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Subject: State Aid SA.59029 (2020/N) – Italy – COVID-19 Compensation scheme for airlines with an Italian operating license

Excellency,

1. PROCEDURE

- (1) By electronic notification of 15 October 2020, the Italian Republic (“Italy”) notified a compensation scheme in favour of airlines with an Italian operating license to compensate their damages linked to the COVID-19 outbreak (“the Measure”), in accordance with Article 108(3) of the Treaty on the Functioning of the European Union (“TFEU”). Following contacts between the Italian authorities and the Commission services,¹ Italy completed the notification on 27 November 2020 and it later amended it on 9 December 2020.
- (2) Italy exceptionally agrees to waive its rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation 1/1958,² and to have the present decision notified and adopted in English.

¹ The Commission services sent requests for information on 19 and 22 October 2020. The Italian authorities replied to the requests for information on 23 November 2020. On 4 and 17 December 2020, the Commission services sent a further request for information to the Italian authorities, to which Italian authorities replied on 7 and 21 December 2020.

² Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

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2. DESCRIPTION OF THE MEASURE

2.1. Objective of the Measure

- (3) The Italian authorities submitted that the Measure aims at making good the damage suffered by certain airlines due to the COVID-19 pandemic, as a result of the governmental travel restrictions imposed to limit the spread of COVID-19 (“containment measures”), which have severely affected the aviation sector.
- (4) Italy notified the Measure under Article 107(2)(b) TFEU.

2.1.1. *The containment measures related to the COVID-19 outbreak*

- (5) The COVID-19 outbreak has resulted in strict travel restrictions imposed by Member States and third countries, leading to a sharp decrease in both domestic and international passenger air transport.
- (6) Within the Union, Italy was the first country to be hit by the COVID-19 outbreak. After reporting its first cases of COVID-19 infections, Italy declared a state of emergency on 31 January 2020 until 31 July 2020.³ On 29 July 2020, Italy prolonged the state of emergency until 15 October 2020.⁴
- (7) In the course of February 2020, Italy adopted several measures to contain the spread of COVID-19. On 7 February 2020, it banned flights to Italy from China, Taiwan, Hong Kong and Macao. On 21 February 2020, the Ministry of Health imposed quarantine measures on the Italian territory for all persons that had travelled in zones with confirmed cases.⁵
- (8) Subsequently, the rapid spread of COVID-19 led to the cancellation of events and fairs.⁶ As of 25 February 2020,⁷ in Northern Italy all sport events and competition were suspended, while throughout the country all schools and universities were required to organise distance learning until further notice. Cultural centres were closed on Sundays and all exams (school, driving license, etc.) were cancelled. On 1 March 2020, by Decree No 6 of the Prime Minister,⁸ Italy locked down several cities in Northern Italy and considerably restricted economic, transport, religious, cultural, educative and sport activities in several regions of Northern

³ Deliberation of the Council of the Ministers of 31 January 2020 on the declaration for six months of the state of emergency on the national territory as a result of the COVID-19 outbreak.

⁴ <https://www.gazzettaufficiale.it/eli/id/2020/07/30/20G00112/sg>.

⁵ <https://www.gazzettaufficiale.it/eli/id/2020/02/22/20A01220/sg>.

⁶ <https://www.gazzettaufficiale.it/eli/id/2020/02/25/20A01278/sg>.

⁷ Decree of the Prime Minister of 25 February 2020, ‘Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19’.

⁸ Decree of the Prime Minister of 6 March 2020, ‘Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19’.

Italy, while imposing health and sanitary measures throughout the country.⁹ On 4 March 2020, Italy extended the restrictions applicable in the northern regions to the entire national territory.¹⁰

- (9) Between late February and 9 March 2020, several Member States as well as third countries imposed limitations or bans on the entry of persons coming from or through Italy. Such persons either were not allowed to cross the borders of those Member States or had to undergo a period of quarantine.

Table 1 – Non-exhaustive list of countries issuing restriction on flights to/from Italy between late February and 10 March 2020

Country	Type of restriction	Date of entry into force	Date of removal
Ireland	Travel warning to avoid all non-essential travel to Northern Italy	24 February 2020	15 June 2020
Romania	Travel warnings to avoid all non-essential travel to Italy	2 March 2020	15 June 2020
Austria	Health checks at the borders with Italy; suspension of flights to/from Milan and Bologna	6 March 2020	15 June 2020
Denmark	Travel warning to avoid all non-essential travel to Northern Italy	6 March 2020	15 June 2020
The Netherlands	Travel warning to avoid all non-	6 March 2020	15 June 2020

⁹ <https://www.gazzettaufficiale.it/eli/id/2020/03/01/20A01381/sg>. The restrictions applicable in certain regions of Northern Italy included for example the suspension of all competition and sport events, all activities involving gatherings of people and all school activities, in addition to health measures such as social distancing in public places, bars and restaurants; homeworking; closure on week-end of shops and malls; etc.

