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COMMISSION DECISION

of 21.12.2021

**ON THE STATE AID
SA.60165- 2021/C (ex 2021/N)
which Portugal is planning to implement
for TAP SGPS**

(Text with EEA relevance)

(Only the English text is authentic)

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<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>PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1) (a) thereof,

Having regard to the decision by which the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, in respect of the aid SA.60165 (2021/C)¹,

Having called on interested parties to submit their comments pursuant to the provision cited above² and having regard to their comments,

Whereas:

HAS ADOPTED THIS DECISION:

1. PROCEDURE

- (1) On 10 June 2021, Portugal notified its plans to grant State aid in the amount of EUR 3.2 billion, as restructuring aid, under the Guidelines on State aid for rescuing

¹ Commission Decision C(2021) 5278 final of 16 July 2021 in case SA.60165 (OJ C 317, 6.8.2021, p. 13).

² OJ C 317, 6.8.2021, p. 13.

and restructuring non-financial undertakings in difficulty (“R&R Guidelines”)³ to the economic unit, currently under the sole control of the Portuguese State, comprising Transportes Aéreos Portugueses SGPS S.A. (“TAP SGPS”) and its current sister company Transportes Aéreos Portugueses, S.A. (“TAP Air Portugal”), including all their controlled subsidiaries (recitals (8) to (14)). The notification was preceded by a rescue loan to TAP SGPS in the amount of EUR 1.2 billion, to which the Commission raised no objections in a decision of 10 June 2020 (the “initial rescue aid decision”)⁴. Portugal put into effect and disbursed the rescue aid to TAP SGPS in July 2020 and submitted a restructuring plan for TAP SGPS on 10 December 2020. An updated version of the restructuring plan and other supporting documents accompanied the notification.

- (2) On 19 May 2021, the General Court annulled the initial rescue aid decision but suspended the effects of the annulment pending the adoption of a new decision by the Commission⁵. On 16 July 2021, the Commission adopted a new decision raising no objections to the rescue aid⁶ that attracted another action for annulment thereof⁷.
- (3) By letter dated 16 July 2021, the Commission informed Portugal that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (“TFEU”) in respect of the restructuring aid (the “opening decision”). Portugal provided comments on that decision by letters dated 19 August and 27 August 2021.
- (4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union*⁸. The Commission called on interested parties to submit their comments within one month of the publication.
- (5) The Commission received 39 comments from interested parties within the time limit that expired on 6 September 2021. It forwarded them to Portugal, which was given the opportunity to respond. By letter dated 5 October 2021, Portugal submitted comments on the observations from interested parties.
- (6) The Commission requested additional information on the restructuring plan and supporting restructuring aid and funding by letter of 29 October 2021, to which Portugal replied on 16 November 2021. The Commission and the Portuguese authorities held videoconferences relating to the competition measures envisaged in the notification and the Commission also requested additional information on the competitive structure of the market for passenger air transport services to and from

³ 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).

⁴ Commission decision of 10 June 2020 in case SA. 57369 (2020/N) – COVID-19 – Portugal – Aid to TAP (OJ C 228, 10.7.2020, p. 1)..

⁵ Judgment of 19 May 2021, Ryanair DAC v Commission, T-465/20, EU:T:2021:284. The General Court found that the Commission failed to state reasons in accordance with Article 296 TFEU in its initial rescue aid decision, in particular omitting to indicate whether TAP SGPS belonged to a group within the meaning of point 22 of the R&R Guidelines. The General Court ordered the effects of the annulment of that decision to be suspended for a period not exceeding two months from the date of the judgment if the Commission decided to adopt a new decision under Article 108(3) TFEU, and for a reasonable further period if the Commission decided to initiate the procedure under Article 108(2) TFEU.

⁶ Commission Decision of 16 July 2021 in case SA 57369 - Rescue aid to TAP SGPS (OJ C 345, 27.8.2021, p. 1).

⁷ Case T-743/21 Ryanair v Commission, currently pending before the General Court.

⁸ Cf. footnote 1.

Lisbon airport on 25 October 2021, including updated information about the slot holdings of the air carriers operating at the airport. Portugal replied on 2 and 8 November 2021 and submitted further information on 16, 25, 27, 30 November 2021 and, eventually, on 3 December 2021.

- (7) Portugal agreed exceptionally to waive the rights deriving from Article 342 TFEU in conjunction with Article 3 of the EC Regulation 1/1958⁹ and to have this decision adopted and notified pursuant to Article 297 TFEU in English.

2. DESCRIPTION OF THE AID

2.1. Beneficiary: ownership structure and operating subsidiaries

- (8) The beneficiary of the restructuring aid is the economic unit, currently under the sole control of the Portuguese State (recitals (11) and (12)), comprising TAP SGPS and its current sister company TAP Air Portugal, including all their controlled subsidiaries. TAP SGPS is a holding company incorporated in 2003, whereas TAP Air Portugal was created in 1945 as the Portuguese flagship airline. By 2017, TAP SGPS was jointly controlled by Parpública - Participações Públicas, SGPS, S.A. (“Parpública”), a public undertaking managing holdings of the Portuguese State, and by two companies, HPGB SGPS, S.A.¹⁰ (“HPGB”) and DGN Corporation (“DGN”), the latter two operating via a consortium Atlantic Gateways SGPS, Lda. (“AGW”)¹¹. When the Commission adopted the initial rescue aid decision, Parpública held 50 % and AGW 45 % of TAP SGPS’ shares, while the remaining 5 % of shares were held by the employees of TAP SGPS. That ownership situation changed in the context of the implementation of the ongoing rescue and restructuring process of TAP SGPS.
- (9) When the rescue and restructuring process of TAP SGPS started, TAP Air Portugal was fully owned by TAP SGPS and was its largest subsidiary, accounting for around 98 % of TAP SGPS’ turnover. The Portuguese authorities explain that until June 2020, no changes of the shareholder structure of TAP SGPS were contemplated, as all shareholders of the beneficiary agreed on the need for rescue aid to maintain the activity of TAP Air Portugal and the viability of TAP SGPS in the long run.
- (10) The Portuguese authorities only considered issue of the control of TAP SGPS in early July 2020, in the context of a deadlock in negotiations with AGW concerning the implementation of the rescue loan agreement. [...]. Faced with a near financial collapse of TAP SGPS, which was urging the implementation of the rescue aid, the Portuguese authorities decided to conclude a private agreement with the shareholders of AGW in order to buy out the shareholdings of DGN, [...]. [...], the Portuguese Ministry of the Treasury (Direcção-Geral do Tesouro e Finanças (“DGTF”)) acquired directly TAP SGPS’ shares representing 22.5% of the share capital of TAP SGPS previously held by AGW. As a consequence, the Portuguese State assumes today, directly and indirectly, a majority position corresponding to 72.5 % of the share capital and respective economic rights of TAP SGPS (50% through Parpública

⁹ 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).

¹⁰ HPGB, SGPS, S.A. is located in Lisbon and is part of the Management of Companies and Enterprises Industry. HPGB, SGPS, S.A. has [...] employees at this location. There are [...] companies in the HPGB, SGPS, S.A. corporate family.

¹¹ For more details concerning HPGB, DGN and the AGW consortium, see recitals 11 to 15 of the Commission decision of 16 July 2021 in case SA.57369, referred to in footnote 6.

and 22.5% through DGTF). Previously HPGB held a stake in the AGW consortium, not directly in TAP SGPS, but having acquired AGW's stake, HPGB currently directly holds a 22.5 % stake in TAP SGPS.

- (11) The Portuguese authorities confirm that according to the shareholding agreement entered into by the Portuguese Republic via DGTF, [...]. [...] ¹², [...] ¹³. The control over 72.5 % of the share capital, [...], confers sole control to the Portuguese State over TAP SGPS.
- (12) Likewise, since the granting of the rescue aid, TAP SGPS' shareholding in TAP Air Portugal changed when the Portuguese State via DGTF subscribed to TAP Air Portugal's capital increase of EUR 462 million ¹⁴. As of 24 May 2021, the State, through DGTF, holds directly approximately 92% of the share capital of TAP Air Portugal. TAP SGPS currently holds the remaining 8%. TAP Air Portugal is the sole shareholder of TAP Logistics Solutions, S.A., a company incorporated on 30 December 2019 to operate cargo and mail activities.
- (13) 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 holdings;
 - 78.72 % in TAP Manutenção e Engenharia Brasil, S.A (“M&E Brasil”), active in aircraft maintenance for TAP Air Portugal and for third parties;
 - 49 % (43.9 % directly and 5.1 % via Portugalia) in SPdH–Serviços Portugueses de Handling, S.A. (also known as Groundforce Portugal), a company operating in the airport ground handling sector in Portugal; and
 - 51 % in CATERINGPOR– Catering de Portugal, S.A., active in the provision of catering for aviation, whose main client is TAP Air Portugal.
- (14) The above described changes in the control during the rescue and restructuring process are notwithstanding that for the purposes of this Decision, any reference to the beneficiary undertaking that is favoured by the restructuring aid includes TAP SGPS and all its subsidiaries when its rescue and restructuring process started as of June 2020, including TAP Air Portugal, unless stated otherwise. Any reference to TAP Air Portugal includes all the air transport subsidiaries of TAP SGPS, including Portugalia, unless stated otherwise.

2.2. Beneficiary: main activities in the aviation sector

- (15) Within the beneficiary economic unit, TAP Air Portugal is active in the air transport of passengers and cargo. In 2019, prior to its restructuring, TAP Air Portugal operated a fleet of 108 aircraft, including aircraft operated under wet-lease

¹² [...].

¹³ [...].

¹⁴ Commission decision C(2021) 2991 final of 23 April 2021 in case SA.62304 (2021/N) – Portugal – COVID 19: Damage compensation to TAP Portugal (OJ C 240, 18.6.2021, p.1.).

agreements, and served 92 destinations in 38 countries, carried over 17 million passengers and operated over 130 000 flights. Those flights were notably on regular routes from airports such as Lisbon, Porto, Faro and four islands in the Azores and Madeira and also to international destinations, including [...] airports in Europe (outside Portugal), [...] destinations in Brazil¹⁵, [...] in Africa¹⁶ and [...] in North America in 2019¹⁷. TAP Air Portugal has mainly structured its operations around Lisbon airport that serves as its main hub.

- (16) Portugal submits that TAP Air Portugal is a major provider of connectivity for passengers and cargo to, from and within Portugal. In 2019, TAP Air Portugal was the only airline operating [...] of its [...] routes in summer season and [...] out of [...] routes in winter season. In particular, TAP Air Portugal plays a crucial role for the connectivity of Portugal and countries with the Portuguese-speaking diaspora. TAP Air Portugal is also considered a pillar of the Portuguese economy, in particular due to its contribution to the development of the tourism industry in Portugal.
- (17) Other airlines, in particular European airlines, provide air passenger transport or cargo services to Portugal, such as Ryanair as the second-largest airline operating in Portugal, Wizzair and easyJet, Lufthansa Group's airlines (including Brussels Airlines and Austrian Airlines), Air France-KLM, Finnair, and IAG's airlines (in particular, Vueling and Iberia).

2.3. Origin of the difficulties of the beneficiary and financial situation

- (18) The current situation of difficulty of the beneficiary has been caused by issues of both solvency and liquidity, which were highly aggravated by an acute liquidity crisis provoked by the COVID-19 pandemic.
- (19) First, between 2006 and 2015, TAP SGPS accumulated EUR [...] million [...]. Considering the weight of the airline business on the revenues of TAP SGPS, [...].
- (20) TAP SGPS also incurred extraordinary operational disruption costs in recent years that hindered the growth of profitability and competitiveness. [...] EUR [...] million [...] ¹⁸ [...], [...] EUR [...] million [...], driven by a high level of flight delays and cancellations, as well as very high foreign currency exchange exposure due to business in Brazil and Angola.
- (21) Second, considering that TAP Air Portugal earned around [...] % of the revenues of TAP SGPS, the air carrier's performance had a major impact on the overall financial situation of its holding parent. After TAP SGPS' privatisation in 2015¹⁹, TAP Air Portugal launched a transformation process and had been on a growth trajectory in operational terms presenting [...] % revenue growth until 2019. The transformation process targeted to [...].
- (22) The actions pertaining to the transformation process mainly took place in 2018 and 2019, namely with the delivery of [...] fuel efficient A339 aircraft followed by the

¹⁵ [...].

¹⁶ [...].

¹⁷ [...].

¹⁸ Irregular Operations Costs are identified by an airline or ground handler acting on behalf of an airline when a disruption on the day of travel or the day prior to travel causes the customer to not be able to use the flight(s) ticketed.

¹⁹ The privatisation of 61% TAP SGPS share capital was executed in 2015. In 2017, the Portuguese State re-purchased part of the share capital from AGW, increasing its participation to 50%.

transformation of product, sales and tools, improvement of procurement and systems. On the operational side, TAP Air Portugal increased its operations on high value markets, such as Brazil and North America. The transformation process, particularly new fleet phase-ins and phase-outs executed until 2019, contributed to reduce overall Cost of Available Seat Kilometre (CASK)²⁰ levels. However, it also entailed high one-off costs related [...]. In addition, TAP Air Portugal continued to be less competitive than its peers in terms of labour costs and efficiency.

- (23) On 2 December 2019, TAP Air Portugal closed an offering of EUR 375 million of senior unsecured bonds with a five-year maturity serving regular annual coupons of 5.625 % and effective interest of 5.75 %²¹. The issuance aimed at meeting general corporate expenditure and at partly repaying debt and extending its average maturity. The issuance attracted preliminary ratings of BB- (Standard & Poor's) and B2 (Moody's), i.e., below "investment grade" rating. Several months before, on 24 June 2019, TAP Air Portugal had issued EUR 200 million of bonds with four-year maturity serving regular annual coupons of 4.375 %²². Whilst the amounts and conditions of the two issuances in June and December 2019 differ, the interest shown in those issuances indicate that the beneficiary could access finance on the market before the COVID-19 outbreak at reasonable conditions.
- (24) The transformation process was interrupted as a result of the global pandemic of COVID-19 and the economic crisis that followed, at a time when TAP Air Portugal had not yet been able to considerably reduce its costs, in particular labour costs, compared to competitors, especially low cost airlines.
- (25) As a consequence, in light of the unprecedented government travel restrictions and quarantine orders due to the COVID-19 outbreak, on 20 March 2020, the rating agency Standard & Poor's lowered the rating of TAP Air Portugal to B- long-term rating and an outlook on short-term liquidity rating of CCC+. In the same announcement, Standard & Poor's assigned recovery prospects of 45 % to the EUR 375 million bonds issue. On 19 March 2020, the rating agency Moody's also downgraded the probability of default and corporate ratings of TAP Air Portugal to Caa1-PD and Caa1, respectively. On 28 May 2020, the annual yield to maturity (December 2024) of the EUR 375 million senior notes issued in December 2019 was 9.45 % on the secondary market. In other words, at that stage, buyers of those bonds issued by TAP Air Portugal required a discount on the nominal value of the security, so as to obtain a return of 9.45 %, to accept holding them to maturity. The information provided by the Portuguese authorities corroborates [...] of the financial situation of TAP Air Portugal and the beneficiary [...] ²³, [...].
- (26) The difficulties of TAP SGPS and of TAP Air Portugal cumulated and led to a sharp deterioration of the equity position. At the end of 2019, TAP SGPS registered a

²⁰ Cost of Available Seat Kilometre is used to measure the unit cost expressed in cash value [EUR cent per seat] to operate each seat for every kilometre.

²¹ 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.

²² Reference ISIN PTTAPBOM0007, TAP-SGPS 19/23.

²³ Earnings before interest, taxes, depreciation, amortisation, and restructuring or rent costs. EBITDAR is a metric used primarily to analyse the financial health and performance of companies that have gone through restructuring within the past year.

negative equity of EUR [...] million, which grew to EUR [...] billion in 2020. TAP Air Portugal also had a negative equity position in 2020 (EUR [...] billion).

2.4. Description of the restructuring plan and restructuring aid

- (27) The restructuring aid supports the implementation of the restructuring plan that covers the period from 2020 until the end of 2025 (the “restructuring period”). The plan covers the economic unit, currently under the sole control of the Portuguese State (recitals (11) and (12)), comprising TAP SGPS and its current sister company TAP Air Portugal, including all their controlled subsidiaries..

2.4.1. The restructuring of operations

- (28) The restructuring plan aims to address the root causes of TAP SGPS’ difficulties and turn the company around by 2025. Due to the weight of TAP Air Portugal in the TAP SGPS’s balance sheet when it entered into difficulties for the activities covered by the restructuring plan, most operational restructuring measures reducing costs and strengthening revenue and projections provided in the restructuring plan refer to TAP Air Portugal. The restructuring plan includes measures that started being implemented as of June 2020 or that will be implemented and that relate to four pillars: (i) focus on core strategy (ii) adjustment of capacity; (iii) improvement of operating costs and (iv) enhancement of revenues. Subsections 2.4.1.1 to 2.4.1.4, describe each pillar of TAP’s restructuring plan as last updated.

2.4.1.1. Focus on core strategy

- (29) The logic of the restructuring plan is to focus on the core activity, namely the aviation business carried out through TAP Air Portugal and Portugalia, while gradually shifting away from and divesting non-core businesses. Within that logic, the restructuring plan envisages that TAP SGPS will progressively abandon all other revenue-generating service activities which it has been supplying on the market by selling, divesting or discontinuing three lines of business, as follows. First, TAP SGPS plans to divest its stake in the Brazilian aircraft maintenance subsidiary, M&E Brasil, [...]. The second divestiture concerns the [...] in the ground handling services provider Groundforce, [...]. Third, TAP SGPS plans to divest its stake in the catering services provider, Cateringpor, [...].

