ Now Article 3(2) of Regulation (EC) No 139/2004.

³⁴ Consolidated Jurisdictional Notice under Council Regulation (EC) N° 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p.1).

³⁵ Case T-282/02 *Cementbouw Handel & Industrie v Commission*, EU:T:2006:64, paragraphs 42, 52 and 67.

³⁶ Consolidated Jurisdictional Notice under Council Regulation (EC) N° 139/2004 on the control of concentrations between undertakings, point 63.

³⁷ Case T-76/08 *EI du Pont de Nemours v Commission*, EU:T:2012:46, paragraph 74.

larger business for the purposes of point 22 R&R Guidelines. It reaches that conclusion by taking into account the established case law and the facts which show that Parpública and AGW may exercise joint control through blocking veto rights on TAP SGPS' strategic matters, including on the financing and joint arrangements regarding the appointment of the members of the corporate bodies over TAP SGPS (recital 19).

- (109) Considering that the execution of [...], there appears to have been a change of control over TAP SGPS prior to the date of transfer of shares. This is also supported by the fact that the Portuguese authorities requested a waiver from the Portuguese Competition Authority with regards to the standstill obligation applicable to merger control³⁸ which was granted on 8 July 2020.
- (110) Based on the information provided by Portugal, it is apparent that the joint control of AGW and Parpública over TAP SGPS had existed since the Shareholders agreement entered into force on [...].
- (111) The Commission takes note of the information provided by Portugal that after the rescue aid was granted in June 2020, the Portuguese Republic, via DGTF acquired a further 22.5% stake in TAP SGPS from the other shareholder AGW. In that way Parpública became the majority shareholder with 72.5% stake in TAP SGPS and acquired de facto sole control over TAP SGPS.
- (112) The implementation of the transfer of 22,5% of the share capital of TAP SGPS to the Portuguese Republic and entry into force of the new shareholders agreement between the Portuguese Republic and HPGB only occurred on [...]. However, it should be noted that the execution of the [...]. That change in ownership and control, which happened after the notification and granting of rescue aid, is nevertheless not material for the assessment of rescue aid. For the purposes of point 22 of the R&R Guidelines, the Commission needs to perform a retrospective analysis covering the period when the difficulties arose until the moment of the aid notification.
- (113) On the basis of those considerations, which lead to the conclusion that TAP SGPS belonged to a larger business group at the moment of the notification, the Commission will next assess the remainder of the requirements under point 22 of the R&R Guidelines.

3.3.1.4. The beneficiary's difficulties are not a result of an arbitrary allocation of costs within the group and are too serious to be dealt with by the group itself

- (114) In the light of the foregoing assessment and the conclusion that at the time of the notification, TAP SGPS belonged to a larger business group with its shareholders Parpública and AGW, the Commission will assess whether the difficulties faced by TAP SGPS, which led to the request for rescue aid, were intrinsic to TAP SGPS and its subsidiaries and not a result of cost allocation within the group decided by either Parpública or AGW or both.
- (115) For the difficulties to be intrinsic, they have to be the result of commercial or

strategic choices by the beneficiary and not the result of an arbitrary allocation of costs within the larger business group to which the beneficiary belongs. This means, for example, that proceeds from TAP SGPS cannot be used to cover the costs of other activities or business done by the larger business group (AGW or Parpública or both), unless this can be objectively justified or unless the activities or business benefited TAP SGPS.