¹⁰ <http://www.governo.it/it/articolo/coronavirus-firmato-il-dpcm-4-marzo-2020/14241>.

	essential travel to Northern Italy		
China and Taiwan	Suspension of flights between Italy and China/Taiwan	30 January 2020	8 June 2020
Kuwait	Suspension of flights to Italy	24 February 2020	On-going
Israël	Quarantine measures for travellers arriving from Italy (entry ban on foreign travellers arriving from Italy)	26 February 2020 (5 March 2020)	11 October 2020
India	Travel warning to avoid all non-essential travel to Italy	26 February 2020	8 August 2020
Madagascar	Travel warning asking Italian travellers to postpone or cancel their journey	27 February 2020	On-going
Lebanon/Jordan	Entry bans on foreigners coming from Italy	28 February 2020	31 July 2020
Canada/United States	Travel warning to avoid all non-essential travel to Italy	28 February 2020	On-going
Dominican Republic	Health checks and suspension of flights to/from	28 February 2020	1 July 2020

	Milan		
Oman	Suspension of flights from Milan, Rome, Verona and Salalah and vice versa	1 March 2020	1 December 2020
Maldives	Entry ban on travellers coming from Italy and on cruises' arrivals	7 March 2020	15 July 2020

Source: Italian authorities

- (10) On 8 March 2020, Italy imposed lockdown measures with immediate effect that included travel restrictions in Northern Italy in response to the COVID-19 outbreak. Those general measures were extended to the entire national territory on 9 March 2020¹¹ with entry into force on 10 March 2020, and remained in force until 2 June 2020.
- (11) By Decree No 112 of 12 March 2020,¹² the Ministry of Transport ordered the closure of the majority of airports in Italy (except for 17 out of 39 commercial airports in total where only governmental, cargo and emergency flights were allowed). Those restrictions also covered all flights in Italy, with the exception of those needed to ensure minimum essential services (health reasons, absolute necessity). Those travel restrictions remained in force until 2 June 2020.¹³
- (12) To contain the spread of the virus, on 16 March 2020 the Commission invited Member States to apply a coordinated restriction on non-essential travel from third countries to the Union for an initial period of 30 days,¹⁴ subsequently extending it twice until 15 June 2020.¹⁵ The envisaged travel restriction, as well

¹¹ Decree of the Prime Minister of 9 March 2020, 'Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19, applicabili sull'intero territorio nazionale'.

¹² <http://www.mit.gov.it/sites/default/files/media/notizia/2020-03/d.m.%20n.%20112%202020.pdf>.

¹³ Italy prolonged Decree No 112 of 12 March 2020 on 12 and 29 April and on 17 May 2020, up to 2 June 2020.

¹⁴ Communication from the Commission to the European Parliament, the European Council and the Council of 16 March 2020, COVID-19: Temporary Restriction on Non-Essential Travel to the EU, COM/2020/115 final.

¹⁵ Communication from the Commission to the European Parliament, the European Council and the Council of 8 May 2020 on the second assessment of the application of the temporary restriction on non-essential travel to the EU, COM(2020) 222 final.

as the invitation issued by the Commission on 11 June 2020 to prolong it until 30 June 2020, applied to all Schengen Member States (as well as Bulgaria, Croatia, Cyprus, and Romania) and the four Schengen Associated States (Iceland, Liechtenstein, Norway, and Switzerland) – 30 countries in total.¹⁶

- (13) As of 3 June 2020,¹⁷ Italy lifted the ban on the free movement within Italy, as well as to and from other Member States and the four Schengen Associated States. The restrictions remained applicable for movements to third countries until 30 June 2020.¹⁸
- (14) On 2 June 2020, Italy partially lifted the restrictions on air services, allowing air services to be commercially performed in 23 Italian airports, while the rest of the airports remained closed until further notice.¹⁹ On 14 June 2020, Italy expanded the list of open airports to 24 airports.²⁰
- (15) Most Member States reopened their borders with other Member States and the Schengen Associated States as of mid-June 2020,²¹ following the recommendation of the Commission to lift the internal borders controls and restrictions on free movement within the Union by 15 June 2020.²² On that date, some Member States still kept their borders closed or accepted only citizens from a very limited list of countries (e.g. Denmark and Portugal), while others kept their borders closed for incoming travellers from Italy (e.g. Cyprus and Malta).

2.1.2. *Impact of the containment measures on Italian airlines*

- (16) The containment measures taken by Italy and other countries negatively affected the European aviation sector and seriously impaired airlines' operations. Between March and June 2020, the number of flights in Europe decreased by up to 93%

¹⁶ https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/travel-and-transportation-during-coronavirus-pandemic_en

¹⁷ Decree-Law of 16 May 2020, No 33, 'Ulteriori misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19'.

¹⁸ Decree of the Prime Minister of 11 June 2020, "Ulteriori disposizioni attuative del decreto-legge 25 marzo 2020, No 19, recante misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19, e del decreto-legge 16 maggio 2020, No 33, recante ulteriori misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19".

¹⁹ Joint Decree of the Ministry of Infrastructure and Transports and Ministry of Health No 227 of 2 June 2020.

²⁰ Joint Decree of the Ministry of Infrastructure and Transports and Ministry of Health No 245 of 14 June 2020.

²¹ This was the case on 10 June 2020 for Slovakia; on 13 June 2020 for Romania and Poland; 15 June 2020 for Austria, Belgium, Croatia, Finland, France, Germany, Greece, the Netherlands, Czechia and Sweden; on 17 June 2020 for Bulgaria and on 21 June 2020 for Spain.

²² Communication of 11 June 2020 from the Commission to the European Parliament, the European Council and the Council on the third assessment of the application of the temporary restriction on non-essential travel to the EU, COM/2020/399 final.