2.4.1.2. Adjustment of capacity

- (30) Measures aimed at adjustment of TAP Air Portugal’s capacity mainly consist in right-sizing TAP Air Portugal’s fleet and optimizing TAP Air Portugal’s network. The fleet plan envisages [...]. Overall, in 2025, TAP Air Portugal’s fleet plan will lead to a more homogeneous fleet composition and to a reduction in operating costs, due to the lower fuel consumption and maintenance requirements of the new aircraft.
- (31) With regard to network optimisation, the restructuring plan increases the role of Lisbon as connectivity hub, which is crucial given the small size of TAP Air Portugal’s domestic market. Operating a connectivity hub will be beneficial to the strategy [...]. [...]. Finally, network optimisation measures include a more cost-efficient route-aircraft match, the reduction of loss-making routes and routes with low connectivity value. For example, in 2020 TAP Air Portugal operated [...] fewer destinations than in 2019 (from [...] to [...]) and suspended indefinitely the opening of [...] additional routes.
- (32) With respect to TAP Air Portugal’s foothold at Lisbon airport, the decrease in TAP Air Portugal’s fleet reduces its ability to provide passenger air transport services

without, however, calling into question the significant market position that it currently has and is expected to have at the end of the restructuring period at its Lisbon hub.²⁴ There are two main reasons for the preservation of TAP Air Portugal's significant market position at Lisbon airport until 2025:

- (a) First, as part of the restructuring plan, TAP Air Portugal intends to further concentrate on its core hub-and-spoke operations at Lisbon airport.²⁵ As a result, the market positions and competitive structure at the airport are not expected to materially change, although TAP Air Portugal has reduced its slot holding by [...] % ([...] daily slots) in Winter 2021/2022 IATA Season compared to Winter 2019/2020 IATA Season and both the next largest slot holders (Ryanair and easyJet) have preliminarily managed to increase their slot holding for Summer 2022 IATA Season compared to Summer 2019 IATA Season.²⁶ More specifically, information submitted by Portugal shows that the slot holding of TAP Air Portugal would represent [45-55] % of the total capacity of Lisbon airport in Summer 2022 IATA Season and for the following IATA Seasons, to be compared to [10-20] % and [5-10] % for respectively Ryanair and easyJet. In addition, TAP Air Portugal would deploy by far the largest fleet at Lisbon airport with [90-100] aircraft throughout the restructuring period. According to Portugal's estimates, Ryanair would base seven aircraft at Lisbon airport and easyJet five aircraft.²⁷
- (b) Second, due the relatively strong, although fragile, recovery in passenger demand, Lisbon airport is expected to return during the restructuring period to the high level of congestion [90-100] % that it had reached before the COVID-19 pandemic following a phase of fast-paced growth of TAP Air Portugal and of low-cost carriers. As a consequence, during the whole restructuring period, the severe capacity constraints at Lisbon airport, linked notably to its single runway, are expected to act as a barrier to entry or expansion for TAP Air Portugal's competitors, with part of their demand for access to airport infrastructure services at Lisbon airport being unmet.

2.4.1.3. Reduction of costs

- (33) TAP Air Portugal envisages reducing operating costs over the course of the restructuring plan through three levers.

²⁴ In line with the Commission's decisional practice, it is considered that an air carrier's slot holding at an airport and the latter's capacity constraints provide a measure of the air carrier's ability to compete on the passenger air transport market to or from that airport (see e.g. recital 209 of Commission Decision C(2021) 2488 final of 5 April 2021 in case SA.59913, OJ C 240, 18.6.2021, p. 1; recital 178 of Commission Decision C(2020) 4372 final of 25 June 2020 in case SA.57153, OJ C 397, 20.11.2020, p. 1).

²⁵ As an illustration, the number of aircraft based at Lisbon airport is only marginally reduced compared to the situation pre-restructuring. During the Summer 2019 IATA Season, TAP Air Portugal had an average fleet of approximately [90-100] aircraft based at Lisbon airport and [5-15] aircraft based at Porto airport. For the Summer 2022 IATA Season, the seasonal average would be approximately [90-100] aircraft based at Lisbon airport and [0-10] aircraft based at Porto airport. For the years 2023-2025, TAP Air Portugal expects to add a limited number of aircraft compared to 2022. The breakdown between the fleet based at Lisbon airport and the fleet based at Porto airport results from the allocation of the aircraft counts based on the allocation of the block hours to Lisbon or Porto operations. All aircraft of TAP Air Portugal are formally based at Lisbon airport, although not all flights operate to or from the airport. The Porto operations are resourced by rotating Lisbon-based aircraft, including overnighing them. TAP Air Portugal does not allocate aircraft to any other airport at which it operates.

²⁶ Portugal's submission of 16 November 2021.

²⁷ Portugal's submission of 8 November 2021.

- (34) The first is the renegotiation of contracts with aircraft suppliers and lessors. With its suppliers, TAP Air Portugal agreed [...] period [...], as set in the initial contract, to [...], leading to a deferral of EUR [...] billion of capital expenditure until after the end of the restructuring plan. In addition, TAP Air Portugal obtained cash savings of EUR [...] million through renegotiations with lessors and EUR [...] million of cash proceeds from the sale and lease-out of aircrafts.
- (35) The second lever for operating cost reduction is a set of measures to reduce third party costs. First, TAP Air Portugal expects EUR [...] million of fuel costs savings over the business plan period (of which EUR [...] million in [...]) through the operation of newer, more energy-efficient aircraft, a better route-aircraft match and the implementation of a fuel optimisation software. Second, TAP plans to achieve EUR [...] million cost savings per year by [...]. [...]. Third, the restructuring plan envisages EUR [...] million of yearly cost savings through contract renegotiations with suppliers of certain services, [...].
- (36) The third lever driving the planned reduction of TAP Air Portugal's operating costs is the downsizing of labour costs, which TAP Air Portugal expects to yield EUR [...] million of savings per year, cumulated to approximately EUR [...] billion over the duration of the restructuring plan. To achieve those costs savings, TAP Air Portugal has taken the following measures:
- (a) Reduction of the staff headcount (in full-time equivalent (FTE)) by 1200 in 2020 and early 2021, mainly through the non-renewal of temporary labour contracts, with a further headcount decrease of 2000 in 2021.
- (b) In addition, measures of salary reductions, suspension of automatic salary increases, suspension of the collective bargaining agreements' clauses in order to increase productivity and reduce labour costs until 2024, which are applicable to all staff through the "Emergency Agreements" with trade unions, as follows:
- i) a transversal reduction of 25% for fixed salary above EUR 1,330 between 2021 and 2023 and 20% in 2024 (that reduction is increased up to 50% in 2021 and gradually reduced to 35% in 2024 for pilots); cabin crews and a specific union M&E mechanics also accepted a 15% reduction of their working hours in 2021, gradually decreasing to 5% in 2023, so to allow 750 FTE to be financed and not reduced;
 - ii) a suspension of the automatic salary increases and automatic progressions, as well as of several remunerations components; and
 - iii) a reduction in the number of cabin crew members in each plane to minimal aircraft manufacture cabin crews' composition.
- (c) TAP Air Portugal obtained the commitment of several unions in the Emergency Agreements towards the 2025 labor cost targets. Those targets will be achieved either by signing new collective bargaining agreements (CBAs) or, in case of failure of the negotiations, by triggering the termination of the current CBAs and directing work rules to general labour law, which is considerably less restrictive than the current CBAs. [...].

2.4.1.4. Enhancement of revenues

- (37) TAP Air Portugal expects that its revenues will increase in the range of EUR [...] million per year in steady state, i.e. upon completion of the restructuring plan, but it

only takes into account EUR [...] million (per year, in steady state) in the restructuring plan. Increases in revenues will mainly come [...].

2.4.2. *Overview of restructuring costs and sources of financing*

- (38) According to the restructuring plan, the implementation of the restructuring measures will trigger net restructuring costs that are not covered by expected operating staff-related cost reductions or other revenues, estimated at EUR [...] billion until 2025. In particular, the bulk of restructuring costs of EUR [...] billion are ascribed to the shortfall of cost coverage for the period, which need to be covered for TAP SGPS's operations not to risk a default or the inability to maintain its operating licence. The remaining restructuring costs are attributed to debt reimbursements up to the amount of EUR [...] million, acquisition of new aircraft up to the amount of EUR [...] million, and EUR [...] million labour indemnities to staff. The restructuring costs are net of aid notified before the present decision as compensation for damage to TAP Air Portugal suffered from an exceptional occurrence resulting from public restrictions on air transport pursuant to Article 107(2)(b) TFEU, as set out in the relevant Commission Decisions²⁸.
- (39) According to Portugal, due to the worsened financial situation and the severe impact of the COVID-19 outbreak in the sector and in the economy, TAP SGPS is currently unable to [...] without support from the State. Nonetheless, TAP Air Portugal has secured EUR [...] million [...], guaranteed at [...] % by the Portuguese Republic, while the remaining [...] % is to be collateralised by TAP Air Portugal, [...]. Portugal considers that the implementation of substantial equity-enhancing measures should allow TAP SGPS to have access to the capital markets as from [...], in order to raise additional funds from private investors.
- (40) Once the EUR [...] million State-guaranteed financing and the capital increase are in place, as from [...] TAP Air Portugal would obtain financing without public guarantee of at least EUR [...] million [...]. The access to private market finance obviates the need for an additional liquidity buffer in the form of loan funding under State guarantee up to EUR [...] million that was included in the initial notification of restructuring aid as a contingency buffer.
- (41) The total State funding as revised on 16 November 2021, includes equity or quasi equity measures, to be implemented as follows:
- (a) EUR 1.2 billion rescue loan to be converted into equity in the same nominal value plus accrued interest of around EUR [...] million in 2021;
 - (b) EUR [...] million for the portion of [...] % of EUR [...] million loan, that is guaranteed by the State at [...] %, to be granted by the end of [...] and repaid in [...] through an equity injection from the State. The loan will have an interest rate in line with the market terms applicable at the moment of granting

²⁸ Commission decisions of 23 April 2021, in case SA.62304 (2021/N) – Portugal COVID 19: Damage compensation to TAP Portugal, (OJ C 240, 18.6.2021, p. 1), of 21 December 2021, in case SA.63402 (2021/N) - COVID-19 TAP Compensation II –not published- and case SA.100121 (2021/N) COVID-19 Damages compensation to TAP III. The amounts provided as compensation to TAP Air Portugal are an income which, like operating revenues, reduce the outstanding costs that cannot be covered by past and present operating revenues or own contributions from the beneficiary of the restructuring aid or, for instance, from lenders or suppliers.

([...]), but will not exceed the reference rate set out pursuant to the Commission Reference Rate Communication²⁹.

- (c) EUR [...] million direct equity injection to be executed by the State in [...].
- (42) Portugal informed that it would fund the measures directly from the State budget³⁰, which requires the necessary acts of implementation, including corporate approval of modifications to share capital and loan and guarantee agreements to be concluded.
- (43) The own contribution of TAP SGPS and its various contributors to the restructuring costs will consist of around EUR [...] billion, spread over the period from 2020 to 2025, and integrating the following measures:
- (a) payment of labour restructuring indemnities – [...] – [...] EUR [...] million ([...] EUR [...] million [...]);
 - (b) third-party contributions or cost efficiency totalling EUR [...] million, of which EUR [...] million already implemented in 2021 and EUR [...] million stemming from ongoing contracts, comprising:
 - i) EUR [...] million related to airport services and catering and inflight due to contract renegotiations (i.e. new requests for proposal) for catering in outstations, supplier renegotiations for catering in LIS, renegotiation of Buy-on-Board, renegotiation of cleaning, ticketing and other airport services),
 - ii) EUR [...] million related to Fleet and monitoring and evaluation, i.e. renegotiation of buyer-furnished-equipment, materials and rebates),
 - iii) EUR [...] million related to corporate services and real estate (i.e. renegotiation of parking and media fees, advertising and legal support, etc.),
 - iv) EUR [...] million related to IT (i.e. renegotiation of licences, communication platforms, support being outsourced, etc.), and
 - v) EUR [...] million related to crew accommodation and fuel (i.e. renegotiation of transport and accommodation in the outstations);
 - (c) leases of new aircraft of at least EUR [...] million already committed, [...];
 - (d) other contributions linked to asset phase-outs and renegotiations with original equipment manufacturers, totalling around EUR [...] million, broken down as follows:
 - i) EUR [...] million, [...] EUR [...] million,
 - ii) EUR [...] million [...]
 - iii) EUR [...] million [...];
 - (e) new financing for EUR [...] million raised with or arranged by a [...], namely:
 - i) EUR [...] million loan non-guaranteed by the State and collateralised by TAP Air Portugal out of the EUR [...] million loan, and

²⁹ 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).

³⁰ State Budget Laws approved during the years of the restructuring plan. In the case of the year 2021, see Article 166 of Law no. 75-B/2020, of 31 December 2020 that approves the State Budget for 2021.

- ii) new debt for EUR [...] million with an instrument rating [...] EUR [...] million [...]; this new debt is contingent on liquidity needs that could arise and de facto replaces the initially notified contingent liquidity guaranteed by the State for the amount of EUR [...] million that is no longer considered to be granted as restructuring aid³¹;
 - (f) payment of contingencies associated with the divestment of the subsidiary [...] EUR [...] million ([...]% [...], [...]% [...])% [...], [...]³²;
 - (g) deferrals of reimbursement of EUR [...] million outstanding nominal amount of two bonds issuances (recital (23)) and syndicated loans resulting from waivers of covenants on the respective bonds and loans; existing creditors waived their right to due repayment by the beneficiary [...] ([...] EUR [...] million, [...] EUR [...] million [...] EUR [...] million); [...].
- (44) In its submissions of 10 June and 16 November 2021, Portugal notes that all these measures of own contribution are implemented or on the verge of implementation. They are based on binding commitments already agreed with the respective parties, which have been implemented with internal instructions to be executed. With regard to the labour restructuring measures, the costs savings are based on emergency agreements concluded between TAP Air Portugal, Portugalia and the employees' unions, after the suspension of the collective bargaining agreements that were previously in force.
- (45) With regard to the burden sharing, Portugal submits that TAP SGPS has a total share capital of EUR [...] million, [...]. In order to ensure due burden sharing by the shareholders of the beneficiary, the total amount of share capital will be reduced to [...] in the accounts of TAP SGPS. Prior to that reduction, [...] for the purposes of the loss absorption. It should be noted that [...]. Following the capital reduction and loss absorption referred above, the Portuguese State, via DGTF, will subscribe a capital increase of approximately EUR [...] million in TAP SGPS, becoming the sole shareholder of TAP SGPS. In addition, TAP Air Portugal will be a direct aid beneficiary through a capital reduction for the purposes of loss absorption followed by an equity injection. The first aid measure of conversion into equity of the existing rescue loan of EUR 1.2 billion will only be executed after loss absorption and capital reduction.
- (46) In the notification of 10 June 2021, as updated on 16 November 2021, Portugal recognises that the amount of the own contribution is less than 50% of the estimated restructuring costs. In that regard Portugal stresses that, in the current circumstances, with the uncertain outlook of the air transport industry, heavily affected by the direct and indirect effects of the COVID-19 outbreak, the beneficiary is [...]. Portugal informs that [...]. However, the debt funding markets were largely shut down for airlines following the onset of the COVID-19 pandemic with financial institutions in general drastically reducing their credit limits for the airline sector.
- (47) Portugal underlines the scope of the cost-saving measures borne by stakeholders of the beneficiary and maintains that such measures amount to real and actual sources of own contribution to the restructuring plan, considering that they are effective and lasting. In conclusion, according to Portugal, the level of own contribution is

³¹ [...].

³² [...].

significant, as it corresponds to the maximum level that the beneficiary is able to undertake in the particular circumstances related to the COVID-19 pandemic.

2.4.3. *Solvency and liquidity needs: prospective return to viability*

- (48) Portugal provided financial projections in the baseline scenario of the restructuring plan, as notified on 10 June 2021 and modified on 16 November 2021, that refer to the core aviation activities of TAP Air Portugal (which will include Portugalia), as described in Section 2.4.1.1. Those projections envisage [...]. At the end of the restructuring plan in 2025, TAP Air Portugal expects to attain a return on equity (ROE) of [...] % and a return on capital employed (ROCE) of [...] %.
- (49) With regard to liquidity projections, TAP Air Portugal expects to [...]. The financial projections also envisage the equity to assets and net debt to equity ratios [...] and attaining a level of [...] % and [...], respectively, in 2025. Finally, the projections of the net debt to EBITDA ratio gradually decrease from [...] in 2022 to [...] in 2025.

Table 1 : Financial projections of the restructuring plan as notified on 10 June 2021 (baseline scenario)

EUR million	Restructuring period					
	2020	2021	2022	2023	2024	2025
Revenues	1060	[...]	[...]	[...]	[...]	[...]
EBIT	(965)	[...]	[...]	[...]	[...]	[...]
Net income	(1230)	[...]	[...]	[...]	[...]	[...]
Net debt	4110	[...]	[...]	[...]	[...]	[...]
Operational cash flow	(244)	[...]	[...]	[...]	[...]	[...]
Equity	[...]	[...]	[...]	[...]	[...]	[...]