- (116) The Commission will then assess whether TAP SGPS' difficulties were too serious to be dealt with by the business group and its shareholders itself, in particular considering the amount of rescue aid immediately needed as a minimum, and assessing the financial means and situation of the larger business group, the shareholders' own funds, their net profit, turnover, i.e. meaning their financial strength, possibilities and willingness to help TAP SGPS in the acute liquidity crisis.
- (117) In that context, it has to be noted that TAP SGPS does not consolidate its balance sheet with either Parpública or AGW (recital (19)).³⁹ Portugal has confirmed in addition that Parpública, AGW and TAP SGPS have no shared functions whose costs could be spread among the three companies.
- (118) As Portugal explained (recital (29)), TAP Air Portugal was responsible for around [...] % of the revenues of TAP SGPS and therefore the performance of TAP Air Portugal has a major impact in the group. Between 2006 and 2015, TAP SGPS accumulated a negative shareholders' equity of EUR [...]. Considering the weight of the TAP Air Portugal's business on the revenues of TAP SGPS, until 2019 TAP SGPS has structured [...].
- (119) Moreover, TAP Air Portugal had been on a growth path in operational terms, which started after the launch of the transformation process following the privatization in 2015, presenting [...] % revenue growth until 2019. However, at the same time it consistently presented lower profitability driven [...]. That investment sought to [...]. The Commission notes that TAP Air Portugal [...]. Portugal plausibly explains that after a negative result for 2018, which was due to a high increase in oil prices, restructuring costs and extraordinary aircraft chartering, in 2019 the EBIT of TAP Air Portugal was [...]. The Commission finds that Portugal's assertions corroborate with the fact that the demand from investors buying the bonds in question eventually allowed the issuance to raise more money (EUR [...] over EUR [...] initially) and with lower pricing ([...]) than what was initially envisaged (see footnote 13). The positive result allowed TAP Air Portugal to access funding markets, namely in two consecutive bonds issuances (recital (26)).
- (120) TAP Air Portugal's transformation process which started in 2015 was interrupted due to the COVID-19 outbreak. The impact of the COVID-19 outbreak and the constraining measures imposed to limit the spread of the pandemic led to an abrupt and long lasting reduction of sales and bookings since the beginning of March 2020, and to an almost total suspension of TAP Air Portugal's operations, which were only slowly relaunched after July 2020.
- (121) In the light of the factual elements presented by Portugal, it is manifest that what

³⁹ Typically the horizontal functions (e.g. finance, personnel etc.) are carried out by the parent, which then distributes the costs across its subsidiaries based on a certain allocation key. TAP SGPS does not rely on others for those functions.

led to the need for the rescue loan of EUR 1.2 billion was TAP SGPS' acute liquidity crisis and that that acute liquidity crisis was caused by difficulties intrinsic to TAP SGPS, additionally aggravated by the outbreak of COVID-19 (recitals (32) and (33)). There is neither evidence nor any indication that the acute need for liquidity faced by TAP SGPS was due to an arbitrary allocation of costs within a group TAP SGPS belonged to together with its shareholders Parpública and AGW. Moreover, it is apparent that the difficulties to which TAP SGPS had been exposed to have been aggravated by the unprecedented public restrictions taken by Portugal and other countries with respect to air transport (see recitals (57) to (60)).

- (122) Given the magnitude of the liquidity needs of TAP SGPS, the Commission finds that this situation was too serious to be dealt with by the larger business group to which TAP SGPS belongs.
- (123) Considering those facts, the Commission has found no evidence of cost allocation among TAP SGPS, AGW and Parpública or of artificially burdening TAP SGPS by the parents in the relevant period. As explained above, TAP SGPS made unwise investments, while the COVID-19 crisis exacerbated its difficulties. In essence, it is evident that those costs and those losses did not come from the own operations of the jointly controlling parents.
- (124) As for the possibility for Parpública to support TAP SGPS in the acute liquidity crisis phase, Parpública being a 100% State-controlled company, any amounts it were to grant to TAP SGPS would have been considered to be State aid to an undertaking in difficulty, unless it took the form of an investment that could have been decided by a private investor under normal market conditions, possibly by being made *pari passu* with AGW.
- (125) Moreover, Portugal explained that Parpública generally has very limited capacity to provide ad hoc financial support to any of the undertakings it controls, either solely or jointly. Furthermore, the more urgent the support is, the less likely it is that Parpública would intervene as a shareholder. Any financial responsibilities which exceed the annual budget or any financial interventions that do not result from the business plan of the company in which Parpública has a stake, constitute civil, criminal and financial liabilities for the Directors of those (State-owned) companies under Portuguese law. It is for those reasons that Parpública does not intervene as a shareholder under circumstances such as those faced by TAP SGPS.
- (126) As regards the other principal shareholder, AGW was not in position to provide the necessary support to TAP SGPS either. The reason is that AGW constituted a vehicle company created as a consortium partnership set up by two individual shareholders solely for the purposes of holding share capital in TAP SGPS. AGW therefore did not have any economic activity capable of generating financing capacity of its own.
- (127) As for the possibility for the financial needs to be provided by two individual shareholders of AGW, Mr David Neeleman and Mr David Humberto Pedrosa, the financial data provided by Portugal show that the magnitude of the rescue and subsequently restructuring loan required by TAP SGPS to overcome its difficulties before 2020 and after under COVID-19 circumstances was impossible to bear for either of them, either jointly or individually. Both individual shareholders hold business groups active in the transport sector (air transport, in the case of Mr David Neeleman, and road transport in the case of Mr David Humberto Pedrosa), which