(with the biggest decrease reached on 12 April 2020) compared to the flights operated during the same period in 2019.²³

- (17) Likewise, the activities of aid beneficiaries were significantly disrupted by the fallout from the COVID-19 crisis, notably the travel bans imposed at national and international level, which caused a dramatic fall in the number of routes operated by those airlines within Italy and to the rest of the world.
- (18) The Italian authorities stressed that the aid beneficiaries were affected by the negative consequences of the COVID-19 crisis even before the start of the Italian travel ban, notably due to both the Italian local restrictions in Northern Italy and the travel bans immediately imposed on Italian citizens and Italian routes at Union and international level (see recital (9)). Given those restrictive measures, the aid beneficiaries reported a significant decrease in passenger traffic and revenues already as of 1 March 2020. For instance, Neos' passenger traffic fell by more than 50% in the period 1-9 March 2020. In the same vein, Blue Panorama had to cancel all its flights operated to/from Italy between 1 and 9 March 2020 compared to the same period in 2019.²⁴ Those sharp decreases in demand resulted from the restrictions adopted by countries to/from which the beneficiaries were flying and/or the severe restrictions put in place in Northern Italy where the beneficiaries were operating air services.²⁵
- (19) According to the Italian Civil Aviation Authority (ENAC), the monthly total number of flight movements registered in Italy remained stable in January and February 2020 compared to the same months in 2019, before dropping by 66% in March, 95% in April, 97% in May and 88.5% in June 2020.²⁶ In particular, between 1 June and 15 June 2020, the number of flights in Italy were still around 88% below the level recorded for the same period in 2019.²⁷

²³ Eurocontrol - COVID19 Impact on European Air Traffic – Comprehensive Assessment. Air Traffic situation for Wednesday 1 July 2020 compared with equivalent period in 2019. Available at: eurocontrol.int/publication/eurocontrol-comprehensive-assessment-covid-19s-impact-european-air-traffic.

²⁴ Blue Panorama did not operate any flights in Italy from 1 to 9 March 2020 compared to 48 flights operated in the same period in 2019.

²⁵ For example, Neos has its hub at Milan Malpensa airport, which is situated in the area most affected by the pandemic as of late February 2020.

²⁶ Italian Civil Aviation Authority, traffic data for the first semester 2020, available (in Italian) at: [https://www.enac.gov.it/sites/default/files/allegati/2020-Nov/Dati traffico 2020 I semestre 201119.pdf](https://www.enac.gov.it/sites/default/files/allegati/2020-Nov/Dati%20traffico%20I%20semestre%20201119.pdf).

²⁷ Source: Eurocontrol, COVID19 Impact on Air Traffic, Factsheet for Italy, 17 November 2020. Available at: <https://www.eurocontrol.int/sites/default/files/2020-11/eurocontrol-brief-on-covid19-impact-italy-it-17112020.pdf> **Error! Bookmark not defined..**

Table 2: Overview of flights movements in Italy over the reference period

	2019²⁸	2020	Difference
March	100 000	35 095	- 66%
April	120 000	5 858	- 95%
May	130 000	7 804	- 97%
June	135 000	15 590	- 88,5%

Source: Italian Civil Aviation authority, Eurostat.

- (20) Similarly, the monthly number of passengers transported in Italy dropped by 85% in March 2020, 99% in April and May and 94% in June 2020 compared to the previous year.

Table 3: Overview of air passengers in Italy over the reference period

	2019	2020	Difference
March	13 988 037	2 082 648	- 85%
April	16 090 918	118 194	- 99%
May	17 096 526	213802	- 99%
June	18 892 135	1 098 888	- 94%

Source: Assaeroporti – Associazione Italiana Gestori Aeroporti.

2.2. Legal basis

- (21) The legal basis for the Measure is Article 198 of Decree-law No 34 of 19 May 2020.²⁹

²⁸ See footnote 26. The data are approximate.

²⁹ Art. 198 of Decree-law of 19 May 2020, No 34, 'Misure urgenti in materia di salute, sostegno al lavoro e all'economia, nonche' di politiche sociali connesse all'emergenza epidemiologica da COVID-19', as amended and converted into law by Law of 17 July 2020, n. 77.

- (22) A joint ministerial decree to be adopted by the Ministry of Infrastructure and Transport, the Ministry of Economic Development and the Ministry of Economy and Finance will lay down the detailed arrangements for the application of that provision. The Italian authorities submitted a draft of that decree.
- (23) On 14 August 2020, the Italian authorities adopted Decree-Law No 104³⁰ (the ‘August decree’) allowing the Ministry of Infrastructure and Transport to grant aid in the form of an overall direct grant up to EUR 50 million distributed among the companies meeting the eligibility conditions to receive compensation under the Measure, and which requested or will request that compensation pending the outcome of a notification procedure before the Commission.

2.3. Form and budget of the Measure

- (24) The Measure will take the form of a grant paid by a compensation fund (“Fund”) of EUR 130 million that is financed by the general budget of the Italian State.
- (25) Italy confirms that the aid paid to the beneficiaries will be net of any amount recovered from insurance, litigation, arbitration or other source for the same damage. Should the aid be paid out before such amounts have been established and paid, Italy will recover an amount corresponding to such compensations and interest from the beneficiary at a later stage.

2.4. Administration of the measure

- (26) The measure will be managed by the Italian Ministry of Infrastructure and Transport.

2.5. Beneficiary

- (27) Potential beneficiaries of the Measure are all airlines that fulfil all the following conditions:
- a. the carrier is not a beneficiary of the fund established by Article 79(2) of Decree-Law No 18 of 17 March 2020³¹, which granted compensation for COVID-19 damages to airlines with an Italian air operating licence and which were entrusted on 17 March 2020 with public service obligations;
 - b. the carrier holds a valid air operator’s certificate and air operating license issued by the Italian Civil Aviation Authority (ENAC);
 - c. the carrier operates by using aircraft with a capacity higher than 19 seats;
 - d. on the date of requesting the aid, the carrier applies to its employees that are assigned to a “home base” in Italy pursuant to Commission Regulation No

³⁰ Decree-Law of 14 August 2020, No 104 ‘Misure urgenti per il sostegno e il rilancio dell’economia’.