Source: Company information. All data refers to TAP Air Portugal (including Portugalia)

- (50) TAP Air Portugal's return to viability hinges on cost reductions, as revenues projections follow the recovery of air traffic. Cost reductions stem from the restructuring measures described in sections 2.4.1.1 - 2.4.1.3, through which TAP Air Portugal expects to reduce CASK from EUR cent [...] in 2019 to EUR cent [...] in 2025. Such EUR cent [...] of CASK originates mainly from the restructuring measures affecting TAP Air Portugal's largest cost items in 2019, namely fuel (EUR cent [...] in 2019) and labour (EUR cent [...] in 2019). With regard to fuel, TAP Air Portugal expects savings of EUR cent [...] per ASK, assuming an exchange rate and fuel price in line with the current market expectations retrieved from Bloomberg, from the acquisition of more fuel-efficient aircraft, a better route-aircraft match and the implementation of a fuel optimisation software (section 2.4.1.3). With regard to labour, TAP Air Portugal expects the FTE reduction measures and contract renegotiations with employees (section 2.4.1.3) to yield savings of EUR cent [...] per ASK.
- (51) With regard to revenue projections, most of them originate from passenger air traffic, with maintenance, cargo and mail revenues representing roughly [...] % of the total revenues in 2025. To estimate revenues from passenger air traffic, TAP Air Portugal

assumes a recovery trend in line with the IATA baseline forecasts (October 2020)³³, but lower levels of air traffic per year. For example, while IATA expects air traffic to increase from 49% in 2021 to 109% in 2025, relative to the number of passengers who flew in 2019, TAP assumes [...] % in 2021 and [...] % in 2025. Furthermore, TAP Air Portugal assumes a yield of EUR cent [...] and a load factor of [...] % in 2025, which are respectively lower (EUR cent [...]) and higher ([...] %) than their value in 2019. Finally, TAP Air Portugal projects an increase in revenues stemming from the measures related to cargo and ancillary activities described in section 2.4.1.4. Overall, taking into account all sources of revenues, TAP Air Portugal expects revenues per CASK to decrease from EUR cent [...] in 2019 to EUR cent [...] in 2025.

- (52) The restructuring plan as notified on 10 June 2021, provided for an adverse scenario based on a pessimistic evolution of three parameters: fuel cost, demand and yield. With negative variations of the parameters in the adverse scenario, TAP Air Portugal's operational cash flow and EBIT [...], the pessimistic assumption changing only the magnitude of the results. Only in the most adverse scenario, assuming a negative evolution of all three parameters concerned, [...].
- (53) Finally, Portugal provided an update of the financial projections of the notified restructuring plan on 9 November 2021. Such update takes into account the latest developments in the aviation market vis-à-vis the notified projections, notably the improvement in the traffic recovery prospects³⁴ and the increase of jet fuel prices, and assumes a [...] % increase in traffic costs to reflect the recent inflation dynamics. Those revised assumptions lead to an increase of revenues as well as costs, compared to the notified projections. Overall, EBIT [...], but reaches [...], namely EUR [...] million instead of EUR [...] million in the notified projections. In the same vein, the net income turns positive [...] ([...] EUR [...] million), [...] EUR [...] million. In [...], ROCE would be [...], while ROE would [...] % [...].

2.5. Preliminary findings in the opening decision

- (54) Based on the information provided by Portugal in the notification of 10 June 2021, in the opening decision, the Commission qualified the notified State support to TAP SGPS as a lawful State aid under of Articles 107(1) and 108(3) TFEU. It assessed the compatibility of that aid with the internal market under the R&R Guidelines and, having found that several conditions of compatibility laid down in these guidelines appeared, *prima facie*, not to be met, it decided to open a formal investigation procedure.
- (55) In the opening decision, the Commission preliminarily concluded that TAP SGPS, designated as the beneficiary of the aid, was eligible for restructuring aid, in particular due to the accumulated negative equity that grew from EUR [...] million at the end of 2019 to EUR [...] billion in 2020. The Commission also found that the restructuring aid was necessary for the successful completion of the restructuring

³³ Demand recovery data for domestic traffic in Europe and Europe to North & South America, Sub Saharan & North Africa. Source: IATA / Oxford Economics –Air Passenger Forecast Global Report, October 2020

³⁴ Demand recovery data for domestic traffic in Portugal, Portugal to Europe and Portugal to North & South America and Africa, according to 2019 TAP passenger weights. Source: IATA / Oxford Economics –Air Passenger Forecast Global Report, October 2021.

plan and that its form was appropriate to address the liquidity and solvency problems encountered.

- (56) The Commission found that, based on prudent assumptions, the assessment of expected profits and returns on equity around [...]% [...], by the end of the restructuring period sustained the argument of Portugal that the restructuring plan would secure the long-term viability of the beneficiary and remained robust also in an adverse scenario. Without the State intervention, the beneficiary, and, as a consequence, TAP Air Portugal, would inevitably exit the market, causing social hardship, negative spill-over effects for the entire Portuguese economy – heavily dependent on the tourism sector – and a disruption of an important service that is difficult to replicate.
- (57) The Commission then raised doubts, first as to the proportionality of the aid³⁵, noting that most sources of own contribution came from cost reductions, i.e. avoidance of costs only with no fresh funding from a market investor or lender, apart from new contracts for aircraft leases arriving in 2021. The Commission noted that the own contribution would correspond at best only to [...]% of the restructuring costs, while it was unclear whether labour cost reductions, representing more than [...]% of the own contribution, were admissible. As regards burden sharing requirements, the Commission noted that no justification had been provided as to why any partial reduction of debt borne by the holders of TAP SGPS's bonds would, as a matter of principle, not be achievable.
- (58) Second, the Commission raised doubts on the measures limiting distortions of competition³⁶. The Commission observed in particular that: (i) it was doubtful if the proposed divestitures of certain assets concerning loss-making activities could be considered as addressing the competition distortion created by the aid, and whether in any event the proposed divestitures were sufficient to address such distortion, (ii) the view of the Portuguese authorities that slots divestiture was premature and unnecessary was not substantiated by any quantitative analysis showing that such divestitures would indeed jeopardise the return to viability of TAP Air Portugal, given its strong position in terms of slots at the highly congested Lisbon airport, and (iii) while the overall fleet capacity forecasted for 2025 was lower than before the restructuring, nothing allowed to verify that the capacity created via the acquisition of new aircraft during the restructuring period would not be excessive and there was no commitment to maintain a lower capacity for the duration of the restructuring plan.
- (59) Finally, the Commission noted that the plan was lasting longer than five years, whilst the projections carried uncertainties about the evolution of the demand by the end of 2025 in very stressed scenarios, that might require more aid³⁷.

3. OBSERVATIONS OF PORTUGAL

- (60) Portugal submitted its observations on the opening decision on 19 August 2021.
- (61) As an initial remark, Portugal recalls the unprecedented and generalised halt in air traffic caused by the COVID-19 pandemic and a devastating and asymmetric

³⁵ See recitals 83 to 88 of the opening decision.

³⁶ See recitals 97 to 100 of the opening decision.

³⁷ See recitals 74 and 75 of the opening decision.

consequences it had for air carriers. Portugal points out that before the outbreak TAP Air Portugal was profit-making on a stand-alone basis and presented clear signs of financial stability. Finally, Portugal observes that the pandemic postponed the review of the R&R Guidelines, intended to be applied until 31 December 2020. While the R&R Guidelines are not designed for exceptional circumstances such as the COVID-19 pandemic, they leave room for a more flexible application of its rules, in particular when it comes to own contribution to be considered sufficiently high and adequate. According to Portugal, the unique circumstances and challenges associated with COVID-19 and of its impact on TAP business model justify a more flexible approach compared with conventional rescue and restructuring precedents in the industry. The unprecedented context of the COVID-19 pandemic calls for such flexible enforcement of the rescue and restructuring rules and principles.

3.1. Financial projections and return to viability

- (62) Portugal stresses that the projections in the restructuring plan are based on reliable and conservative assumptions. Portugal underlines that, whereas the forecasts of IATA surpass 2019 levels already by 2024, the demand projections in the baseline scenario of the plan do not recover 2019 levels until [...]. Similarly, TAP Air Portugal's revenue path starts from a lower point in 2021 vs passengers forecast, e.g. passenger's revenue in 2021 is [...] % of 2019 levels vs [...] % for the number of passengers.
- (63) Portugal underlines TAP Air Portugal's agile capacity deployment. The company was able to redeploy its capacity to target demand pockets, compensating on travel to/from Brazil with a stronger recovery in African flows. It had also been actively replacing bigger aircraft with smaller gauge when facing low load factors and had reconfigured passenger aircraft to transport cargo etc. That agile capacity deployment and flexible operations coupled with tight cost control policies resulted in a lower cash burn than expected in the restructuring plan, despite the worse demand scenario (e.g. TAP Air Portugal's EBIT in first half of 2021 was EUR [...] million better than forecasted in the plan).
- (64) Portugal observes that TAP Air Portugal assumed a path of revenue per available seat per kilometre (RASK) below historical levels (EUR cent [...] by 2025 vs up to EUR cent [...] in 2018) and what it has currently been able to achieve (compensating for lower volume of passengers compared to the restructuring passenger numbers vs. plan). Portugal also notes that the restructuring plan did not take into account up to EUR [...] million in additional revenues coming from improvements in processes/methodologies, upgrades of key systems/tools and additional cost reduction initiatives (e.g. in fleet leases, deferrals and future negotiation rounds after approval) that were identified after the notification.
- (65) With regard to the duration of the restructuring period, Portugal claims that many of the measures contained in the restructuring plan have already been implemented as of 2020, although the restructuring aid will only be granted in the last quarter of 2021. The duration of the State intervention, which is key to TAP Air Portugal's return to viability [...], will be therefore lower than five years.

3.2. Proportionality and limitation of State aid to minimum

- (66) In its submission of 16 November 2021, Portugal notes new sources of own contribution, no longer insists on the qualification of labour cost reductions as a

source of own contribution, presents a new breakdown of the restructuring costs and comments on burden sharing measures.

3.2.1. *New sources of own contribution*

(67) Portugal identified the following new additional sources of own contribution:

- (a) *Support from existing debt providers*: Portugal notes that TAP Air Portugal managed to receive the support of existing debt providers. Due to the COVID-19 pandemic and the consequent deterioration of EBITDAR, TAP Air Portugal has [...]. However, the company managed to obtain waivers, which avoided the triggering of put and early repayments options. According to Portugal, such waivers amount to a form of burden sharing and own contribution, since [...] (recital (43)g)).
- (b) *New investor and market funding*: Portugal notes that TAP Air Portugal has been approached by potential new investors with an interest in a future stake acquisition and has negotiated new funding (recital (43)e));
- (c) *Additional aircraft funding*: Portugal presents evidence demonstrating new commitments for funding of aircraft leases, raising the level of such funding from EUR [...] million to a total of EUR [...] million (recital (43)c)).

3.2.2. *Labour cost reductions*

(68) With regard to the labour cost reductions on which the Commission raised doubts, Portugal submitted in essence that they contribute to minimising aid and constitute effective, lasting and non-reversible contributions from creditors of the beneficiary. Portugal insists that, under Portuguese law, workers constitute privileged creditors in relation to employers, as workers claims are liquidated in first place over any other guaranteed or privileged claims. Hence, the labour cost reductions proposed as own contribution, in the total amount of EUR [...] million, include such credits. Finally, Portugal observes that TAP Air Portugal achieved such cost reductions through negotiations and required workers to forego part of their future claims. They are thus equivalent to a debt write-off or other reductions of contractual costs from partners (e.g. aircraft suppliers/lessors) both in terms of participation in the effort, as well as a sign of confidence in the long-term viability of the beneficiary.

(69) Whilst Portugal acknowledged that the own contribution should normally be comparable to the aid granted in terms of effects on the solvency or liquidity position of the beneficiary and that cost reductions do not constitute equity enhancing measures, an own contribution not having a comparable effect to the aid granted can still be accepted, in view of exceptional circumstances. Eventually, in its submission of 16 November 2021, Portugal no longer included labour cost reductions among the sources of own contribution of the beneficiary to the restructuring costs.

3.2.3. *Breakdown and sources of finance of the restructuring costs*

(70) On 16 November 2021, Portugal submitted a breakdown of restructuring costs and respective own contribution calculation and ratio, taking into account the new sources of own contribution, which is portrayed as follows.

Table 2

Breakdown and sources of finance of restructuring costs (million EUR rounded)

Restructuring costs		Sources of finance	MEUR	%
		Own contribution		
Acquisition new aircraft	[...]	Labour indemnities	[...]	[...]%
Debt reimbursement	[...]	Renegotiated contracts third parties	[...]	[...]%
[...]	[...]	Lease new aircraft	[...]	[...]%
Labour (Indemnities)	[...]	Other contributions	[...]	[...]%
Operating losses	[...]	Bond and bank debt covenant (market value)	[...]	[...]%
		Temporary liquidity ([...]% non guaranteed)	[...]	[...]%
		New bank debt	[...]	[...]%
		Contingencies M&E Brazil	[...]	[...]%
		State aid		
		Equity injection	[...]	[...]%
		Temporary liquidity ([...]% guarantee)	[...]	[...]%
		Amount own contribution	[...]	[...]%
		Amount restructuring aid	[...]	[...]%
		TOTAL FUNDING	[...]	

- (71) Portugal observes that contributions below 50% of the restructuring costs have already been accepted in other restructuring aid cases in the aviation sector³⁸ and that the COVID-19 pandemic qualifies as an exceptional circumstance, as recognised by the Commission in the COVID-19 Temporary Framework³⁹ (“Temporary Framework”). In consequence, Portugal submits that the revised level of own contribution is significant in the particular context of the uncertainties faced by the aviation sector due to the COVID-19 pandemic.

³⁸ Commission Decision of 9 July 2014 in case SA.34191 – Alleged aid to Air Baltic (OJ L 183, 10.7.2015 p. 1); and Commission Decisions of 27 June 2012 in case SA.33015 – Air Malta (OJ L 301, 30.10.2012, p. 29).

³⁹ Communication from the Commission “Temporary Framework for State Aid measures to support the economy in the current COVID-19 outbreak” (C/2020/1863, OJ C 91I, 20.3.2020, p. 1), as last amended by Commission Communication C(from the Commission Sixth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance C/2021) /8442 final of 18 November 2021 (, OJ C 473, 24.11.2021, p. 1).

3.2.4. *Burden sharing*

- (72) Portugal reiterates that burden sharing will be ensured at the level of shareholders of TAP SGPS. The losses of TAP SGPS have been fully accounted for in the consolidated accounts of 2020 and correspond to a total amount of negative equity of EUR [...] million. Following the approval of the restructuring plan, the total amount of EUR [...] million [...] will be reduced to [...] in the accounts of TAP SGPS. Before that, [...] for the purposes of loss absorption.
- (73) Portugal further explains that, as envisaged in the restructuring plan, TAP SGPS will have to return to the lending markets as soon as possible. The impact of an imposition of losses on creditors will affect negatively any future attempt of TAP SGPS to raise funds from the private sector even on a secured basis. It will be seen by credit market participants as a *de facto* default situation, which will trigger immediate rating downgrades to the worst credit category by rating agencies. This, in turn, would lead banks to refrain from future dealings with the company. Finally, Portugal notes that the waivers of certain right of debts providers under the relevant loan agreements/debt emissions (recital (43)g)) should be deemed as a form of burden sharing under the R&R Guidelines.

3.3. **Measures limiting the distortions of competition**

- (74) In terms of divestments of assets, reduction of capacity or market presence, in the restructuring plan, as notified on 10 June 2021, Portugal put forward the sale of the stakes held by TAP SGPS in non-core business, i.e., Groundforce, M&E Brasil and Cateringpor. As regards, however, a potential transfer of slots, Portugal initially expressed the view that in the case of TAP Air Portugal, a commitment to give up slots at Lisbon airport would be premature and most probably unnecessary to ensure effective competition, involving a risk of compromising connectivity and the hub model of that company and potentially jeopardizing its return to viability. Portugal further argued, clarified or expanded during the formal investigation procedure the measures aimed at limiting the distortions of competition, so that the measures as proposed in their final form stand as follows.

3.3.1. *Divestment of holdings in activities vertically integrated with air transport*

- (75) Portugal submits that Groundforce has been historically profitable, with a EUR [...] million net income and EUR [...] million revenues in 2019, but it was severely hit by the COVID-19 crisis. Groundforce lost EUR [...] million of revenues in 2020 compared to 2019 and, [...]. Due to those difficulties, Groundforce entered a controlled insolvency procedure, which will ultimately lead to the restructuring or liquidation of the company. In that context, Groundforce has already attracted interest of several leading ground handling providers in Europe.
- (76) Cateringpor is a catering company created in 1994. It is the main catering provider of TAP SGPS, which is also its majority shareholder (51% stake) and main source of revenues ([...] % of 2019 revenues). The company has been historically profitable, with a EUR [...] million net income and EUR [...] million net revenues in 2019. However, like Groundforce, Cateringpor suffered because of the COVID-19 crisis, which led to a [...] % reduction of meals provided and a net income decrease of EUR [...] million compared to 2019. To deal with such difficulties, Cateringpor started a restructuring process that is underway [...], at the end of which TAP SGPS plans to [...] % [...]. According to the projections, the [...] EUR [...] million.

(77) M&E Brasil is a maintenance, repair and overhaul (MRO) service provider incorporated in Brazil, whose majority shareholder is TAP SGPS. M&E Brasil provides wide-body aircraft maintenance services to TAP SGPS, which accounted for [...] % of its revenues in 2019. [...] has been [...], in spite of a [...]. The COVID-19 crisis exacerbated the company's difficulties, with revenues in 2020 (around EUR [...] million) shrinking to half of those in 2019 (EUR [...] million) [...] ([...] EUR [...] million [...], EUR [...] million [...]). [...] EUR [...] million [...].

(78) As the abovementioned divestitures will significantly reduce vertically integrated activities of TAP Air Portugal, ancillary to air transport, Portugal believes that they constitute an admissible measure to limit distortions of competition under the R&R Guidelines.

3.3.2. *Reduction and freeze of aircraft fleet*

(79) The restructuring plan contemplates also a reduction in capacity, as a result of fleet resizing, network streamlining and adjustment to demand reduction. TAP Air Portugal has already implemented a fleet reduction from 108 to [90-100] aircraft by February 2021. Portugal commits that over the course of the restructuring plan and until 2025 inclusive, TAP Air Portugal's fleet will not exceed [90-100] aircraft.