were highly affected by the COVID-19 outbreak. The individual shareholders of AGW were therefore faced with [...] and did not have, not even partially, available capacity to cope with TAP SGPS' severe situation. That assessment is supported by the evidence provided by Portuguese authorities which shows that prior to submitting the notification they engaged in several discussions with AGW and its shareholders in order to assess their capacity to contribute to support liquidity needs of TAP SGPS and to explore alternative options to State aid [...]. On the basis of the information from the Portuguese authorities, the Commission has concluded, first, as long as AGW as a shareholder was not in a position to support TAP SGPS, the two jointly controlling parent companies of TAP SGPS could not deal with the difficulties of TAP SGPS either. Second, the Commission finds based on its evaluation of the evidence (recital 49) that the shareholders did not have the necessary capacities to meet the liquidity needs estimated at EUR 1.2 billion required for ensuring continuity of TAP SGPS for a period of six months and to further finance the restructuring of TAP SGPS (without granting State aid).

(128) In the light of the foregoing, the Commission concludes that TAP SGPS is eligible to benefit from the notified rescue aid, pursuant to points 20 to 22 of the R&R Guidelines.

3.3.2. *Contribution to an objective of common interest*

(129) Under point 38(a) of the R&R Guidelines, in assessing whether the rescue aid can be declared compatible with the internal market, the Commission examines whether the State aid contributes to a well-defined objective of common interest in accordance with Article 107(3) TFEU. In that respect, point 44 of the R&R Guidelines requires the Member State concerned to show that the failure of the beneficiary of rescue aid would be likely to involve social hardship or market failure. This can be demonstrated in particular by showing that one of the circumstances listed from letters a) to g) of point 44 are met.

(130) In that regard, the Portuguese authorities refer to circumstances mentioned under point 44(b) and (c) of the R&R Guidelines (see recitals (69) to (72)).

(131) [...].

(132) In the circumstances present at the time of the notification, triggered by the COVID-19 outbreak, it would be difficult for any competitor (including those already active on the Portuguese market) to step in and fully or significantly replicate the role of TAP Air Portugal, without risking a significant discontinuation of connectivity on the routes from and to Portugal which TAP Air Portugal serves. In that respect, the Commission has considered in several occasions that rescue aid to airlines of a particular size⁴⁰ or whose operations extend to most commercial airports in one Member State⁴¹ contribute to an objective of common interest. In the same vein, it appears that a discontinuation of activities would have significant

⁴⁰ In line with point 48 of the Commission Notice on the notion of State aid as referred to in Article 2017 in case SA.48937 – Rescue aid in favour of Air Berlin (OJ C 400, 24.11.2017, p.1), recitals (82-83) and Commission Decision of 14.10.2019 in case SA.55394 – Rescue aid to Condor (OJ C 294, 4.9.2020, p. 1), recitals (81-97).

⁴¹ Commission Decision of 24.2.2020 in case SA.56244 – Rescue aid to Tarom (OJ C 310, 18.9.2020, p.1).

negative spill-over effects on important segments of the Portuguese economy concerning tourism-related activities. Hence, the information provided by the Portuguese authorities demonstrates that the rescue aid contributes to a well-defined objective of common interest.