³¹ Decree-law of 17 March 2020, No 18, ‘Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all’emergenza epidemiologica da COVID-19’, as amended and converted into law by Law of 24 April 2020, No 27, by Article 202 of Decree-Law of 19 May 2020, No 34 and by Law of 17 July 2020, No 77.

EU/965/2012³², as well as to employees of third parties involved in the carrier's activities, a remuneration not lower than the minimum established by the national collective agreement for the aviation sector stipulated by the employers' and trade unions' organizations, which are comparatively most representative at national level (the "minimum remuneration requirement").

- (28) The Italian authorities submitted that there are only three eligible carriers that fulfil all those requirements: Air Dolomiti, Blue Panorama and Neos.

2.6. Eligible damages

- (29) Eligible damages are defined as the net losses incurred by the beneficiaries that are directly linked to the containment measures during the period running from 1 March until 15 June 2020, net of the avoided costs resulting from the corresponding reduction of activity and the benefit of general social measures (e.g. technical unemployment financed by the State).
- (30) The Italian authorities specified that the beneficiaries of the scheme must prove the direct causal link between the damages suffered and the COVID-19 outbreak by providing concrete and solid evidence for the period immediately preceding the Italian lockdown (1 March – 9 March) and the period following its lifting (3 June – 15 June). The evidence will include, per beneficiary, concrete figures on a daily/weekly basis for ticket sales, number of non-show, number of carried passengers, load factor, number of cancellations of tickets, number of departures, etc. The evidence should demonstrate that the beneficiary strongly suffered from the restrictions in place already prior to the full lockdown and after its lifting.
- (31) The net losses are quantified as the difference between the profit/loss of the beneficiaries between 1 March and 15 June 2020 and those during the same period in 2019. That calculation takes into account the following elements:
- (a) loss of revenue: a review of the impact of the containment measures taken by governments as a consequence of the COVID-19 outbreak on total revenue, including (i) fare revenues from tickets (tickets that could not be sold), and (ii) additional/ancillary revenues (seat reservation, upgrades);
 - (b) additional and avoided costs³³: a review of the beneficiary's cost base and the impact (both positive and negative) of the containment measures taken by governments as a consequence of the COVID-19 outbreak on variable costs, including deviations in (i) all variable costs (in particular fuel costs, fees and charges, maintenance costs, IATA commissions and catering costs), (ii) fixed costs which varied due to the containment measures taken

³² Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, OJ L 296, 25.10.2012, p. 1.

³³ Avoided costs are all costs that the airline could avoid thanks to the reduction of its activities. Notably, they include all costs directly related to operating flights: fuel costs; airport and air navigation charges; ground handling services; onboard catering services; passenger services (baggage compensation; hotel expenses for crew and transit passengers etc.).

by governments as a consequence of the COVID-19 outbreak (in particular lower personnel costs and marketing costs).

- (32) When requesting the aid, each beneficiary will have to submit to the granting authority a table detailing all costs and revenues on a monthly basis between 1 March and 15 June 2020 as certified by an independent economic expert.³⁴
- (33) In evaluating the eligible damages, Italy will also take into account the losses expressed in terms of EBITDA³⁵ figures recorded by each beneficiary from 1 March to 15 June 2020 in comparison with the same period in 2019.
- (34) The amount of compensation per beneficiary may not exceed the eligible damages it suffered, and it will be determined by retaining the lowest damage calculation (EBITDA or net losses).
- (35) In its notification, Italy has provided the EBITDA data of each beneficiary registered in the reference period, which amounted to EUR 15.97 million for Air Dolomiti, EUR 32.50 million for Blue Panorama and EUR 29.97 million for Neos.
- (36) Thus, on the basis of a comparison of the EBITDA of the relevant period in 2019 and in 2020, the total net losses of the three eligible carriers due to the COVID-19 outbreak between 1 March and 15 June 2020 are estimated at EUR 78.45 million compared to the corresponding period in 2019. Therefore, the maximum amount of compensation to be granted under the Fund will not exceed in any event EUR 78.45 million.³⁶

Table 4: Estimated damages per eligible airline (EUR)

Airline	March 2020	April 2020	May 2020	1-15 June 2020	Total estimated damage (EUR)
Air Dolomiti	3 515 305	3 163 374	6 153 658	3 142 195	15 974 532
Blue Panorama	9 054 539	8 728 700	6 670 441	8 055 110	32 508 790
Neos	11 771 262	12 471 154	0	5 725 658	29 968 074

³⁴ For the month of June, the company will only indicate the costs and revenues relating to the first half of the month.

³⁵ EBITDA stands for earnings before interest, taxes, depreciation and amortisation.

³⁶ Should the budget established not be entirely exhausted to cover the eligible damages suffered during the period of reference (1 March – 15 June), the Italian authorities may decide to extend the eligible period beyond 15 June 2020. Such extension would be notified to the Commission.

- (37) Within one year from the date of adoption of this decision, Italy will provide the Commission with a report on the amount of compensation granted to each beneficiary and potential overcompensation recovered.