3.3.3. *Slot release*

(80) In light of, notably, TAP Air Portugal's high slot holding at its heavily congested Lisbon base (recital (32)),⁴⁰ the Commission considers that, for the purposes of this Decision, TAP Air Portugal will have a significant market position for the supply of passenger air transport services at Lisbon airport after restructuring.

(81) In that respect, Portugal submitted on 3 December 2021 an additional structural commitment to further limit the distortive effects of the aid on competition for the provision of passenger air transport services on routes to or from Lisbon airport, where TAP Air Portugal is expected to keep a significant market position after restructuring.

(82) Namely, Portugal committed that TAP Air Portugal would transfer a slot package of up to 18 daily slots (winter and summer) to another air carrier (an actual or potential competitor) to allow it to establish a new base⁴¹ or to expand its existing base at Lisbon airport (the "remedy taker").⁴²

(83) The slots made available by TAP Air Portugal to the remedy taker at the time of signing the slot transfer agreement, would correspond to the slot times requested by the remedy taker within +/- 20 minutes for short-haul flights and within +/- 60 minutes for long-haul flights. In the event that TAP Air Portugal does not have slots

⁴⁰ Such a combination of factors (high slot holding at a heavily congested airport used as a base) is not found at any other EU airport to or from which TAP Air Portugal provides passenger air transport services.

⁴¹ A base means that aircraft are parked overnight at the airport and that the based aircraft are used to operate several routes from that airport. This means for short-haul flights that per day the first movement of the aircraft is a departure from Lisbon airport and the last movement is an arrival in Lisbon airport.

⁴² As further explained in recital (88), the potential remedy takers have to commit to base at Lisbon airport the aircraft using the slots transferred from TAP Air Portugal. The requirement to operate a new or expanded base at Lisbon airport using the remedy slots is justified by the relative degree of competitive pressure exerted on legacy carriers by based carriers and non-based carriers.

within the relevant time window, TAP Air Portugal would offer to transfer the slots closest in time to the remedy taker's request.

- (84) By exception, TAP Air Portugal would not be obliged to transfer:
- (a) more than one slot before 08:00 (local time) per aircraft based by the remedy taker at Lisbon airport using the remedy slots;
 - (b) more than half of the total remedy slots before 12:00 (local time); and
 - (c) more slots before 20:00 (local time) than the total remedy slots minus one slot per aircraft based by the remedy taker at Lisbon airport using the remedy slots for the operation of short-haul flights.
- (85) In the event that a request is made for more than one slot before 08:00 (local time) per based aircraft, more than half of the total remedy slots before 12:00 (local time) or more slots before 20:00 (local time) than the total remedy slots minus one slot per aircraft based by the remedy taker at Lisbon airport using the remedy slots for the operation of short-haul flights, TAP Air Portugal would offer the remedy taker the next closest slot after 8:00 (local time), after 12:00 (local time) and after 20.00 (local time) respectively.
- (86) The arrival and departure slot times should be such as to allow for reasonable aircraft rotation by the remedy taker to the extent possible, taking into account the eligible potential remedy taker's business model and aircraft utilisation constraints.
- (87) Portugal committed that TAP Air Portugal would not re-acquire the divested slots from the remedy taker.
- (88) To be eligible, a potential remedy taker must:
- (a) be an air carrier holding an operating licence issued by an EU/EEA Member State;
 - (b) be independent of and unconnected with TAP Air Portugal;
 - (c) not be subject to competition remedies having received a COVID-19 recapitalisation instrument of more than EUR 250 million;
 - (d) commit to operate the number of aircraft based at Lisbon airport using the remedy slots until the end of the restructuring plan. Potential remedy takers indicate in their proposals the number of aircraft to be based at Lisbon airport using the remedy slots;⁴³ For the purpose of committing to base aircraft using the remedy slots, a potential remedy taker must commit to comply with the applicable EU and national labour laws, as interpreted as relevant by the EU Courts ⁴⁴.

⁴³ The Commission will assess the operational and financial credibility of the proposals submitted by potential remedy takers, including the business plan for the operation of the aircraft to be based at Lisbon airport using the remedy slots. To be approved, a potential remedy taker will have to demonstrate the operational and financial credibility of the business plan for its new or expanded Lisbon base. However, for the avoidance of doubt, the commitment to operate the number of aircraft based at Lisbon airport using the remedy slots is not a condition for their effective transfer or for their use imposed on the remedy taker after its approval. In other terms, once the remedy taker is approved, the remedy slots are transferred unconditionally and the remedy taker can use them freely.

⁴⁴ See e.g. Nogueira, Joined Cases C-168/16 and C-169/16, EU:C:2017:688.

- (89) The remedy taker would be approved by the Commission following a transparent and non-discriminatory selection procedure (call for proposals).
- (90) The Commission would be assisted by a monitoring trustee, which would be appointed directly following the adoption of this Decision.
- (91) The call for proposals would be published by the monitoring trustee sufficiently in advance of the beginning of the general slot allocation procedure for each IATA Season until the Commission approves a remedy taker, and would be granted adequate publicity.
- (92) The Commission, assisted by the monitoring trustee, would assess the proposals received. It may reject the proposals if they are not credible from an economic or operational point of view, or in respect of EU competition law.
- (93) In case of competing proposals, the Commission would give preference, in decreasing order, to potential remedy takers that in particular: (i) will provide the largest seat capacity in respect of the based aircraft using the remedy slots from the start of the operations until the end of the restructuring plan; and (ii) serve the greatest number of destinations by direct flights operated by the based aircraft using the remedy slots from the start of the operations until the end of the restructuring plan (direct connectivity, without taking account of the frequencies).
- (94) If the Commission gives the same or similar evaluation to several proposals (tied bids) upon assessment of the two criteria, it would give preference to the proposal best ranked by TAP Air Portugal (which may use any criteria of its choice, provided that they are transparent).
- (95) Shortly after the Commission's evaluation decision, TAP Air Portugal would enter into a slot transfer agreement, to be reviewed by the monitoring trustee and approved by the Commission, with the highest ranked potential remedy taker that has confirmed that it intends to establish a base or expand its base at Lisbon airport using the remedy slots.
- (96) The slots would be transferred by TAP Air Portugal to the remedy taker free of charge pursuant to Article 8b of Council Regulation (EEC) No 95/93⁴⁵ (the "Slot Regulation").
- (97) The slots would be offered for transfer until the end of the restructuring period (end of 2025, see recital (27)). Whatever the circumstances, no call for proposals would be organised after the end of the restructuring period.

3.3.4. *Acquisition and advertising ban*

- (98) In addition to those divestment of assets and measures to reduce market capacity and presence, Portugal put forward the commitments that the beneficiary would refrain from (i) acquiring shares in any company during the restructuring period, except

⁴⁵ Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L 14, 22.1.1993, p. 1). According to its Article 8b, "[t]he entitlement to series of slots referred to in Article 8(2) shall not give rise to any claims for compensation in respect of any limitation, restriction or elimination thereof imposed under Community law, in particular in application of the rules of the Treaty relating to air transport. This Regulation shall not affect the powers of public authorities to require the transfer of slots between air carriers and to direct how these are allocated pursuant to national competition law or to Articles 81 or 82 of the Treaty or Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings. These transfers can only take place without monetary compensation."

where indispensable to ensure its long-term viability and subject to Commission approval, and (ii) publicising State support as a competitive advantage when marketing its products and services.

4. COMMENTS FROM THIRD PARTIES

- (99) Third parties filed 39 replies to the invitation to submit comments within the deadline by 6 September 2021. Four further submissions came after the deadline. The observations submitted on time included substantive submissions from two direct competitors – Ryanair and euroAtlantic Airways (EAA) – and from business partners, such as travel agencies, tour operators or associations of those (13), major hotel groups (1), ticketing agencies (2), suppliers (1), airport managers/traffic control agencies (2). Other submissions came from governmental bodies, such as representations of several states of Brazil, as well as the Brazilian Ministry of Tourism (8), and from bodies promoting tourism and commercial or cultural exchanges (10).
- (100) All third parties except the two direct competitors and another party generally support the restructuring aid and confirm the important role played by TAP Air Portugal in connectivity of Portugal with the Union and other regions of the world, and for the economy of Portugal.

4.1. Comments from competitors

4.1.1. Ryanair

Contribution to a well-defined objective of common interest

- (101) Ryanair disagrees with the Commission’s interim finding that the restructuring aid contributes to an objective of common interest. In Ryanair’s view there is no evidence of a risk of disruption to an important service which is hard to replicate since TAP Air Portugal’s service is being replicated by competitors that are stepping in. In particular, Ryanair also provides connections to destinations outside the EU, such as Israel, Turkey or Ukraine. Ryanair also indicated that it operates flights to Morocco and the United Kingdom from Portuguese airports.
- (102) Furthermore, Ryanair disagrees with the statement that other major EU air carriers, which would be offering intercontinental connections via Lisbon, operate in hub-and-spoke model and accordingly they would transfer passengers from Portugal to their hubs in other Member States instead of establishing another hub in Portugal. To that end, Ryanair submits that the key long haul destinations (e.g., New York, São Paulo, Toronto, Montreal, Philadelphia, Boston, Washington DC, Dubai) are also served by large international carriers such as American Airlines, Air Canada, Delta Airlines, LATAM, United Airways, and Emirates directly from Lisbon, while TAAG Angola Airlines would offer direct flights between Lisbon and Luanda. In Ryanair’s view, it would remain possible to fly to these destinations from Portugal without transfer or transit through another airline’s hub, even if TAP Air Portugal discontinues some long haul routes.
- (103) According to Ryanair, several competitors operate the same routes as TAP Air Portugal domestically, to the Autonomous Regions of Madeira and Azores, other Portuguese-speaking countries and the diaspora, as well as other countries in and outside Europe. Next to TAP Air Portugal, several other airlines would provide routes from Portugal to the Autonomous Regions of Madeira and Azores, such as Ryanair, easyJet, Transavia, SATA Air Açores and Azores Airlines.

- (104) In this context, Ryanair suggest that TAP Air Portugal would also face competition on its domestic routes from the high-speed railway system or intercity bus companies, such as Flixbus, which can continue ensuring connectivity throughout Portugal and its regions.
- (105) Ryanair puts forward that it competes head-to-head with TAP Air Portugal in a large number of point of origin/point of destination (“O&D”) city pair routes. To support its findings, Ryanair submitted annexes with data on “Portuguese city pair routes on which Ryanair and TAP competed in 2020” and “TAP European Routes & Competitors in March 2021”. Ryanair alleges that Ryanair Group competed on 17 TAP Air Portugal city pairs in 2019, 29 city pairs in 2020 and 24 city pairs in 2021, which would be far more than any other airline. Ryanair also submitted a study⁴⁶ prepared on the request of Ryanair. The study analyses the size and operating licence origin of the largest airlines in a number of major European markets. It covers the total intra-European capacity offered in 2014 and 2019 and current forecasts for 2021. In addition to identifying the key airlines shares in these years, the study looked at the five-year rate of growth of the major markets between 2014 and 2019, the contribution to this growth by the leading airlines and the overall growth in routes served by the airlines over this same period. It then repeats this exercise for the two years ending 2021, as currently forecast. With specific regard to Portugal, the study finds that low cost carriers have provided 44.3% of the growth in seat capacity between 2014 and 2019, with other airlines that are not the lead domicile airlines accounting for a further 29.3% of growth. According to the study, the two lead domiciled Portuguese airlines provided only 26.4% of the growth seen over this five-year period. The study finds that in terms of connectivity, the low cost carriers have delivered more again over this same five-year period, the low cost carriers have added 199 new routes to their combined networks. In comparison, the two lead Portuguese carriers have cut their number of routes by a combined 12. With regard to intra-European, non-domestic routes, this would stand at +199 vs. -10 respectively. This discrepancy would allegedly be disappointing for Portugal’s lead carriers given that they control 30% of the total market and 65% of the domestic market in terms of seat capacity. The study also offers a table showing low cost carriers’ forecast to increase their share of the Portuguese market during the pandemic. Following seven findings, the study concludes that the history of supporting the traditional “flag carriers” at a national level has delivered neither superior growth nor greater connectivity and continues that it is the pan-European low cost carriers that have delivered this for more open markets.
- (106) Finally, Ryanair informs that Portugal is one of Ryanair Group’s expansion targets. In that context, according to Ryanair, the routes where the Ryanair Group and TAP Air Portugal compete head-to-head are economically important. In particular, Ryanair Group and TAP Air Portugal would compete head-to-head on international routes to important cities, including London, Berlin, Dublin, Paris, Rome, Milan, and Vienna, which are economically relevant because they connect Portugal to the largest and most prosperous cities in Europe. Ryanair and TAP Air Portugal would also

⁴⁶ “Landing market shares in key European passenger markets”, 10 August 2021, prepared in the context of the of Ryanair’s appeal of the European Commission’s Decision of 23 April 2021 on State Aid SA.62304 (2021/N) – Portugal - COVID-19: Damage compensation to TAP Portugal; author Mark Simpson, an airline analyst at Goodbody, United Kingdom.

compete on domestic routes linking Lisbon and Ponta Delgada and Terceira for instance.

- (107) In the same context of the contribution to a well-defined objective of common interest, Ryanair asserts that the opening decision did not explain why TAP Air Portugal would be a systemic undertaking and does not even use the adjective “systemic.” According to Ryanair, as the European airlines now emerge from the crisis, one airline’s lost capacity would quickly be replaced by other airlines keen to deploy their surplus capacity and operate more efficiently.
- (108) Ryanair is of the view that even if some of TAP Air Portugal’s activities had a truly systemic character, the Commission has failed to determine whether such systemic activities could not be preserved by downsizing the group and reducing or suppressing non-systemic or loss-making activities. Namely, according to Ryanair, other airlines and transport providers already play an important role in the connectivity of Portugal and its regions and can provide the same service as TAP Air Portugal and could take over TAP Air Portugal’s service should it exit the market.
- (109) In conclusion, Ryanair postulates TAP Air Portugal would be in the process of being replaced by more efficient airlines which already serve the common interest. Therefore, its restructuring would not serve the common interest because it would endanger this process.

Long-term viability of TAP Air Portugal

- (110) First, Ryanair complains that recital 73 and Section 2.3.3 of the opening decision, which refer to long term viability, are heavily edited and all the financial data and the chronological milestones of the restructuring plan were deleted. Therefore, it would not be possible for Ryanair to make any detailed comments due to insufficient information. Nevertheless, Ryanair makes a general comment that TAP Air Portugal’s problems would stem from breakneck growth that TAP was unable to exploit to generate revenue and cover its costs, in the absence of sufficient competitiveness. In this context, TAP Air Portugal’s plan to resume capacity growth as soon as market conditions become normal again would appear to repeat the failed strategy that led to TAP Air Portugal’s difficulties in the first place.

Appropriateness of aid

- (111) Ryanair is of the view that verifying the satisfaction of this condition would require comparing the various options available in order to identify the least distortive option. However, the opening decision did not present or compare the aid with other options involving or not involving State aid and therefore failed to verify that the aid is appropriate.

Proportionality of aid

- (112) With regard to proportionality of the restructuring aid, Ryanair claims that the opening decision does not present any evidence of TAP SGPS’s attempts to raise private funds. In Ryanair’s view, given that TAP SGPS’s lack of access to financial markets before the grant of the aid would not be established, its lack of access after the aid is granted appears doubly doubtful. In addition, Ryanair asserts that TAP SGPS should be able to raise private funds after the implementation of the equity measures, hence the EUR [...] million “buffer” would be excessive. Ryanair also complains about the absence of sufficient financial data in the opening decision to allow interested parties to assess the proportionality of the quantum of aid in detail.

- (113) Ryanair critically observes that the opening decision does not provide a justification for Portugal's presumption that a Standard & Poor's B- financial rating would make borrowing on the financial markets impossible. According to Ryanair, Portugal has not described any concrete failed attempt by TAP to obtain financing nor does it explain why collateralisation was not available to secure debt. In Ryanair's view, TAP Air Portugal's portfolio of airport slots and other assets would represent a significant collateral.
- (114) With regard to the burden sharing, Ryanair raises concern that the remaining private shareholder (HPGB) will receive a favourable treatment. According to Ryanair, the opening decision did not provide any factual details that would allow Ryanair to make comments on the satisfaction of the burden sharing condition by HPGB and a fortiori other stakeholders in TAP SGPS.

Measures to limit distortions of competition

- (115) Ryanair agrees with the Commission's finding that the measures to limit distortions of competition are not justified and appear insufficient, even based on the insufficient information provided in the opening decision.
- (116) With regard to the slot release Ryanair claims that the massive size of aid provided and insufficient levels of own contribution militate in favour of slot divestments going far beyond the level of divestments of Lufthansa⁴⁷.
- (117) In Ryanair's view, slot divestments at Lisbon airport of the same extent as the slot divestments in the Lufthansa decision (24 slots per day) would not harm the connectivity of Portugal (including to Brazil) or TAP Air Portugal's hub operations (e.g., by making its routes unprofitable). Ryanair believes that allowing TAP Air Portugal to hold on to slots that it would be unable to use due for instance to loss of traffic or fleet reduction would amount to hoarding of a rare resource and therefore, slot divestments should at least be equal in proportion to the reduction in TAP Air Portugal's fleet. Moreover, the demand for slots by viable airlines at Lisbon and Porto airports would be high.
- (118) To that end, Ryanair suggests the Commission should consider the right size for TAP Air Portugal that would allow Portugal to have adequate connectivity and should not exclude the hypothesis that the right size for TAP Air Portugal may amount to market exit. In Ryanair's view, the Commission should not exclude a priori a scenario in which TAP Air Portugal would provide only long-haul services and other (including low fares) airlines would act as codeshare or even de facto operators of the current collector routes to Lisbon.
- (119) Finally, with regard to the freeze of capacities and reduction of activities, Ryanair claims that the opening decision does not explore sufficiently a downsizing scenario.