- (133) In addition, the beneficiary, mainly through its biggest subsidiary TAP Air Portugal, undoubtedly plays a key role in the Portuguese economy as demonstrated by Portugal. In 2019, TAP SGPS contributed EUR [...] to the Portuguese GDP, accounting for [...] % of total GDP of the country and EUR [...] in direct taxes and social contributions. TAP SGPS' contribution to Portuguese exports is close to EUR [...], while the value of services and goods purchased by TAP SGPS from more than [...] national suppliers is close to EUR [...]. In particular, the beneficiary is closely associated with the tourism sector in Portugal, which has been of great importance for the country's economy and recovery after 2008 crisis.⁴² Finally, with almost 10 000 employees (in 2019), the beneficiary is one of the biggest employers in the country and it accounts for more than 110 000 indirect jobs. Those figures demonstrate that a possible insolvency that the beneficiary would be facing in the absence of the aid would cause social hardship and would have a significant negative spill-over effect on the entire Portuguese economy.
- (134) The Commission concludes that the information provided by the Portuguese authorities demonstrates that, by allowing the beneficiary to meet its payment obligations in the near future, the rescue aid contributes to a well-defined objective of common interest as provided by point 44(b) and (c) of the R&R Guidelines.

3.3.3. *Appropriateness*

- (135) Under point 38(c) of the R&R Guidelines, the Commission will not consider an aid measure to be compatible with the internal market if other, less distortive, measures allow the same objective to be achieved. In that respect, rescue aid must fulfil the conditions laid down in point 55 in its letters a) to e) and point 56 of the R&R Guidelines.
- (136) As to letters a) and d) of point 55 of the R&R Guidelines, the Commission notes that the rescue loan, covering net cash flow needs up to EUR 1.2 billion is temporary in nature and will not be automatically converted [...]. The Portuguese authorities committed to communicating to the Commission, no later than six months after the rescue aid measure has been authorised, a restructuring plan or, in any event, proof that that the rescue loan has been repaid or a liquidation plan has been adopted (see recital (63)). On 10 December 2020, the Portuguese authorities submitted to the Commission a restructuring plan for TAP SGPS, in line with their obligation under the R&R Guidelines.
- (137) According to the notification, the rate of the rescue loan was set at 12-month IBOR indexed rate plus a margin of [300-500] basis points; or an annual fixed interest rate of [300 -500] basis points. The amounts finally disbursed by the Portuguese Republic accrued interest at the 12-month EURIBOR index rate plus a margin of [3-5] % until [...] and, since then, bear interest at the 12-month EURIBOR index rate plus a margin of [...] %.⁴³

⁴² Tourism contributes ca. EUR 19 billion to Portugal's GDP, which represented 8.7% of 2019 GDP.

⁴³ Established under clause 7.1 of the Loan Agreement.

- (138) Therefore, the interest rate applied at least equal to the reference rate set out in the Reference Rate Communication for weak undertakings offering normal levels of collateralisation, which is currently 1-year IBOR plus 400 basis points⁴⁴ (see recital (65)), which is in line with requirements of points 55(b) and 56 of the R&R Guidelines.
- (139) The Commission notes the declaration by the Portuguese authorities in the notification that the loan will be used only to meet the identified urgent liquidity needs of the beneficiary, and in particular will cover normal operating costs (see recital (60)). Accordingly, the beneficiary had committed not to use the rescue aid to finance structural measures or other activities than its current operations (point 55(e) of the R&R Guidelines).
- (140) In view of the information provided by the Portuguese authorities, the Commission concludes that the rescue loan meets the conditions laid down in points 38(c) and 55 of the R&R Guidelines and therefore the form of the aid allows the rescue of the beneficiary in the least distortive way.