2.7. Cumulation

- (38) The Italian authorities confirm that the aid cannot be cumulated with other aid (also *de minimis*) covering the same eligible costs.
- (39) Italy acknowledged that one of the eligible carriers under the Measure, Air Dolomiti, is a subsidiary of the Deutsche Lufthansa Group, whose parent company (Deutsche Lufthansa AG) received a recapitalisation aid of EUR 6 billion and a loan guarantee of EUR 3 billion from Germany, both approved by the Commission.³⁷ Italy submitted that the legal basis of the Measure provides sufficient safeguards against any risk of overcompensation. In particular, Article 2 of the draft implementing decree excludes from compensation any damage already recovered by the beneficiaries from another source. In addition, Article 6 of the draft implementing decree prohibits any cumulation of aid for the same eligible damages and establishes an ex-post mechanism to recover any aid unduly granted. The Italian authorities added that the fact that the damages eligible for compensation have not been already restored by other sources will be certified by the evaluation report of an independent auditor.

3. ASSESSMENT

3.1. Legality of the Measure

- (40) Pursuant to Article 108(3) TFEU, when the Commission has been notified of plans to grant aid, the Member State concerned must not grant the aid until the Commission adopted a decision approving that aid (“the standstill obligation”).
- (41) According to Article 198 of Decree-Law No 34 of 19 May 2020, the granting of the aid to compensate airlines that meet the eligibility criteria to benefit from compensation under the Fund³⁸ for damages suffered due to the COVID-19 pandemic is subject to the prior authorisation of the Commission.
- (42) However, as stated in recital (23), Italy adopted in August 2020 a Decree authorising the Ministry of Economic Development to provide advance payment in the form of a direct grant of up to EUR 50 million to airlines that qualify for such compensation from the fund at their request.
- (43) Since the Decree is an act conferring the right to receive the aid from the State budget, the Italian authorities adopted a legally binding act by which they undertook to grant the aid to any beneficiary of the Fund that has requested or will request it and meeting all applicable conditions.

³⁷ SA.57153 – Germany – COVID_19 – Aid to Lufthansa, decision of 25 June 2020, C(2020) 4372 final; SA.56714 – Germany – COVID-19 measures, decision of 22 March 2020, C(2020) 1886 final.

³⁸ See recital (21).

- (44) It follows that the Italian authorities granted the measure in breach of the standstill obligation. The measure is therefore unlawful under Article 108(3) TFEU.

3.2. Existence of State aid

- (45) Article 107(1) TFEU defines State aid as 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, in so far as it affects trade between Member States.
- (46) 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.
- (47) The Measure is imputable to the State, since it is established by Decree-law adopted by the Italian government, which will be implemented by a joint ministerial decree adopted by the Italian Ministry of Infrastructure and Transport, the Ministry of Economic Development and the Ministry of Economy and Finance. It is financed through State resources, since the Measure will be paid out from the general budget of the Italian State.
- (48) The Measure confers an advantage on the beneficiaries in the form of a grant. The Measure thus relieves the beneficiaries of costs that they would have had to bear under normal market conditions.
- (49) The Measure is selective, since it is granted to certain airlines as opposed to other airlines that do not fulfil the eligibility requirements to benefit from the Fund or other companies active in other economic sectors which may have equally suffered from the outbreak.
- (50) The Measure is liable to distort competition, since it strengthens the competitive position of the airlines benefitting from the Measure. It also affects trade between Member States, since these airlines are active in the aviation sector, in which intra-Union trade exists.
- (51) In view of the above, the Commission concludes that the Measure constitutes aid within the meaning of Article 107(1) TFEU. The Italian authorities do not contest that conclusion.

3.3. Compatibility

- (52) Article 107(2)(b) TFEU covers aid which is compatible with the internal market, provided that it satisfies certain objective criteria. Since this is an exception to the general principle stated in Article 107(1) TFEU that State aid is incompatible with the internal market, Article 107(2)(b) TFEU must be interpreted narrowly. Therefore, only damage caused by natural disasters or exceptional occurrences may be compensated for under that provision. There must be a direct link between the damage suffered by an undertaking and the exceptional occurrence, and the compensation must not exceed the amount of damage.

3.3.1. *The notion of exceptional occurrences with the meaning of Article 107(2)(b) TFEU*

- (53) Article 107(2)(b) TFEU provides that aid to make good damage caused by natural disasters or exceptional occurrences shall be compatible with the internal market. Neither the TFEU nor Union legislation contains a precise definition of the notion of exceptional occurrence. As they constitute exceptions to the general prohibition of State aid within the internal market laid down in Article 107(1) TFEU, the Commission, in line with the consolidated Union case-law³⁹ has consistently held that the notions of ‘natural disaster’ and ‘exceptional occurrence’ referred to in Article 107(2)(b) TFEU must be interpreted restrictively.
- (54) The characterisation of an event as being an exceptional occurrence is made by the Commission on a case-by-case basis, having regard to its previous practice in the field.⁴⁰ In that regard, the following indicators relating to the event concerned must be cumulatively met: (i) unforeseeable or difficult to foresee,⁴¹ (ii) significant scale/economic impact⁴² and (iii) extraordinary, i.e. differ sharply from the conditions under which the market normally operates.⁴³

³⁹ Judgment of the Court of Justice of 11 November 2004, *Spain v Commission*, C-73/03, EU:C:2004:711, paragraph 37 and judgment of the Court of Justice of 23 February 2006, *Atzeni and others*, in Joined Cases C-346/03 and C-529/03, EU:C:2006:130 paragraph 79.

⁴⁰ Exceptional occurrences which have been accepted in the past by the Commission include war, internal disturbances and strikes, and, with certain reservations and depending on their extent, major industrial accidents which result in widespread economic loss, see Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020, paragraph 330 (OJ C 204, 1.07.2014, p. 53).