4.1.2. EAA

- (120) At the outset, EAA puts forward that by approving the Public State Budget Law for 2021 in November 2020 in which the Portuguese Government earmarked EUR 500 million of financial support for TAP SGPS, the Portuguese State committed to make

⁴⁷ Commission Decision of 25 June 2020 in case SA.57153 (2020/N) COVID-19 - Aid to Lufthansa (OJ C 397, 20.11.2020, p. 1).

State resources available, which EAA considers to be State aid not notified to the Commission.

- (121) EAA complains about the discriminatory treatment in favour of TAP SGPS when the State provided financial support to assist TAP SGPS with its restructuring. As background information, EAA informs that it has repeatedly requested proportionate support from Portugal. Despite EAA's best efforts and presentation of the advantages to the economy, Portugal has refused to look upon the facts and has failed to provide any meaningful assistance.
- (122) EAA also informs that it transported a total of more than 1.4 million passengers on its 8 500 flights, of which 430 000 (equal to 30% of the total passengers flown during this period) were from/to Portugal. It was the first Portuguese airline to start charter operations to northern Brazil and when TAP Air Portugal started scheduled flights to that region and gave very low rates to the tour operators, EAA found new opportunities. In 2020, due to the COVID-19 pandemic, EAA's main activity shifted to charter operations.

Appropriateness of aid instrument

- (123) In EAA's view, the aim of the restructuring aid is to provide liquidity support for the implementation of the restructuring plan and to balance the negative equity of TAP SGPS. However, the aid in question is structured mainly as equity and partly as a guarantee, which will also be converted into equity in the most adverse scenario if the access to capital markets is not achieved. This aid instrument does not seem appropriate as it goes beyond what is necessary. A less distortive measure in the form of a financial guarantee without an equity nature would be sufficient to facilitate the access to capital markets and in this way restore the liquidity and solvency of TAP SGPS. By doing so TAP SGPS would be required to find its own financing methods and thus also achieve the objectives of own contribution.

Proportionality of aid

- (124) EAA shares the concerns raised by the Commission in its preliminary findings regarding the proportionality of the aid, in particular, whether TAP SGPS would have a sufficient level of own contributions. In addition, EAA expresses its concern that Portugal already anticipates granting damage compensation under Article 107(2)(b) TFEU.
- (125) As Ryanair, EAA also complains about excessive redaction of the opening decision, which would make it impossible to make meaningful comments on proportionality.

Competition measures justified for TAP Air Portugal

- (126) EAA supports the Commission's concerns that the closure of loss-making activities is not sufficient to address competition distortions created by the restructuring aid and puts forward that the measures proposed by the Portuguese Government in the restructuring plan are not sufficient to address the distortions of competitions created by the aid. In EAA's view, more comprehensive measures are needed to limit distortions of competition taking account the size of the aid to TAP Air Portugal. To that end, EAA has identified a range of measures that should be considered cumulatively as necessary to limit the competition distortions created by an aid of this size, type and characteristics.
- (127) EAA also provides concrete proposals as to competition measures. In particular, it suggests that TAP Air Portugal should reduce its share on routes on which EAA is

also present and open code share agreements with EAA on flights from Portugal to São Tomé e Príncipe and to Guinea Bissau. EAA informs that it has been the only Portuguese operator able to consistently operate direct flights do São Tomé since 2008. Moreover, from Christmas 2013 and for the next 3 years TAP Air Portugal suspended flights to Guinea Bissau due to security reasons and during this period EAA was the only Portuguese operator able to assure connection between those countries and ultimately to the Portuguese-speaking world. In addition, EAA puts forward that the Commission should ask for a commitment that TAP Air Portugal will not engage in predatory pricing practices on routes to São Tomé e Príncipe and Guinea Bissau in which TAP Air Portugal and EAA would directly compete.

- (128) EAA requires that TAP Air Portugal does not use State aid to open new routes compared to those operated before the pandemic and that it gives up frequencies on flights to profitable destinations. Moreover, EAA proposes that TAP Air Portugal should reduce its slots by 1/3 on defined profitable destinations in order to open the way for other airlines, including EAA. In addition, EAA is of the view that TAP Air Portugal must cancel all the routes it started during the pandemic.
- (129) Furthermore, EAA invites the Commission to consider two further commitments, a commitment that TAP Air Portugal will not expand into new activities, such as cargo and passengers, including with Portugalia, and as a second commitment that TAP Air Portugal will exit charter operations, and will not offer charter flights to tour operators or other clients (e.g. for sports teams).
- (130) EAA sees positively TAP Air Portugal's plans to reduce capacity in terms of aircraft numbers and proposes an additional commitment that TAP Air Portugal would not acquire any new aircraft for a period of at least five years to expand its fleet.
- (131) More generally, EAA also offers its views on competition in the airline sector in Portugal. According to EAA, Portugal should favour the entry of new competitors and the expansion of existing small competitors by granting an approval to smaller operators to operate in the main cargo routes currently operated by TAP Air Portugal, so that other (Portuguese) companies can compete on those routes.

4.2. Comments from other third parties

- (132) With the exception of the Chamber of Commerce of Porto, the other third parties expressed support for the State intervention in favour of TAP SGPS. The evidence brought by other third parties demonstrates that TAP Air Portugal does secure improved connectivity and competition. Business partners and governmental bodies highlight in particular:
- the volume and the importance of passenger air traffic between Portugal and Portuguese-speaking countries served by TAP Air Portugal, as well as a steadily growing business travel sector based on cultural and/or historical connections⁴⁸;
 - the importance of services provided by TAP Air Portugal for the development of tourism, and more generally, the economy not only of Portugal but also of other regions of the world, like Cape Verde or Brazil⁴⁹;

⁴⁸ See the submissions of: Associação Portuguesa das Agências de Viagens e Turismo (APAVT), the Brazilian Ministry of Tourism; governments of the various states of Brazil.

⁴⁹ See the submissions of: the Brazilian Ministry of Tourism; governments of the various states of Brazil.

- the specificity and uniqueness of TAP Air Portugal’s network that takes into account the political, economic, cultural and historical ties of Portugal and the EU with several third countries, diversity of connections provided (10 different points in Brazil, including poorly served regions of Nordeste; connections to several islands of the Cape Verde archipelago; unique connections to the Portuguese-speaking African countries, as well as the convenient geographical (peripheral) position of Lisbon hub, which allows to shorten the long haul flights and to attract overseas tourist/clients to Portugal⁵⁰;
 - the importance for Portugal of an airline with enough dimension to create and maintain⁵¹ a hub in Lisbon, which is considered as crucial for the development of connectivity with Portuguese-speaking countries (Brazil, the Portuguese-speaking African Countries);
 - the importance of longstanding and well-established relationship with TAP Air Portugal for their activity/activity of their members/clients, for the development of the tourism industry and the strengthening of commercial and cultural connections between Portugal and other countries;
 - finally, the importance of stability of connections ensured by a national carrier.
- (133) The Porto Chamber of Commerce refers to the statement made by Portugal that TAP Air Portugal is a pillar of the Portuguese economy, in particular because of its contribution to the development of the tourist industry in Portugal. However, in the view of the Porto Chamber of Commerce, the population, the economic activity and the tourist industry are not only concentrated in Lisbon but in addition on the islands of the Azores and Madeira, as well as in the north and south of the country. In that context, the Porto Chamber of Commerce expresses criticism that the territorial cohesion and service to the tourism sector of the whole country appear to be absent from the restructuring plan when, at least, they were raised at the time of the rescue aid.
- (134) In its letter, the Porto Chamber of Commerce recognises the importance of the Lisbon hub. In its view, the air connectivity and the protection of economic activities, including that of the tourism sector, are best achieved by two means. First, TAP Air Portugal’s slots should be allocated to a company clean of liabilities and interests in other companies. This would ensure that long-haul flights on which the country’s geographical location gives it a competitive advantage and without which there are losses for residents of Portugal, can be operated from Portugal. Second, by providing support for the attraction of routes on a competitive market (by tender open to interested operators) on national and European flights.
- (135) Furthermore, the Porto Chamber of Commerce shares the doubts raised by the Commission. In particular, it points that the salary reductions of the beneficiary’s employees appear to be temporary because the collective bargaining agreement has not been repealed but merely suspended. Also, it claims that the historical record of TAP SGPS (and TAP Air Portugal) in terms of results and equity developments over

⁵⁰ See the submissions of: American Express Global Business Travel (AMEX GBT); HOTELPLAN, APAVT; AMEX GBT; ARCHIPELAGO CHOICE; CVP CORP; the Brazilian Ministry of Tourism; governments of the various states of Brazil; the municipality of Lisbon;

⁵¹ APAVT; Agência para o Investimento e Comércio Externo de Portugal (AICEP).

the past 11 years is not such as to reasonably assume that their contribution to the restructuring plan will be higher.

- (136) As to the relation between the national airports, the Porto Chamber of Commerce states that contrary to the situation at Porto and Faro airports where TAP Air Portugal's presence is low, TAP Air Portugal is dominant at Lisbon airport, to the detriment of the other two national airports and the populations and economic activities that serve and depend on them.

5. COMMENTS FROM PORTUGAL ON THE OBSERVATIONS OF THE THIRD PARTIES

5.1. Need to ensure connectivity

- (137) The Portuguese authorities emphasize that, out of 40 interested parties replying to the opening decision, only three have submitted negative observations raising concerns as to the granting of restructuring aid to TAP SGPS. The large majority of observations received reinforced the importance of TAP SGPS and the need to ensure its long-term viability. The Portuguese authorities accordingly highlight that the restructuring aid to TAP SGPS clearly contributes to a well-defined objective of common interest, considering that, as well established in the opening decision, TAP Air Portugal undoubtedly plays a key role in the connectivity of Portugal and to the Portuguese economy. TAP Air Portugal's close association with the tourism sector in Portugal, which has been of great importance for the country's economy and recovery after the 2008 crisis, will be paramount in the aftermath of the COVID-19 pandemic. The services provided by TAP Air Portugal ensure connectivity with Portuguese-speaking countries and with countries having important Portuguese communities, which are not easily substitutable by other air carriers, namely low-cost carriers.
- (138) Contrary to what is suggested by Ryanair, other airlines offer some long-haul connections from Lisbon, but with limited frequency and few destinations. Boston was operated only briefly in 2019 by Delta as a peak season service only, whereas TAP Air Portugal provides year-round service and has continued to do so through the crisis. Likewise, United operated Washington, DC only in summer seasons and has not maintained the service, whilst TAP Air Portugal has continued to fly there. As regards New York, Delta operated a daily year-round service but has cut it back to three flights a week during the crisis, whilst TAP Air Portugal has sustained a double daily service, continuing to provide essential connectivity for Portugal. United has a daily service, which has been maintained, but United and TAP Air Portugal are both in the Star Alliance and United therefore benefits from connectivity onto TAP Air Portugal's short-haul services, which helps to sustain their operation. The same is true of Air Canada's flights from Toronto and Montreal. The elimination of TAP Air Portugal's hub operations at Lisbon would also threaten these Star Alliance services.
- (139) In addition, Ryanair's observations contain several inaccuracies, which can be misleading for the Commission's assessment. For instance, SATA Air Açores does not operate flights between the Azores and mainland Portugal (this is only the case of Azores Airlines) and there are no ferry connections with the Autonomous Regions of Azores and Madeira. Except and to a limited extent for domestic flights in mainland Portugal, the bulk of services provided by TAP Air Portugal cannot be substituted with high-speed railway system, intercity bus companies or inexistent ferry connections mainly because these transport means have not been available for the destinations that TAP Air Portugal flies to.

- (140) The Portuguese authorities note that no other airline operating to and from Portugal has an equivalent role, which cannot be assured by alternative airlines in the foreseeable future. This is an aspect that both Ryanair and EAA fail to consider, when comparing TAP Air Portugal's operation with that of a low-cost airline operating only highly profitable connections or that of a mostly charter air carrier and a provider of wet leasing (ACMI: aircraft, crew, maintenance, insurance) with limited public interest. Contrary to what its observations imply, Ryanair does not constitute an alternative to TAP Air Portugal. As previously stated, in summer 2019, [...] of the [...] destinations offered by TAP Air Portugal from Lisbon were not served by any other airlines, the majority of which constituted long-haul connections with North and South America, as well as Africa.
- (141) While it is correct to state that Ryanair and TAP Air Portugal compete head-to-head on certain international routes to several large European cities, it is worth recalling that Ryanair only competes with TAP Air Portugal on the more profitable routes and does not provide any long-haul connections. TAP Air Portugal's exit from the market would leave profitable short-haul routes to Ryanair and removing one competitor from intercontinental connections to Lisbon. In essence, the result would therefore be less competition on both attractive and less attractive routes.
- (142) In the case of EAA, it should be noted that the airline does not have a relevant positioning in the Portuguese market, being a small air carrier with 7 aircraft focussing on the provision of services (so called "wet lease" with aircraft, maintenance, crew and insurance provided) to other airlines and charter flights, which are not markets where TAP Air Portugal holds a relevant position. EAA does not have the presence, the resources, nor the organisation required to replace an airline such as TAP Air Portugal (for instance, EAA does not have adequate sales and distribution capabilities or resources).
- (143) While the observations of EAA point towards a certain projected fleet growth (which has not been disclosed to the Portuguese authorities as this constitutes confidential information of EAA), it is unlikely that EAA would reach a fleet size comparable to TAP Air Portugal's. Being a small-sized air carrier, without significant presence at Lisbon airport, the investments required for EAA to be in a position to replace TAP Air Portugal are substantial and extremely improbable to obtain in the near future. Considering EAA's focus on providing ACMI services to other carriers, including TAP Air Portugal, the Portuguese authorities note that a successful restructuring of TAP Air Portugal could potentially translate into additional service agreements between these two companies.

5.2. Appropriateness of aid

- (144) The Portuguese authorities have reiterated their conclusion that, in view of the previous situation of difficulty of TAP SGPS and the impact of the COVID-19 pandemic, State support in the form of equity provides a better financial structure for TAP SGPS to strengthen its balance sheet.
- (145) In relation to the observations of Ryanair and EAA, the Portuguese authorities emphasise that, according to point 58 of the R&R Guidelines, Member States are free to choose the form of the restructuring aid. In doing so, they are not required to conduct an exhaustive comparison of all available options. They should assess the nature of the beneficiary's difficulties and select appropriate instruments to deal with them. Such an exercise was extensively conducted by the Portuguese authorities and submitted to the Commission for its assessment. The State aid measures notified by

Portugal were construed to provide liquidity support to the implementation of the measures of the restructuring plan and address the negative equity position of TAP SGPS.

- (146) In particular, TAP SGPS accumulated a negative shareholders' equity of EUR [...] million between 2006 and 2015, mainly due to [...]. Considering the weight of the airline business on the revenues of TAP SGPS, [...]. With regards to TAP Air Portugal, even though the airline had been on a growth trajectory in operational terms, due to the launch of a transformation process, TAP Air Portugal had not yet been able to considerably reduce its costs when comparing with competitors, and it consistently presented lower profitability driven by lower efficiency and extraordinary costs.
- (147) Furthermore, TAP Air Portugal's transformation process was interrupted as a result of the global pandemic of COVID-19 and the economic crisis that followed, which resulted in an acute liquidity crisis leading to the granting of rescue aid by the Portuguese authorities, in 2020. Already in late 2020, the liquidity analysis Air Portugal clearly indicated that without further State support, TAP Air Portugal would reach a substantial negative net cash position in 2021 and 2022 in the absence of a market recovery.
- (148) As capital markets have not been available for airline borrowers like TAP SGPS, resorting to State funding was the only available option in 2020. TAP SGPS's management has [...]. However, debt funding markets were largely shut down for airlines following the onset of the COVID-19 pandemic with financial institutions in general drastically reducing their credit limits for the sector. In order to maximize liquidity, TAP Air Portugal has made an effort to sell those aircraft that were owned by the company ([...]). Other assets [...].
- (149) Currently, prior to incremental State support and despite TAP SGPS's efforts and discussions with financial institutions and other stakeholders, raising additional funds from private markets for TAP SGPS will not be possible under present conditions and definitely not before the approval of the restructuring plan. This leaves the Portuguese State, who is also the main shareholder, as the only viable source of funding (or provider of a guarantee of funding) for the company.
- (150) In this context, considering the unavailability of capital markets at this stage for TAP SGPS and the company's equity and liquidity position, it is the Portuguese authorities' conclusion that State support in the form of equity provides a better financial structure for TAP SGPS to strengthen its balance sheet. Moreover, combined with the implementation of the measures set forth in the restructuring plan (namely those regarding fleet, network and cost restructuring), the State aid is expected to facilitate TAP SGPS or TAP Air Portugal's 's access to the capital markets during the period from [...].

5.3. Return to long-term viability

- (151) Despite the current uncertainty of the demand recovery path associated with the pandemic situation, the Portuguese authorities reiterate that the financial projections contained in the restructuring plan are based on solid assumptions, which could even be considered conservative. The restructuring plan assumes a demand recovery outlook, in terms of number of passengers transported, which is generally lower than the IATA forecasts. Similarly, the revenue path in the restructuring plan starts from a lower point in 2021 in comparison to passenger forecasts. The restructuring plan also

incorporates some flexibility to adapt the beneficiary's capacity and operations according to foreseeable demand, while respecting the maximum fleet commitment.