3.3.4. *Proportionality of the aid / aid limited to the minimum*

- (141) Under point 38(e) of the R&R Guidelines, aid must not exceed the minimum needed to achieve the objective of common interest. As specified in point 60 of the R&R Guidelines, rescue aid must be restricted to the amount needed to keep the beneficiary in business for six months. In determining that amount, the Commission takes into account the outcome of the calculation under the formula set out in Annex I to the R&R Guidelines. The Commission will authorize any aid exceeding the result of that calculation only if it is duly justified by the provision of a liquidity plan setting out the beneficiary's liquidity needs for the coming six months.
- (142) The EUR 1.2 billion amount of the loan required by Portugal to be approved as rescue aid [...]. Therefore, in line with point 60 of the R&R Guidelines, the Portuguese authorities provided a liquidity plan setting out the beneficiary's liquidity needs for the following six months, from June to December 2020.
- (143) The Commission has reviewed the liquidity plan and found that it reasonably reflects the liquidity needs of the beneficiary, to the extent they can be reasonably and prudently anticipated in the business and financial environment into which the beneficiary will be operating until December 2020. In particular, it includes [...]. The liquidity plan does not include uncommon or illegitimate expenses, such as e.g. financing of structural measures or expansion of operations beyond earlier commitments. The aid does therefore not exceed the necessary minimum to keep the beneficiary in business for the coming six months with a view to providing assistance for the time needed to analyse the circumstances which gave rise to the difficulties and to devise a restructuring plan to address them (see also point 26 of the R&R Guidelines).
- (144) The Commission therefore concludes that the notified rescue aid is restricted to a minimum amount, in line with point 60 of the R&R Guidelines and is consequently proportional.

⁴⁴ Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6).

3.3.5. *Negative effects*

- (145) Under point 38(f) of the R&R Guidelines, the negative effects of the aid on competition and trade between Member States must be sufficiently limited, so that the overall balance of the measure is positive. In the case of rescue aid, the Commission considers that this condition is met when recipients of aid under those Guidelines are not in recurrent difficulties over time that were not properly addressed with rescue or restructuring aid granted earlier or are still recipients of previous unlawful aid which the Commission has declared to be incompatible with the internal market and ordered recovery thereof.
- (146) In that respect, under points 70 and 71 of the R&R Guidelines, aid can be granted to undertakings in difficulty in respect of only one rescue or restructuring operation. Under point 74 of the R&R Guidelines, where a business group has received rescue aid, restructuring aid or temporary restructuring support, the Commission will normally not allow further rescue aid to the group itself or any of the entities belonging to the group unless 10 years have elapsed since the aid was granted including any such aid granted before the entry into force of the R&R Guidelines and any non-notified aid, the Commission will not allow further aid (the 'one time, last time' principle). Further, where an entity belonging to a business group has received rescue aid, restructuring aid or temporary restructuring support, the group as a whole as well as the other entities of the group remain eligible for rescue or restructuring aid (subject to compliance with the other provisions of these guidelines), with the exception of the earlier beneficiary of the aid.
- (147) The Portuguese authorities confirmed in the notification that neither the beneficiary nor any of the companies forming a larger business group together with the beneficiary has not benefited from any rescue aid, restructuring aid or temporary restructuring support in the past ten years. Therefore, the “one time, last time” principle is respected.
- (148) Likewise, the Portuguese authorities confirmed in the notification that TAP SGPS has not benefited from earlier unlawful aid declared incompatible by a Commission decision, which is in line with requirements of point 94 of the R&R Guidelines.

3.3.6. *Transparency*

- (149) According to point 38(g) of the R&R Guidelines, Member States, the Commission, economic operators and the public must have easy access to all relevant acts and pertinent information about the aid awarded. This means that Portugal must respect the provisions on transparency laid down in point 96 of the R&R Guidelines. The Commission notes that Portugal undertakes to respect those obligations. The relevant information will be made available on the website:

<https://www.portaldiplomatico.mne.gov.pt/sobre-nos/gestao-e-transparencia/documentos-legais>

3.4. Conclusion on the compatibility of the aid

- (150) In the light of the findings above, the Commission concludes that the rescue loan meets the conditions of compatibility with the internal market set out in the R&R Guidelines. The Commission therefore considers that the rescue aid provided to the beneficiary is compatible with the internal market.

(151) In addition, the Commission reminds Portugal of its obligation to submit annual reports to the Commission, in accordance with point 131 of the R&R Guidelines.

4. CONCLUSION

The Commission has accordingly decided not to raise objections to the notified individual aid to Transportes Aéreos Portugueses SGPS S.A. on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) of the Treaty on the Functioning of the European Union.

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Your request should be sent electronically to the following address:

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Yours faithfully
For the Commission

Margrethe VESTAGER
Executive Vice President