⁴¹ Commission decision of 1 August 2008 in case SA.32163, Remediation of damage to airlines and airports caused by seismic activity in Iceland and the volcanic ash in April 2010, Slovenia, paragraph 31, OJ C 135, 9.5.2012, p. 1.

⁴² Elements taken into account by the Commission to consider that the occurrence reached a significant scale: negative consequences cannot be contained (Commission decision of 4 October 2000 in case NN 62/2000, Régime temporaire d'aides aux entreprises victimes des intempéries et de la marée noire – France, OJ C 127, 29.05.2003, p. 32), or the number of dead or injured people (Commission decision of 11 April 2012 in case SA.33487, Agricultural and fisheries aid to compensate for damage due to exceptional occurrence (red mud "Aluminium accident"), Hungary, paragraph 35, OJ C 120, 25.04.2012, p. 1; Commission decision of 2 May 2002 in case N241/2002, Régime en faveur des entreprises victimes de la catastrophe industrielle de Toulouse, France, paragraph 19, OJ C 170, 16.07.2002, p. 16), the immense ecological and economic damage (Commission decision of 11 April 2012 in case SA.33487, paragraph 36, OJ C 120, 15.04.2012, p. 1), the amount of material damage, despite the local character of the industrial accident (Commission decision of 2 May 2002 in case N 241/2002, paragraph 19, OJ C 170, 16.07.2002, p. 16).

⁴³ In its decision of 19 May 2004 in case C-59/2001 (OJ L 62, 2007, p. 14), the Commission considered that the (alleged) fall in sales of poultry meat in a Member State not directly affected by the dioxin contamination did not in itself constitute an exceptional occurrence. Even though it was an unforeseeable event, it formed part of the normal commercial risks to which an undertaking is exposed.

3.3.2. *COVID-19 outbreak as an exceptional occurrence*

- (55) Following the first reports of cases of acute respiratory syndrome (COVID-19) in the Wuhan municipality in China at the end of December 2019, the Chinese authorities identified a novel coronavirus (SARS-CoV-2) as the main causative agent, which had not been previously identified in humans. The outbreak rapidly evolved, affecting not only other parts of China but has also spread to the majority of countries worldwide, including all Member States. Outbreaks of novel virus infections among people are always a public health concern and can have a significant economic impact. Specific sectors and areas are particularly affected by the outbreak, be it because of national outbreak control measures, travel restrictions or supply chain disruptions.
- (56) The World Health Organization (“WHO”) warned about the very high risk that COVID-19 would spread and have a global impact. The subsequent spread of COVID-19 ultimately resulted in far-reaching disruption of various economic sectors. That disruption was thus clearly outside the normal functioning of the market. In order to avoid an exponential increase in the number of cases, accompanied by social alarm and severe economic consequences, containment measures needed to be adopted.
- (57) On 11 March 2020, the WHO characterised the COVID-19 disease as a pandemic. The public health risk deriving from the absence of therapeutics or vaccines for the novel COVID-19 virus determined the exceptionality of the circumstances. The rapidity of the spread caused enormous consequences both in terms of fatal outcomes in high-risk groups and in terms of economic and societal disruption.⁴⁴ The necessity to adopt and encourage the respect of measures aimed at interrupting transmission chains stemmed from that acknowledgement.
- (58) Since March 2020, Member States have adopted various measures that aimed at limiting the spread of the coronavirus, e.g. travel restrictions for non-essential travels, closure of borders, closure of non-essential shops, obligation for companies to organise working from home for every position where this is possible and various social distancing measures.
- (59) In view of the above, the COVID-19 outbreak qualifies as an exceptional occurrence, as it was not foreseeable and is clearly distinguishable from ordinary events, by its character and its effects on the affected undertakings and the economy in general, and therefore falls outside the normal functioning of the market.
- (60) In this context, the COVID-19 outbreak can be considered as an exceptional occurrence within the meaning of Article 107(2)(b) TFEU.⁴⁵

⁴⁴ ECDC’s Rapid Risk Assessment, Outbreak of novel Coronavirus disease 2019 (COVID-19): increase transmission globally – fifth update, 2 March 2020.

⁴⁵ See Commission Decision of 12 March 2020 in State aid case SA.56685 (2020/N) – Denmark – Compensation scheme for cancellation of events related to COVID-19, OJ C 112, 03.04.2020, and Commission Decision of 31 March 2020 in State aid case 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.

3.3.3. *Causal link between the damage to be compensated by the Measure and the COVID-19 outbreak*

- (61) The Commission has examined the Measure pursuant to Article 107(2)(b) TFEU, which requires a direct link between the damage and the exceptional occurrence for which the State aid measure provides compensation. That assessment has led to the following observations.
- (62) As described in detail in section 2.1, the COVID-19 outbreak has led to travel restrictions all over the world and the closing down of the vast majority of passenger air transport. Those containment measures were intended to avoid the spread of the virus, but they negatively affected the aviation sector. The damage suffered by airlines benefitting from the Measure is directly linked to the COVID-19 outbreak through the the travel restrictions and other containment measures imposed by the Italian government and other governments around the world.
- (63) The Measure aims at compensating airlines for the damage suffered due to the imposition of travel restrictions and other containment measures linked to the COVID-19 outbreak (recital (3)). For the calculation of the damage, the Italian authorities have considered a compensation period running from 1 March to 15 June 2020 (see section 2.1.1).
- (64) The Commission considers that, for the purposes of calculating the damage subject to possible compensation under Article 107(2)(b) TFEU, net losses occurring during the national lockdown period (10 March to 2 June 2020) and the days immediately before (1 to 9 March 2020) and after (3 to 15 June 2020) can be considered as damage directly linked to the exceptional occurrence, as it will be explained in sections 3.3.3.1 to 3.3.3.3.