- (152) The financial assessment and projections demonstrate that the planned restructuring measures supported with the aid would allow TAP SGPS to attain [...]. The projections evidence a return on equity of around [...] % in 2024 and 2025, by the end of the restructuring period. The expected returns sustain the argument that the restructuring plan would secure the long-term viability of the beneficiary. In fact, those returns compare favourably with the (opportunity) cost of equity across economic sectors in Portugal (10.9%) and for the aviation sector (8.5%) the beneficiary's. Other key indicators such as ROCE and Equity to Assets ratio [...] and remain robust even in an adverse scenario.
- (153) Moreover, the divestment of loss-making and non-core businesses set out in the restructuring plan, namely M&E Brasil, will ensure that no further losses resulting from those activities damage recovery. In view of the above, the Portuguese Republic reiterates that the restructuring plan has been elaborated in order to specifically address the past difficulties of TAP SGPS and ensure its long-term viability.

5.4. Proportionality

- (154) As regards the proportionality of the aid, the Portuguese authorities submit that beneficiary sought to secure from its stakeholders additional sources of own contribution, namely those relating to additional bidding commitments for aircraft leases, as well significant waivers from bondholders, which should be considered as burden sharing from existing creditors of the beneficiary. Even only considering the additional aircraft leases, the level of own contribution to the restructuring costs is increased up to [...] %. This level of own contribution should be deemed sufficient in the particular case of TAP SGPS and the context of the COVID-19 pandemic, given the R&R Guidelines allow for a more flexible and adjusted application of the State aid rules, specifically in exceptional circumstances.
- (155) The suggestions of Ryanair with regard to potential for the usage of collateralisation are not feasible in the case of TAP SGPS. As to Ryanair's allegations that lack of access to capital markets is used to inflate the aid through a buffer of EUR [...] million, such buffer was initially only intended as a precautionary measure set forth in the initial restructuring plan and is no longer considered.
- (156) The Portuguese authorities described TAP SGPS's recent endeavours to enhance its own contribution ratio, which include: (i) seeking additional sources of fresh funding despite the current exogenous challenges and market conditions; (ii) obtaining support of existing debt providers; and (iii) considering the entry of new investors. Since the adoption of the opening decision, TAP Air Portugal has been able to achieve additional commitments for funding of EUR [...] million in new contracts of aircraft leases arriving in 2021 and 2022, further to the EUR [...] million financial lease commitments already included in the restructuring plan. Accordingly, the total amount of own contribution resulting from aircraft leasing based on binding legal commitments entered into with the lessors has been eventually increased to EUR [...] million. Furthermore, TAP SGPS has succeeded in obtaining the support of existing debt providers, by obtaining significant waivers, which would avoid the triggering of put and early repayment options with serious consequences for the beneficiary's liquidity.

- (157) When it comes to burden sharing, it is important to take into consideration the context in which the Portuguese State has acquired, from AGW, shares representing 22.5% of the share capital of TAP SGPS and entered, directly, into the share capital of TAP SGPS. Such transaction was agreed in order to overcome the deadlock in the negotiations regarding the granting of the rescue loan to TAP SGPS and to enable its urgent implementation.
- (158) At such time, the parties could not anticipate the final amount of the restructuring aid, which has required adjustments due to the protracted nature of the pandemic, and therefore the actual sacrifice that would have to be endured by the shareholders for the purposes of burden sharing. In this context, [...] ([...]% [...])
- (159) In addition, and to prevent such a scenario, HPGB [...]%. [...]. According to Portugal, this would constitute burden sharing by HPGB, as it will not benefit from any future gains in value of the beneficiary, resulting from the State equity injected.

6. ASSESSMENT OF THE MEASURES

- (160) The Commission will first assess whether the measures to be provided to finance TAP SGPS' restructuring plan, namely the rescue loan of EUR 1.2 billion to be converted into equity, the State guarantee of EUR [...] million on a EUR [...] million loan to be substituted with equity, as well as the EUR [...] million direct equity injection to be executed in 2022, entail State aid within the meaning of Article 107(1) TFEU, and if so, whether such aid is lawful and compatible with the internal market.

6.1. Existence of State aid

- (161) 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”.
- (162) The qualification of a measure as aid within the meaning of Article 107(1) TFEU requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) the measure must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) it must distort or threaten to distort competition and affect trade between Member States. It is therefore appropriate to examine separately whether the measures qualify as aid.

6.1.1. State resources and imputability to the State

- (163) The measures involve administrative acts and public decisions and they will be funded from the State budget (recital (42)).
- (164) For the purposes of Article 107(1) TFEU, therefore, the measures involve State resources and the decision to grant those measures is imputable to the Portuguese State.

6.1.2. Advantage

- (165) The Commission notes that Portugal has notified the measures as constituting State aid. That declaration does not discharge the Commission from examining itself whether the measures involve State aid and, in particular, whether they favour 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 measures at the same conditions, leaving aside any benefits expected in its situation as public authority⁵².

- (166) The Commission has to examine whether the measures qualify as aid in that they confer an economic advantage on the beneficiary⁵³. The presence of such an advantage can be inferred and established from the fact that the beneficiary cannot obtain capital or raise debt finance at market conditions without public support (recitals (39) footnote 31). Likewise, the assessment of whether a market operator in a situation as close as possible to that of DGTF or Parública would provide the same funding (“market economy operator test”) shows that the public funding in question provides an advantage when compared to market conditions.
- (a) First, there is no *prima facie* evidence that the funding can be ascribed to behaviour and decisions which a market shareholder would take. The funding is premised on reasons of public policy to guarantee air transport connectivity of Portugal and to avoid negative spill-over effects of the bankruptcy of TAP Air Portugal for the Portuguese economy (recital (17)). Such considerations, however pertinent for a public authority, would not be relevant for a market shareholder. Therefore, the market economy operator test appears not to be applicable.
- (b) Second, the funding cannot be assessed as being capable of providing a shareholder return commensurate with the risk taken. Portugal does not claim that such return would actually be achieved until the end of the restructuring period. In the meantime, the other private shareholders of the beneficiary have refrained from providing any further fresh capital, let alone reaching the amounts necessary to preserve their existing proportion of shareholding and ownership entitling them to possible returns therefrom. The available evidence shows that whilst being capable of providing an adequate return and remunerating the State at the end of the restructuring plan (recitals (48)(49) and Table 1), the positive net earnings of the whole restructuring period would amount [...] EUR [...] million [...]. [...] EUR [...] million [...] % [...].
- (167) Therefore, the measures provide funding that the beneficiary cannot and could not obtain on the market. A market operator in a situation as close as possible to that of DGTF or Parública would not provide similar funding.
- (168) Therefore, the measures confer an economic advantage on the beneficiary within the meaning of Article 107(1) TFEU.

6.1.3. *Selectivity*

- (169) The measures are to be granted through the exercise of discretion for an *ad hoc* amount determined by reference to the specific needs of the beneficiary’s restructuring plan (recitals (38)-(43)). The public funding is not, whether by instruments or amount, part of a broader, general, economic policy measure to

⁵² Judgment of the Court of Justice of 20 September 2017, *Commission v Frucona Košice*, C-300/16 P, EU:C:2017:706, paragraph 59; judgment of the Court of Justice of 5 June 2012, *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraphs 78, 79 and 103.

⁵³ Judgment of the Court of Justice of 11 July 1996, *SFEI and others*, C-39/94, EU:C:1996:285, paragraph 60; judgment of the Court of Justice of 29 April 1999, *Spain v Commission*, C-342/96, EU:C:1999:210, paragraph 41.

provide support to undertakings in a comparable legal and economic situation that are active in the air transport or other economic sectors. 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 selective⁵⁴. This is so regardless of whether there are operators on the relevant markets that are in a comparable factual and legal situation.

(170) Therefore, the measures are selective within the meaning of Article 107(1) TFEU.

6.1.4. *Distortion of competition and effect on trade*

(171) The air passenger transport and cargo services sector in which the beneficiary is active is open to competition and trade between Member States. Other airlines licensed in the European Union provide air transport services connecting the Portuguese airports, in particular Lisbon, with other cities of the Union. Therefore, by sustaining the continued operation of the air transport services that the beneficiary provides, the measures are liable to affect trade between Member States.

(172) By granting access to funding at conditions that it would not otherwise obtain on the market, the public funding is liable to improve the position of the beneficiary in relation to actual competing undertakings or potential ones that do not have access to similar State support from Portugal or that have to finance operations at market conditions.

(173) The notified measures are consequently liable to distort or threaten to distort competition and to affect trade between Member States.

6.2. **Conclusion on the existence of aid**

(174) In light of the above, the Commission concludes that the notified measures in favour of TAP SGPS constitute State aid within the meaning of Article 107(1) TFEU.

6.3. **Lawfulness of the aid**

(175) After the General Court annulled on 19 May 2021 the initial rescue aid decision (recital (2)), the General Court suspended the effects of the judgment on the basis of Article 264(2) TFEU pending the adoption of a new decision by the Commission within a period of two months. On 16 July 2021, the Commission adopted a new decision approving the rescue aid to TAP SGPS as notified on 8 June 2020, as a result of which the rescue aid to TAP SGPS must be regarded as lawful.

(176) According to recital (16) of the initial rescue aid decision, the rescue aid up to a maximum of EUR 1.2 billion loan or a combination of loan and loan guarantees, was planned to be repaid within six months of the date of 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, i.e. within six months after the Commission approved the rescue aid in the initial rescue aid decision, Portugal submitted to the Commission a restructuring plan. Therefore, according to point 55(d)(ii) of the R&R Guidelines, the authorisation of the rescue aid and the repayment period was automatically extended until the Commission takes a final decision on the restructuring plan and supporting aid.

⁵⁴ Judgment of the Court of Justice of 4 June 2015, *Commission v MOL*, C-15/14 P, EU:C:2015:362, paragraph 60.

- (177) In its observations on the opening decision, EAA argues that by approving the Public State Budget Law for 2021 in November 2020, by which the Portuguese Government earmarked EUR 500 million of financial support for TAP SGPS, Portugal granted unlawful aid to TAP SGPS (recital (120)). It has to be recalled that the mere designation of funds for a special purpose in a national budget is not equivalent to the granting of aid. For aid to be considered to be put into effect, it is needed that the right to receive support, provided through State resources, is conferred on the beneficiary under the applicable national legislation, which was not the case with the earmarked EUR 500 million.
- (178) As regards the abovementioned funds, Portugal explained that it has not adopted the necessary implementing act nor has the budgetary provision been executed to make these resources available to TAP SGPS or entitling TAP SGPS to receive them. Therefore, Portugal has not granted restructuring aid in contravention of Article 108(3) TFEU.
- (179) Accordingly, Portugal has observed the stand-still obligation laid down in Article 108(3) TFEU and the restructuring aid in favour of TAP SGPS constitutes lawful State aid.

6.4. Compatibility of the aid with the internal market

- (180) Under Article 107(3)(c) TFEU, the Commission may authorise aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.
- (181) Thus, in order to be capable of being considered compatible with the internal market under that provision, State aid must meet two conditions, the first being that it must be intended to facilitate the development of certain economic activities or of certain economic areas and the second, expressed in negative terms, being that it must not adversely affect trading conditions to an extent contrary to the common interest. The above is without prejudice to the fact that decisions adopted by the Commission on that basis must ensure compliance with Union law⁵⁵.
- (182) In the light of the notification and the information collected in the course of the formal investigation into the restructuring aid, it does not result that the restructuring aid or the conditions attached to it, or the economic activities facilitated by the aid, could entail a violation of a relevant provision of Union law. In particular, the competition measure consisting of a transfer of slots at Lisbon airport is based on the rules defined in Union law (recitals (96) and (295)) and the new slot holder must commit to comply with the applicable Union labour law (recital (88)(d)). Moreover, the criticism from EAA that the aid violates the principle of non-discrimination set out in the TFEU (recital (121)) is unfounded. In Union law, the principle of equal treatment does not preclude the grant of ad hoc restructuring aid under Article 107(3)(c) TFEU. In any event, the Commission notes that the position of the beneficiary is objectively different from those of the other airlines operating flights in Portugal or flights to and from Portugal, both in light of its eligibility for aid under the R&R Guidelines and in light of the consequences that its failure would involve. Therefore, it is open to Portugal to decide to grant restructuring aid to the beneficiary

⁵⁵ Judgment of the Court of Justice of 22 September 2020, *Austria v Commission*, C-594/18 P, EU:C:2020:742, paragraphs 18 to 20.

only, and not to other airlines operating in that Member State under Article 107(3)(c) TFEU. Moreover, the Commission has not sent a reasoned opinion to Portugal on a possible infringement of Union law that would bear a relation to this case, nor has it received any complaints or information that might suggest that the State aid, the conditions attached to it or the economic activities facilitated by the aid might be contrary to relevant provisions of Union law, other than Article 107 and 108 TFEU.

- (183) Portugal considers that the restructuring aid can be declared compatible with the internal market pursuant to the R&R Guidelines.
- (184) In view of the nature and aims of the State aid at stake and the claims of the Portuguese authorities, the Commission will assess whether the planned funding supporting the restructuring aid complies with the relevant provisions laid down in the R&R Guidelines. In the R&R Guidelines, the Commission sets out the conditions under which State aid for rescuing and restructuring non-financial undertakings in difficulty may be considered to be compatible with the internal market on the basis of Article 107(3)(c) TFEU.
- (185) In examining whether restructuring aid has an adverse effect on trading conditions to an extent that is contrary to the common interest, the Commission carries out a balancing test according to Article 107(3)(c) TFEU and the R&R Guidelines. In that test, provided that the beneficiary is eligible to receive restructuring aid, the Commission weighs the positive effects of the aid for the development of the activities that the aid is intended to support against the negative effects created by the impact of the State aid on competition and trade between Member States, assessing in particular how the aid measure minimises the distortions on competition and trade (need for State intervention, appropriateness, proportionality, transparency of the aid, one time last time principle and measures to limit distortions of competition).

Eligibility: undertaking in difficulty

- (186) In order to be eligible for restructuring aid, a beneficiary must qualify as an undertaking in difficulty within the meaning 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.
- (187) As explained in the opening decision (recitals (15)-(22)), TAP SGPS presented a negative equity amount of approximately EUR [...] million at the end of 2019. Since then, the financial situation of TAP SGPS has worsened. According to the consolidated account of TAP SGPS of 2020, the total negative equity increased up to the level of EUR [...] billion. TAP Air Portugal also exhibited a negative equity in 2020, equal to EUR [...] billion (recital (26)). Those figures show that at least half of the subscribed share capital of TAP SGPS and TAP Air Portugal has disappeared and thus both companies qualify as an undertakings in difficulty pursuant to point 20(a) of the R&R Guidelines.
- (188) 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 in 2003, so more than three years ago (see recital (8)).

- (189) According to point 22 of the R&R Guidelines, a company belonging to or being taken over by a larger business group is not normally eligible for restructuring aid, unless it can be demonstrated that the company's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself.
- (190) In the second rescue aid decision (recitals 113 to 128), the Commission concluded that that TAP SGPS belonged to a larger business group at the moment of the notification of the rescue aid on 9 June 2020. On the one hand, there was no evidence of arbitrary cost allocation among TAP SGPS, AGW and Parública artificially burdening TAP SGPS by the parents in the relevant period. (In addition, it follows from recitals (19) to (22) of the present decision that the difficulties of TAP SGPS are not the result of arbitrary allocation of costs within a group and are peculiar to the air transport and related sectors on which it operates.) On the other hand, the AGW consortium as the second biggest shareholder which held 45% in TAP SGPS was a limited liability company controlled by individual shareholders, Mr. David Neeleman, who controlled 50% of AGW shares via DGN Corporation (40%) and Global Azulair Projects, SGPS, SA (10%) and Mr. Humberto Pedrosa, who held 50% of AGW, via the company HPGB, SGPS, SA. The corporate form of AGW consortium as such was independent and unrelated to the private wealth of its two indirect shareholders and physical persons Mr. Neeleman and Mr. Pedrosa, who were not personally liable for the obligations of the AGW consortium. Consequently, these two indirect private physical shareholders could not be held accountable for the financial difficulties of the TAP SGPS with their private wealth.
- (191) As the Commission found in the second rescue aid decision (recital (127)) , the jointly controlling shareholders other than Parública (the State) 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).
- (192) In respect of TAP Air Portugal, there is no evidence that its precarious financial conditions stem from an arbitrary allocation of costs within the group or economic unit. This is valid both for the time when TAP Air Portugal was under the ultimate joint control of Parública (the State), HPGB and DGN, and also for the present situation when it is under the sole control of the Portuguese State, within the same economic unit as its sister company TAP SGPS, which also has a non-controlling minority holding in TAP Air Portugal. (recitals (11) and (12)). The finding at recital (191) on the lacking capacity of the former jointly controlling shareholders to meet the liquidity needs of the company (without granting State aid) applies equally to TAP Air Portugal, which is and was in the same economic unit as TAP SGPS.
- (193) Following the modification of the capital structure of TAP SGPS, which is the consequence of the acquisition of 22.5% of the shares of TAP SGPS by DGTF, TAP SGPS is solely controlled by the State [...] (see recitals (8), (11) and (12)). Therefore, TAP SGPS and TAP Air Portugal are part of an economic unit (or a larger business group), which the Commission can consider an independent centre of decision-making within the State providing the notified restructuring aid.
- (194) The Commission considers, therefore, that neither the joint controlling entities, nor subsequently the State as sole controlling shareholder were in a position to alleviate in a market-conform manner the economic and financial strained position of TAP SGPS, or of TAP Air Portugal. For the financial intervention of the State to remedy

the difficulties of the companies whether directly via DGTF or via Parpública would amount to State aid unless carried out, alone or in conjunction with the joint controlling entities, on market terms. Parpública as joint controlling entity has not and could not have supported TAP SGPS on market terms, nor have or could the jointly controlling private entities done so⁵⁶. Therefore, given the pre-existing position of the State as shareholder holding 50% of TAP SGPS [...] and the control held thereafter, the difficulties of TAP SGPS and of TAP Air Portugal cannot be dealt with by a group.

- (195) On the basis of the above, the Commission concludes that both TAP SGPS and TAP Air Portugal (including their controlled subsidiaries) are undertakings in difficulties and are eligible for restructuring aid.

6.4.1. *The aid facilitates the development of certain economic activities or certain economic areas*

- (196) Under Article 107(3)(c) TFEU, State aid, to be considered compatible with the internal market, must facilitate the development of certain economic activities or certain economic areas.

- (197) In that regard, to show that restructuring aid is intended facilitate the development of such activities or areas, the Member State granting such aid must demonstrate that the aid aims to prevent social hardship or address a market failure. In the specific context of restructuring aid, the Commission notes that, as acknowledged at point 43 of the R&R Guidelines, in fact, market exit is important to the wider process of productivity growth, thus merely preventing an undertaking from exiting the market does not sufficiently justify State aid. On the contrary, rescue and restructuring aid are among the most distortive types of State aid, as they interfere with the process of market exit. However, in certain situations, restructuring an undertaking in difficulty may contribute to the development of economic activities or areas, also beyond the very activities carried out by the beneficiary. This is the case where in the absence of such aid, the beneficiary's failure would lead to situations of market failure or social hardship, inhibiting the development of the economic activities and/or areas that would be affected by such situations. A non-exhaustive list of such situations is laid down at point 44 of the R&R Guidelines.

- (198) Such situations occur, *inter alia*, where the aid avoids the risk of interruption to an important service, which is hard to replicate and where it would be difficult for any competitor simply to step in, or where the beneficiary plays an important systemic role in a particular region or sector from which its exit would have potential negative consequences⁵⁷. By enabling the beneficiary to continue its operations, the aid thus prevents such market failure or social hardship. In case of restructuring aid, however, this is only true where the aid enables the beneficiary to compete in the marketplace on its own merits, which can only be ensured if the aid is premised on the implementation of a restructuring plan that restores the beneficiary's long-term viability.

⁵⁶ This finding is necessarily limited to AGW as a vehicle for ownership of, eventually, natural persons, for the examination of the resources of the jointly controlling entities regards the resources of those entities and not the private resources available to the natural persons who are not personally liable on the holdings of those entities.

⁵⁷ Point 44 (b) and), (c) of the R&R Guidelines.

(199) The Commission, hence, will first assess whether the aid is intended to prevent a situation of market failure or social hardship (section 6.4.1.1) and whether it is accompanied by a restructuring plan restoring the beneficiary's long-term viability (section 6.4.1.2).

6.4.1.1. Prevention of social hardship or market failure contributing to the development of economic activity

(200) Among the situations where rescuing an undertaking in difficulty may contribute to the development of economic activities or areas, point 44(b) and (c) of the R&R Guidelines mention cases where aid is intended to avert the risk of economic growth being hampered by the disruption of an important service as a consequence of the exit of the beneficiary from the market (point 44(b) of the R&R Guidelines), or by the failure of an undertaking with an important systemic role in the sector or region concerned (point 44(c) of the R&R Guidelines).

The aid avoids the disruption of an important service

(201) In the opening decision, the Commission noted that the objective of the restructuring aid was to avoid that TAP SGPS and, as a consequence, TAP Air Portugal, goes out of business due to the difficulties it has been experiencing and which were acutely aggravated by the COVID-19 crisis.⁵⁸ Since an airline needs to guarantee sufficient liquidity to maintain its operating licence, it is manifest in light of the available resources and the recent and expected operating losses that TAP Air Portugal would be unable to meet its payment obligations and liabilities and thus need to file for insolvency discontinuing activity without the restructuring aid (Table 1). The Commission has found, on the basis of the information provided during the formal investigation, that there is indeed a concrete risk of an immediate failure of the beneficiary to meet its payment obligations leading to a disruption of the ongoing air transport activity of TAP Air Portugal.

(202) In that respect, TAP Air Portugal provides unique connections services from its hub, Lisbon airport, by providing regular travel schedules (recitals (15) and (16)). In addition to the essential air transport services provided to the Portuguese-speaking community, at national level and abroad, TAP Air Portugal decisively and significantly supports the economic growth of the one of the most relevant economic activities for Portugal, tourism. Specifically, an important segment of Portuguese companies - namely hotels, restaurants, social and cultural events, retail shops and other tourism-related activities, especially present 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 bringing travellers.

(203) As Portugal points out, most of those companies that may survive COVID-19 crisis only due to support of the Portuguese government through temporary subsidised work and measures which allow them to defer due payments, need tourism to ramp up. The Portuguese travel agencies and representatives of regions having submitted comments stress that they depend on TAP Air Portugal's services for part of their business and activities, which would suffer considerable losses in turnover without business with TAP Air Portugal.

(204) The Commission thus considers that in the absence of restructuring aid averting the discontinuation of TAP Air Portugal's activities, not only travellers but also the

⁵⁸ Recital 71 of the opening decision.

travel business community would entirely depend on whether a combination of low cost carriers and long-haul carriers focused on point-to-point connections within the Union and the with the rest of the world in the 92 destinations that TAP Air Portugal offered before its restructuring would be able and willing to establish the same services in frequency and geographic scope, in particular with North America, Latin America and Africa (recital (15)). Third parties – in particular, business partners, such as travel agencies, tour operators, major hotel groups, ticketing agencies and suppliers, in addition to national and foreign governmental bodies, including bodies promoting tourism and commercial or cultural exchanges - have confirmed and corroborate the Commission’s finding in the opening decision that a market exit of TAP Air Portugal would risk causing loss of these connections (recital (100)).

- (205) In order to replicate TAP Air Portugal’s role, competitors would need to build and establish network of destinations, which would take a considerable amount of time and could risk not be achieved at all with the same services in frequency and geographic scope. In this respect, the Commission notes that the objective of the restructuring aid is to avoid that TAP Air Portugal goes out of business due to the difficulties it has been experiencing and which were acutely aggravated by the COVID-19 crisis.
- (206) The concrete routes making up TAP Air Portugal’s network in 2019 before the pandemic are at present reduced in the presence of restrictive travel measures put in place on health grounds to limit the spread of the virus by the Portuguese authorities. However, the forecasts of traffic recovery by IATA referred to in the opening decision, which no party put into question, point at demand recovery earlier than 2025 (recital (223)). In such a setting, in the foreseeable scenario of demand for air transport services and connectivity in Portugal, TAP Air Portugal’s network –or an equally dense one– would be key as it was before the pandemic to meet future demand, especially in all or some of the routes where TAP Air Portugal was the only airline operating [...] of [...] routes in summer season and [...] out of [...] routes in winter season (recitals (15) and (16)).
- (207) As regards a hypothetical network replicating TAP Air Portugal’s, it is highly unlikely that a combination of existing legacy or low-cost carriers would be both willing and able to build within a reasonable timeframe the required network connections, in particular to Portuguese-speaking countries, to take over TAP Air Portugal’s role in connecting Portugal with the rest of the world. Indeed, none of the two air carriers that has intervened has duly substantiated the willingness and ability to develop a similar national transport network or plans to develop a similar connectivity and have only generically referred to other airlines not intervening in the proceedings that could partly replicate TAP Air Portugal’s network, in their view. Likewise, whilst the studies submitted show growth of and competition from low cost carriers (recital (105)), they do not explain, let alone demonstrate that TAP Air Portugal’s services and network could be replicated or substituted with near certainty by one carrier or specific combinations thereof. On the contrary, as set out in recitals ((100) and (132)), many third parties which rely on them have voiced concerns regarding a possible loss of TAP Air Portugal’s services. The information provided in the course of the formal investigation, therefore, confirms the Commission’s finding that there is indeed a concrete risk of an immediate failure of the beneficiary to meet its payment obligations, thus leading to a risk of disruption of the economic activity of air transport services provided TAP Air Portugal.

- (208) Hence, the failure of the beneficiary would in turn risk disrupting an important transport service providing international and nation-wide connectivity and network - connecting mainland Portugal and its islands, as well as the Portuguese-speaking community overseas- which is hard to replicate for other suppliers as set out in point 44(b) of the R&R Guidelines.

The aid supports an undertaking with a systemic role

- (209) The aid also seeks to avert the risk of exit of an undertaking that performs an important service with a systemic role in Portugal within the meaning of point 44(c) of the R&R Guidelines.
- (210) In this respect, the Commission considers that the beneficiary undoubtedly plays a key role in the Portuguese economy⁵⁹, not only for the development of tourism and connectivity with the Portuguese-speaking countries, but also in terms of employment. First, the beneficiary has an important systemic role for the whole of the Portuguese territory as it supports the growth of Portuguese tourism, one of the Member State's most important sectors, which accounted for 14.6% of Portugal's gross domestic product ("GDP") in 2018. That sector was of paramount importance for the Portuguese economic recovery from the financial and sovereign debt crisis after the 2008 crisis. Tourism contributes approximately EUR 19 billion to Portugal's GDP, which represented 8.7 % of 2019 GDP there being no indication that economic recovery post pandemic would significantly affect the composition of the Portuguese GDP and the contribution of tourism thereto. Second, with approximately 10 000 employees (in 2019), TAP SGPS is one of the largest employers in the country and accounts for more than 110 000 indirect jobs. Those figures demonstrate that a possible insolvency that TAP SGPS would face in the absence of the restructuring aid would have a significant negative spill-over effect on the entire Portuguese economy.

Review of claims raised in third party observations and conclusions

- (211) The preliminary findings of the Commission in the opening decision are contested by Ryanair. Ryanair claims, first, that there is no evidence of a risk of disruption to an important service that is hard to replicate. According to Ryanair, competitors that are stepping in could replicate TAP Air Portugal's services. More precisely, Ryanair claims, firstly, that it could easily replace TAP Air Portugal on short-haul flights, whereas, on long-haul flights, there are enough competitors flying from Lisbon who could overtake the capacities of TAP Air Portugal. Secondly, Ryanair claims that TAP Air Portugal is not a systemic undertaking and even assuming that it is, the opening decision does not explain whether downsizing TAP SGPS and suppressing the non-systemic or loss making activities could not preserve systemic activities.
- (212) Ryanair's claims are largely rebutted, first, by the submissions of other third parties and, secondly, by the information submitted by Portugal (recitals (138) to (141)).
- (213) The Commission's preliminary findings in the opening decision have been strongly supported by third parties. Out of 39 replies to the invitation to submit comments on

⁵⁹ According to the notification, in 2019, TAP SGPS contributed EUR 3.3 billion to the Portuguese GDP (accounting for 1.2 % of total GDP of the country) and EUR 300 million in direct taxes and social contributions. TAP SGPS's contribution to Portuguese exports is close to EUR 2.6 billion, while the value of services and goods purchased by TAP SGPS from more than 1000 national suppliers is close to EUR 1.3 billion.

the opening decision, 36 parties have expressed their support for the Commission's view on the importance of TAP Air Portugal as the most important provider of connectivity between Portugal and the other Portuguese-speaking countries (in particular, Brazil, Angola, Mozambique and São Tomé), as well as connecting the whole Europe with Portugal, and through its Lisbon hub, with the abovementioned countries. All stakeholders other than the two direct competitors support the plans for restructuring aid to TAP SGPS and confirm the important role TAP Air Portugal plays, in particular, for the economy of Portugal.

- (214) On the basis of the information in its possession, the Commission also notes that, while some of TAP Air Portugal's routes might be attractive for a competitor on a stand-alone basis, there are no indications that any competitor could take over the whole of TAP SGPS' services. TAP SGPS' market exit would thus be likely to trigger severe social hardship for its clients, staff and suppliers.
- (215) The Commission notes, in particular, that, contrary to its competitors, TAP Air Portugal is currently a major provider of connectivity for passengers travelling to and from the Portuguese-speaking countries. As already mentioned (section 4.2), that company plays a crucial role for the connectivity of Portugal and the whole of Europe with Brazil, Angola, Mozambique and São Tomé. While the services of TAP Air Portugal could theoretically be replaced by several operators within the time-span of the restructuring plan, such replacement could only be partial and would entail an important worsening of services in particular for customers located in Portugal. In the meantime, the downsizing of TAP Air Portugal that Ryanair calls for disregards the negative spill-over effects of reduction of, among other things, a sizeable number of intra-union connections in the hub model of TAP Air Portugal relying also on intercontinental routes that could be irretrievably jeopardised in a mid-term perspective⁶⁰.
- (216) The other largest airlines in Portugal (Ryanair, EasyJet) provide connectivity between Portugal and other Member States of the Union only and their business model excludes long-haul intercontinental flights. Other major EU air carriers offering intercontinental connections from Lisbon operate a hub-and-spoke model. That means that instead of providing direct flights to overseas destinations from Lisbon airport, they would rather transfer passengers from Portugal to their hubs in other Member States such as Orly/Roissy, Schiphol, Frankfurt or Munich before transporting them to such destinations. This in turn would importantly extend the overall duration of flights from Portugal to western or southern destinations.
- (217) Hence, both as employer and as central element in the economic chain for many other Portuguese undertakings, the beneficiary can be considered as an undertaking with a systemic role pursuant to point 44(c) of the R&R Guidelines.
- (218) In the light of the above, the Commission therefore concludes that the aid contributes to the development of the economic activity of provision of air transport services connecting Portugal in that it allows to maintain an important service that could risk

⁶⁰ In that respect, the Commission assessment of the impact on viability of the competition measure consisting of transferring 18 slots implies a reduction and allows the opening of three routes involving three rotations in intra-Union point to point connections. The effect is a reduction by [...] % on the return on capital employed of TAP Air Portugal and a [...] of its debt to equity ratio (Table 3). The assessment thus implies that a broader and more significant reduction of profit-making routes in intra-Union flights that feed the intercontinental flights could impair its ability to sustain its standing on the market without access to market funding, thus requiring more aid by the end of the restructuring period.

not being replicated in its entirety or to broadly similar extent and without social hardship by competitors in the short to medium term, with potential negative consequences on the larger economy of Portugal, ensuing the current crisis caused by the Covid-19 pandemic (point 44 (b) and (c) of the R&R Guidelines).

6.4.1.2. Restructuring plan and return to long-term viability contributing to the development of the economic activity or area

- (219) In addition, under point 46 of the R&R Guidelines, granting of a restructuring aid must be conditional on implementation of a restructuring plan that would restore the viability of the beneficiary. The remediation of the causes that led to the difficulty of the beneficiary, by facilitating its return to long-term viability, is a necessary condition for the restructuring aid to serve the development of the economic activity(ies) and areas where the beneficiary operates. The restructuring aid supports a wide-ranging restructuring plan encompassing the entire perimeter of activities of TAP SGPS and of TAP Air Portugal.
- (220) Under points 45 to 48 of the R&R Guidelines, restructuring aid should only be granted to support a realistic, coherent and far-reaching restructuring plan, the measures of which must be designed to restore long-term viability in a reasonable timescale, excluding any further aid beyond the one supporting the beneficiary's restructuring plan. The restructuring plan must outline how the proposed restructuring measures will remedy the beneficiary's underlying problems.
- (221) The results of the restructuring must be demonstrated in a variety of scenarios, in particular by identifying performance parameters and the main foreseeable risk factors. The return to viability of the beneficiary must result in an appropriate return on capital invested after covering costs, without depending on optimistic assumptions about factors such as variations of price or demand. Long-term viability is achieved when an undertaking is able to provide an appropriate projected return on capital after having covered all its costs including depreciation and financial charges and is also able to compete in the marketplace on its own merits.
- (222) In this section, the Commission will first assess the credibility of the assumptions underlying the beneficiary's restructuring plan and then the evidence of the beneficiary's return to viability at the end of the restructuring plan.

Assessment of the assumptions underlying financial projections

- (223) With regard to the credibility of the assumptions underlying the revenue projections, the Commission notes that the beneficiary's air traffic recovery projections are more conservative than IATA's baseline forecasts. While IATA predicts a volume of passengers in 2025 equal to 109% of that in 2019, the beneficiary assumes that only [...] % of the 2019 passengers will be flying in 2025, the end of the restructuring plan (recital (51)). Furthermore, the beneficiary assumes a slightly lower yield in 2025 (EUR cent [...]) vs 2019 (EUR cent [...]), while the load factor in 2025 is expected to be [...] percentage points higher than in 2019 ([...] % compared to [...] %). Finally, the beneficiary's revenue per ASK is lower in 2025 than in 2019 (EUR cent [...]) compared to EUR cent [...]), which indicates that the beneficiary has already been able to achieve similar revenue per ASK targets immediately before the start of the restructuring period. Since the beneficiary's traffic projections are more conservative than IATA's forecasts, and the revenue-related key performance indicators are in line with the beneficiary's historical values in 2019, the Commission considers the beneficiary's revenue projections as reasonable.