3.3.3.1. Period from 1 to 9 March 2020

- (65) Italy was the first Member State severely affected by the COVID-19 outbreak and this led to the early adoption of restrictive measures imposed on Italian citizens and Italian routes both at national and international level already in late February 2020 (see recitals (8)-(9)).
- (66) On 1 March 2020, a Prime Minister's decree locked down several of the cities in Northern Italy and enacted health and sanitary measures on the rest of the territory (recital (8)). Those restrictions were further reinforced for the whole territory on 4 March 2020. In the meantime, other countries either imposed travel restrictions specific to Italy or published travel warnings concerning Italian citizens and/or Italian routes between the end of February and 9 March 2020 (recital (9)).
- (67) These restrictions had an impact on airlines operating to/from Italy, including the beneficiaries (recital (18)).
- (68) In addition, the Italian authorities committed that Italy will grant compensation for that period to the beneficiaries that demonstrate, based on concrete and solid evidence, that they were impacted by the COVID-19 outbreak already in the period between 1 March and 9 March 2020.

- (69) Therefore, the Commission considers that the period from 1 to 9 March 2020 can be included as part of the reference period for the compensation.

3.3.3.2. Period from 10 March to 2 June 2020

- (70) The Commission notes that in the period from 10 March to 2 June 2020 lockdown measures were extensively and widely in force (see section 2.1.1) in Italy and within the Union, together with a ban on flight activities.
- (71) Therefore, the Commission considers that this period can be included as part of the reference period for the compensation.

3.3.3.3. Period from 3 to 15 June 2020

- (72) The Commission considers that, while the Italian travel ban was lifted as of 3 June 2020, the data submitted by Italy indicate that, due to the various restrictions and containment measures in place at national and international level, there was very limited air traffic until 15 June 2020 as a direct consequence of the COVID-19 outbreak.
- (73) Until 14 June 2020, only 23 out of 41 Italian airports were open, so that many important routes were still closed (such as those operated from Milan Linate Airport) ((14)). In addition, Italy applied specific restrictions on some domestic routes, such as those to/from Sardinia.
- (74) Air traffic data show that in the first half of June 2020, the number of flights were still around 88% below the level recorded for the same period in 2019 (recital (19)).
- (75) This is notably due to the fact that, following on the official advice of the Commission to maintain control measures in place until 15 June 2020,⁴⁶ many Member States kept travel warnings, travel bans and flight restrictions in place until mid-June (recital (15)).
- (76) At the same time, Italy continued to limit to a great extent travels to third countries (recital (13)); in the same vein, numerous third countries continued to apply their travel bans and flight restrictions to/from Italy so that air traffic started to resume noticeably only after 15 June 2020.
- (77) In addition, the Italian authorities committed that Italy will grant compensation for that period to the beneficiaries that demonstrate, based on concrete and solid evidence, that they were directly affected by the COVID-19 outbreak already in the period between 3 June and 15 June 2020.
- (78) Therefore, the Commission considers that the period from 3 to 15 June 2020 can be included as part of the reference period for the compensation.

⁴⁶ See recital (15).

3.3.3.4. Conclusion on the direct link between the damage and the exceptional event

- (79) The Commission concludes that the notified measure aims to cover the net losses incurred by airlines as a direct effect of the COVID-19 outbreak and related governmental restrictions between 1 March and 15 June 2020, subject to a factual demonstration from each beneficiary of their damages.

3.3.4. *Proportionality of the aid measure*

- (80) In order to be compatible with Article 107(2)(b) TFEU, the aid must be proportional to the damage directly caused by the exceptional occurrence. Aid must not result in over-compensation of damage; it should only make good the damage caused by the exceptional occurrence.
- (81) To ensure proportionality, it is necessary to analyse the assumptions and evidence on which the calculation of damage for the factual scenario is based. In particular, it is necessary to look at how the exceptional occurrence has actually and directly affected the operations of the carriers and what actual impact it has had on the costs and revenues of the carriers.
- (82) The Commission notes that the damage to be compensated corresponds to the net loss, defined as loss of revenue minus avoided costs. The loss of revenue is the difference between the revenue that the airlines would have expected during the period from 1 March to 15 June 2020, had the containment measures linked to the COVID-19 outbreak not occurred, and the revenue that the airlines have actually generated during the period from 1 March to 15 June 2020. To approximate counterfactual revenues, actual revenues for the same period of the previous year are used. Avoided costs correspond to costs that the airlines would have had during the period from 1 March to 15 June 2020 if their activity had not been affected by the containment measures linked to the COVID-19 outbreak, and that the airlines did not have to bear as a result of the cancelled operations (see footnote 33). The avoided costs are quantified by comparing the costs borne by the airlines for the same period of the previous year with the costs borne by the companies during the period from 1 March to 15 June 2020.
- (83) That quantification can be done by comparing the financial results from 1 March to 15 June in 2020 and in the corresponding period of 2019. As stated in section 2.6, Italy will assess the overall net losses on the basis of a list of all flight-related revenues minus all costs registered between 1 March and 15 June 2020, including avoided costs (see footnote 33).
- (84) The Commission also observes that the Italian authorities already submitted an evaluation of the damages based on a comparison of the monthly EBITDA for the period March-June 2020 and the same period in 2019, which established the total net losses of the three airlines potentially eligible under the Measure between 1 March and 15 June 2020 at EUR 78.45 million: EUR 15.97 million for Air Dolomiti; EUR 32.50 million for Blue Panorama and EUR 29.97 million for Neos (see recital (35)).
- (85) The amount of compensation to be granted will correspond to the lowest damage calculation (EBITDA or net losses) provided by the beneficiaries (see recital (34)).

- (86) The Commission therefore considers that the compensation to be granted to each beneficiary will be established on the basis of a conservative and prudent estimation of the damages.
- (87) In addition, the Commission takes due note that the aid cannot be cumulated with other aid (also *de minimis*) covering the same eligible costs (recital (38)). Italy also committed to implement sufficient safeguards against any risk of overcompensation of damages already recovered by the beneficiaries from other sources. An *ex-post* mechanism to recover any aid unduly granted will be established, and the evaluation report of an independent auditor will certify which damages of the beneficiaries have been already restored by other sources (recital (39)).
- (88) Lastly, Italy will provide the Commission with a report on the implementation of the Measure within one year from the date of adoption of this decision (see recital (37)).
- (89) In light of the above, the Commission considers that the Measure granted by Italy under Article 107(2)(b) TFEU does not exceed the damage incurred by Italian airlines directly linked to the exceptional occurrence as a result of the governmental restrictions. The Commission therefore concludes that the Measure provides for compensation that does not exceed what is necessary to make good the damage.
- (90) In view of the above, the Commission concludes that the Measure is proportionate.

3.3.5. *Compliance of the Measure with other provisions of Union law*

- (91) State aid which contravenes provisions or general principles of Union law cannot be declared compatible with the internal market.⁴⁷
- (92) It is settled case-law that those aspects of aid that contravene specific provisions of the Treaty other than Articles 107 and 108 TFEU may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately, in which case their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in Article 108 TFEU.⁴⁸
- (93) The Commission notes that Italy established four eligibility requirements to select potential beneficiaries under the aid scheme,⁴⁹ and considers that those requirements are indissolubly linked to the scheme.

⁴⁷ See judgment of the Court of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraphs 50 and 51; judgment of the Court of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742, paragraphs 20 and 44.

⁴⁸ See judgment of the Court of 22 March 1977, *Iannelli v Meroni*, Case 74/76, EU:C:1977:51, paragraph 14; judgment of the Court of 15 June 1993, *Matra v Commission*, C-225/91, EU:C:1993:239, paragraph 41.

⁴⁹ See recital (27).

- (94) The Commission has received a complaint filed by AICALF, the Italian Low Fares Airline Association representing 6 airlines, which concerns Article 203 of the Relaunch Decree (CHAP (2020)01831). The wording of that provision, which imposes a minimum remuneration obligation on carriers operating on the Italian territory, echoes that of Article 198 of the Relaunch Decree, the legal basis for the aid scheme notified by Italy. At the time of this decision, no formal infringement proceedings under Article 258 TFEU had been started.
- (95) Given that context, the Commission notes that there is particular reason to consider the fourth eligibility requirement which imposes a minimum remuneration to the beneficiaries' employees, who are assigned to a home base in Italy. That condition is not inherent in the objective of the Measure, as it aims at ensuring that the beneficiaries grant a minimum salary protection to their employees based in Italy as required by Italian law (Article 203 of the Relaunch Decree). Therefore its compatibility must also be assessed in the light of other relevant provisions of Union law.
- (96) The minimum remuneration requirement applies only to employees who have their "home base"⁵⁰ in Italy. According to the case-law,⁵¹ the concept of "home base" does constitute a significant indicium for the purpose of determining the "place where, or from which, the employee habitually performs his work" for the purpose of the Rome I Regulation.⁵²
- (97) Article 8(1) of the Rome I Regulation provides that an individual employment contract shall be governed by the law chosen by the parties. However, such a choice of law may not have the result of depriving the employee of the protection afforded to the latter by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of Article 8. Pursuant to Article 8(2) of the same Regulation, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract.
- (98) In light of the above provision, employees that have their home base in Italy cannot be deprived of the protection under the mandatory rules of Italian law, which cannot be derogated from by their individual employment contract. As a consequence, all carriers that have employees based on the Italian territory are requested to meet the minimum protection afforded under Italian law, no matter

⁵⁰ That is to say '*the location, assigned by the operator to the crew member, from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal circumstances, the operator is not responsible for the accommodation of the crew member concerned*' (Annex II, Section I, point 14 of Commission Regulation (EU) No 83/2014 of 29 January 2014 amending Regulation (EU) No 965/2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council).

⁵¹ Judgment of the Court of 14 September 2017, *Nogueira and others* Joined Cases C-168/16 and C-169/16, EU:C:2017:688, para. 73.

⁵² See Article 8(1) of Regulation (EC) N o 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6).

the nationality of the carrier or of the law applicable to the individual employment contract.

- (99) Therefore, the Commission takes the view that the minimum remuneration requirement set out in Article 198 of the Relaunch Decree for potential beneficiaries under the aid scheme aims at supporting companies that ensure a minimum salary protection to employees home-based in Italy. That provision *prima facie* complies as such with the protection granted to employees under Rome I Regulation and does not constitute a breach of other provisions of Union law. It will be for the Italian competent authorities, and, as the case may be, the Italian courts, to ensure that this requirement is implemented and enforced in a way which is compatible with Union law.

4. CONCLUSION

The Commission has decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(2)(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:

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Directorate-General for Competition
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Yours faithfully,

For the Commission

Margrethe VESTAGER
Executive Vice-President