- (224) With regard to the cost projections, the Commission observes that the beneficiary's return to profitability hinges on the reduction of costs, especially fuel and labour, as described in section 2.4.3. With regard to fuel, projections take into account the operation of newer, more fuel-efficient aircraft and rely on market-implied expectations on fuel prices retrieved from the Bloomberg database. Since the delivery schedules of the new aircraft have already been negotiated with suppliers, the fuel consumption of such aircraft is objective and verifiable data and so is the expectation of fuel prices; the Commission thus considers the fuel cost projections as credible.
- (225) With regard to labour cost projections, the Commission notes that the beneficiary has already signed agreements with all its trade unions until 2024 (the Emergency Agreements), which are applicable to all its employees. The Emergency Agreements envisage salary reductions, freeze of automatic salary increases and productivity improvements. Furthermore, the beneficiary already obtained a 1200 FTE reduction through the non-renewal of fixed-term contracts and started the process to achieve an additional 2000 FTE reduction through both voluntary measures and dismissals. The beneficiary has also started preparing the negotiation of new collective bargaining agreements, which will replace the Emergency Agreements, and has already obtained the commitment of several labour unions to the 2025 cost targets of the restructuring plan. Overall, considering the beneficiary has already achieved negotiations on most of the assumptions underlying the labour cost projections, the Commission finds those projections credible.
- (226) The Commission considers that the following elements also contribute to the credibility of the financial projections. First, the beneficiary already identified and started implementing multiple measures aiming to reduce costs other than labour and fuel (recital (35)). Second, financial projections do not include EUR [...] million (out of EUR [...] million) revenue increases that the beneficiary has envisaged (section 2.4.1.4), which creates an additional safety buffer. Third, the restructuring plan focuses on the aviation business and envisages the sale or closure of non-core activities, such as M&E Brasil, which has been historically loss-making and contributed to the difficulties of the beneficiary (section 2.4.1.1).
- (227) To assess the overall reasonableness of the beneficiary's financial projections, the Commission has compared the beneficiary's expected EBIT margin (i.e. EBIT divided by revenues) in 2025 to that of a sample of peers for which stock market analyst forecasts for the same year are available⁶¹. The average EBIT margin in that sample is 13.1%, while the beneficiary's one is expected to be [...]%. Therefore, the Commission finds the beneficiary's profitability projections in 2025 to be in line with those of its average peer, which provides an additional indication of the credibility of the assumptions underpinning the restructuring plan.

Assessment of the beneficiary's return to viability

- (228) Having established the credibility of the assumptions underlying the financial projections, the Commission will now assess whether, based on those projections, the beneficiary is able to return to viability by the end of 2025, the end of the restructuring plan. More specifically, the Commission will verify whether, in 2025, the beneficiary expects to generate a sufficient rate of return from its operation and be able to compete on its own merits.

⁶¹ The sample includes: Lufthansa, IAG, SAS, Aegean and Finnair, Ryanair, Easy Jet and Wizz Air.

- (229) With regard to the beneficiary's ability to generate a sufficient return from its operations in 2025, a customary approach is to compare the return on capital employed (ROCE)⁶² in 2025 to the weighted average cost of capital (WACC). If the former is greater than the latter, the operations of a company are able to generate sufficient profits to cover its cost of capital, which is an indication of that company's viability.
- (230) The beneficiary's ROCE, whose calculation hinges on the financial projections that the Commission has assessed as credible in recitals (223) - (227), is expected to be [...] % in 2025, according to Portugal (recital (48)). That value is the ratio between the pre-tax EBIT and capital employed in 2025. However, since the viability test consists in comparing the ROCE to the WACC, which is a post-tax rate of return, the Commission considers it is more appropriate to compute the ROCE using post-tax EBIT. Moreover, in order to smooth out the yearly fluctuations in balance sheet variables, the Commission also finds it reasonable to use the average capital employed in 2024 and 2025, instead of the capital employed in 2025, as the denominator of the ROCE in 2025. With those two changes, the Commission obtains a ROCE of [...] %.
- (231) The ROCE value of [...] % is higher than the beneficiary's WACC of [...] %. Such WACC, in line with the standard methodology, consists in a weighted average of the beneficiary's cost of equity ([...] %) and cost of debt ([...] %), with weights equal to the beneficiary's target debt to debt plus equity ratio ([...] %). Those components of the WACC are appropriately justified, based on market data and financial information on the beneficiary's peers retrieved from Capital IQ and Reuters (footnote 61). More specifically, the cost of equity calculation assumes a risk-free rate of [...] %, which is well above the current negative yields on German 10-year government bonds, an equity risk premium of 4.72% and a country risk premium of 1.95%, which are both in line with publicly available benchmarks⁶³, and a beta of [...].⁶⁴ Such beta is the average stock beta of the beneficiary's peers in footnote 61, adjusted to reflect differences in debt to equity ratios and tax rates, in line with the standard Hamada formula. The cost of equity also incorporates a small size risk premium of 1.75%, as calculated by Duff & Phelps. With regard to the cost of debt, it is an average of the current yield on the beneficiary's outstanding debt ([...] % pre-tax, [...] % post-tax), which is a conservative assumption since the beneficiary's indebtedness and creditworthiness ratios are expected to improve over the planning period. Therefore, the Commission considers that the beneficiary will be able to return to viability in 2025, based on the reasonable expectation that its ROCE in 2025 will be higher than its WACC.
- (232) The Commission also notes that the expected ROCE in 2025 is higher than the median 2019 ROCE ([...] %) of the peer airlines listed in footnote 61. That is a further indication of the beneficiary's return to viability, since those airlines, in 2019, were able to compete in the market on their own merit.

⁶² ROCE in year t is defined as after-tax EBIT in year t divided by the average capital employed in year t and t-1.

⁶³ Equity and country risk premiums available on Prof. Damodaran's website (https://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/ctryprem.html).

⁶⁴ The cost of equity is calculated as the sum of the risk free rate, the country risk premium the small size risk premium and the product of the beta and the equity risk premium.

- (233) The beneficiary's return to viability is corroborated by an alternative approach, namely the comparison between the return on equity (ROE) and the cost of equity. Such approach focuses on the profits accruing to shareholders, while that in recital (230) hinges on the profits generated by a company's operations. From the point of view of shareholders, a company is viable if it generates a ROE higher than the cost of equity. The Commission observes that holds true for the beneficiary in 2025, since the expected ROE is [...] % and the cost of equity is [...] %.
- (234) To ensure the robustness of the return to viability assessment, the Commission has considered an alternative approach to the calculation of the WACC and cost of equity. That approach consists in using the beneficiary's expected debt to equity ratio in 2025 ([...]), instead of that of peers (1.5), to adjust the peers' stock beta for differences in leverage and compute the weights of debt and equity in the WACC formula. As a result of that assumption, the cost of equity increases from [...] % to [...] %, reflecting the higher leverage and hence riskiness of the beneficiary's equity compared to its peers. Moreover, the WACC goes from [...] % to [...] %, due to the counterbalancing effects of a higher cost of equity and a lower weight of equity in the beneficiary's capital structure. Overall, considering the expected ROCE (ROE) in 2025 is [...] % ([...]), the Commission concludes that the return to viability tests are met even under such an alternative approach to calculate the WACC and cost of equity.
- (235) With regard to the beneficiary's ability to compete on its own merits at the end of 2025, the end of the restructuring plan, the Commission expects the beneficiary to restore its full access to capital markets without public co-funding by 2025, that is three years after the last equity support. That expectation hinges on the following arguments. First, the financial projections show an increasing net income over the planning period, contributing to a positive equity level of EUR [...] million in 2025. That value is higher than TAP Air Portugal's equity position of EUR [...] million in 2019, when the beneficiary could raise EUR [...] million long-term finance at market conditions (recital (23))⁶⁵. Second, the beneficiary expects a net debt to EBITDA ratio of [...]. Such ratio is [...] than the 3.5 threshold, which is the upper threshold consistent with an investment grade rating and hence ensuring an easier access capital markets, according to market practice. For these reasons, the Commission considers the beneficiary to be able to compete on its own merits without further rescue or restructuring aid by 2025.
- (236) As further evidence of the beneficiary's ability to access capital markets without State support and hence compete on its own merits in the future, the Commission notes promisingly that the beneficiary has already secured EUR [...] million of aircraft leasing contracts and negotiated already partly non-State guaranteed loan with [...], which declared to be highly confident in the positive closing of future funding needs up to the amount of EUR [...], should liquidity need to be enhanced. Both of these elements are indicative already of the beneficiary's ability to restore its full access to capital markets and represent a signal of market confidence into its return to viability once the restructuring aid is in place.
- (237) In addition to the baseline scenario, Portugal provided a sensitivity analysis and contemplated various adverse scenarios (recitals (52) and (53)). The former analysis consists in an update of the financial projections compared to the notified plan of

⁶⁵ Source: Annual report of TAP Air Portugal for 2019, page 53.

June 2021, taking into account the improvement of air traffic forecasts, but also the increase in fuel prices and the rising inflation expectations. The adverse scenarios build on the notified plan of June 2021 and consist in simulating the effect of higher fuel prices ([...] % increase), lower yields ([...] % decrease) and a combination thereof. The Commission considers those sensitivity analyses and adverse scenarios as reasonable, as they simulate the effects of adverse changes to key elements for the profitability of airlines.

- (238) The Commission observes that, while those adverse scenarios have a negative impact on the profitability and creditworthiness of the beneficiary, they do not jeopardize its return to viability by 2025. In the scenario with [...] % higher fuel price and [...] % lower yields (recital (52)), the beneficiary would generate a positive EBIT [...], and attain an EBIT of EUR [...] million [...], instead of EUR [...] million. In the adverse scenario with updated financial projections (recital (53)), the ROCE in 2025 [...], while the ROE decreases from [...] % to [...] %. Those ratios still indicate significant profitability and are higher than the viability thresholds, even assuming the most conservative configuration of WACC ([...] %) and cost of equity ([...] %). With regard to the beneficiary's ability to access capital markets and compete on its own merits in 2025, it would not be jeopardised, because the equity position would still be positive (EUR [...] million) and net debt to EBITA ratio would not exceed [...], reaching the value of [...].

Conclusion on the facilitation of the development of economic activities and areas

- (239) In conclusion, the Commission considers the beneficiary's restructuring plan as realistic, coherent and credible. As such, it is suitable to restoring the beneficiary's long-term viability without relying on further State aid within a reasonable period of time. Therefore, the restructuring aid meets the requirements provided for in points 44(b) and (c) and 46 of the R&R Guidelines, thus contributing to developing the economic activity of air transport services connecting Portugal, as required by Article 107(3)(c) TFEU.

6.4.2. Positive effects of the aid for economic areas outweigh the negative effects on trade and competition

- (240) In order to assess whether the aid does not unduly affect the competition and trading conditions it is necessary to examine the necessity, appropriateness and proportionality of the aid, and to ensure transparency. It is also necessary to examine the effects of the aid on competition and trade and weight the positive effects of the aid for the development of the economic activities and areas, as well as other positive effects, that the aid intends to support against its negative effects on the internal market.

6.4.2.1. Necessity

- (241) Under point 53 of the R&R Guidelines, Member States that intend to grant restructuring aid must provide a comparison with a credible alternative scenario not involving State aid, demonstrating that the development of the economic activities or areas sought by the aid, referred to in section 3.1.1 of the R&R Guidelines will not be attained or would be attained to a lesser degree.
- (242) The objective of the restructuring aid is to avoid that TAP SGPS goes out of business, and thereby to avert a situation of market failure and social hardship which would inhibit the development of air transport services connecting Portugal. That objective is achieved through the implementation of the restructuring plan, partially

financed by the restructuring aid. The restructuring plan shows that both liquidity and solvency issues of the beneficiary need to be addressed to resolve its financial problems. In the short term, TAP SGPS is not able to ensure the continued provision of essential air transport, comply with financial obligations or have access to financial markets. In the long term, given the sheer negative equity of EUR [...] billion that will continue for a prolonged period, TAP SGPS is also unable to fulfil its financial obligations. The restructuring aid is therefore necessary for the successful completion of the restructuring plan, the implementation of which in turn seeks to facilitate the development of air transport services connecting Portugal.

6.4.2.2. Appropriateness

- (243) Under points 38(c) and 54 of the R&R Guidelines, the Commission will not consider restructuring aid to be compatible with the internal market if other less distortive measures allow the same objective to be achieved. Restructuring aid must be properly remunerated and fulfil the conditions laid down in point 58 of the R&R Guidelines, so that the instruments chosen must be appropriate to the solvency or the liquidity issue that it is intended to address.
- (244) The competitors contested the Commission's preliminary finding in the opening decision that the restructuring aid was appropriate in form. Ryanair claims that the aid is not appropriate, as the opening decision does not present or compare the aid with other options involving or not involving State aid. EAA claims that the form of aid, composed mainly of equity injection is not appropriate and goes beyond what is necessary, as a State guarantee (without any equity measures) would be sufficient to facilitate access to capital markets and this way restore the liquidity and solvency of TAP. EAA's claim is not substantiated by any evidence, whereas Ryanair does not take into account the present situation evidenced by a lack of sufficient access to capital markets to select an investor willing and capable of providing equity or long term funding. By contrast, the discussions securing both immediate and contingent financing with [...] corroborate the inability of TAP SGPS/TAP Air Portugal at present to raise capital at large scale ⁶⁶.
- (245) Moreover, the Commission considers the EUR 2.55 billion restructuring aid to TAP SGPS as appropriate in form, for the following reasons. First, TAP SGPS was an undertaking in difficulty with negative equity in 2019 (EUR [...] million). It recorded losses of EUR [...] billion in 2020 and expects a positive net income [...]. Absent the restructuring aid, the beneficiary would not be able to build enough equity to offset the roughly EUR [...] billion [...], without which TAP SGPS or TAP Air Portugal could likely not be able to attract significant long-term debt or investment funds in capital markets. In that respect, the Commission also notes that, in 2025, the beneficiary expects an equity position of EUR [...] million, which is not excessive compared to the expected net debt of EUR [...] billion. Second, the liquidity projections show that, absent the restructuring aid, the beneficiary would have a negative cash position of roughly EUR [...] billion in 2021, EUR [...] billion in 2022 and EUR [...] billion in 2023. For these two reasons, the Commission concludes that the size and form of the restructuring aid provided through mainly equity measures is the most appropriate to address TAP SGPS' problems of solvency and liquidity.

⁶⁶ [...].

- (246) With regard to the remuneration of the State aid, the Commission notes that the structure of the intervention of the Portuguese State is such that it will own 100% of TAP Air Portugal's share capital. The Commission considers the value of that share capital, which Portugal can realise through a sale, as the remuneration of the State aid. To quantify such remuneration, the Commission has carried out a valuation of TAP Air Portugal's equity (recital (229)) on the basis of the financial projections in the notified restructuring plan and by relying on standard valuation methodologies, i.e. the discounted cash flow and multiples method.
- (247) To estimate the value of TAP Air Portugal's equity, the Commission has first estimated its total enterprise value. To that end, it has discounted the free cash flows to the firm (FCFF) over the planning period, as well as the terminal value, by using the WACC referred to in recital (230) as a discount rate. The Commission employed two approaches to calculate the terminal value. The first is the Gordon growth approach, which assumes a constant growth rate of the company's free cash flows to the firm, from the last year of the plan in perpetuity. The second is the multiples method, by which a company is worth a multiple of its profits. The Commission has considered EBITDA as the relevant profit metric, in line with market practice, and has retrieved the (forward looking) enterprise value to EBITDA multiple from peer airlines (footnote 61). Having estimated the total enterprise value of TAP Air Portugal, the Commission calculates its value of equity by subtracting net debt.
- (248) The estimates of the Commission show an increasing value of TAP Air Portugal's equity over the planning period, which goes from EUR [...] – EUR [...] million in 2022 to EUR [...] million in 2025⁶⁷. The Commission considers that is a reasonable expectation, as of today, of the remuneration that Portugal could earn on the State aid by selling its stake into TAP Air Portugal.
- (249) It follows that the restructuring aid is adequate in form and sufficiently remunerated.

6.4.2.3. Proportionality of the aid: own contribution and burden sharing

- (250) Under point 38(e) of the R&R Guidelines, aid must not exceed the minimum needed to achieve the objective sought by the restructuring aid. The amount and intensity of restructuring aid must be limited to the strict minimum necessary to enable restructuring to be undertaken, in the light of the existing financial resources of the beneficiary, its shareholders or the business group to which it belongs (point 61 of the R&R Guidelines). In particular, a sufficient level of own contribution to the costs of the restructuring must be ensured and, where State support is given in a form that enhances the beneficiary's equity position, burden sharing. The assessment of those requirements will take account of any rescue aid granted beforehand.
- (251) The own contribution of the beneficiary to the restructuring plan must be real and actual and should normally be comparable to the aid granted in terms of effect on the solvency or liquidity position of the beneficiary. Pursuant to point 63 of the R&R Guidelines, the Commission needs to assess whether the various sources of own contribution are actual and aid-free. According to point 64 of the R&R Guidelines,

⁶⁷ To calculate the terminal value using the Gordon growth model, the Commission assumes a growth rate of 1.5%, perpetual investment equal to depreciation in 2025, perpetual EBIT equal to EBIT in 2025 and zero changes in net working capital. With regard to the multiples method, the Commission retrieved a median enterprise value to (forward looking) EBITDA ratio of 4.16 by using data on the beneficiary's peer airlines from Capital IQ. Forward looking means the stock market analyst forecast of EBITDA in 2025.

the Commission normally considers the own contribution to be adequate if it amounts to more than 50 % of the restructuring costs.

- (252) The Commission needs to verify whether the various sources of funding to the plan described in recitals (43) to (45), are free of aid and real, that is sufficiently certain to materialise in the course of the implementation of the restructuring plan, excluding expected future profits. Contributions by the State in its position of shareholder of TAP SGPS and of TAP Air Portugal are not free of aid and cannot be taken into account in the assessment.
- (253) The payment of labour restructuring indemnities for EUR [...] million, of which EUR [...] million already paid in 2021 (recital (43)a), regards costs that are pertinent to the reduction of employees foreseen by the restructuring plan. Such costs are immediate, given that TAP Air Portugal has already terminated labour contracts, as part of the labour rightsizing and restructuring undertaken as from April 2020 and minor in proportion of the revenues already cashed in until December 2021. The overall amount of indemnities relating to the termination of the employment contracts as a consequence of the restructuring is reported by Portugal as being equal to EUR [...] million, of which the mentioned are paid directly by TAP Air Portugal with operational cash flow, whereas EUR [...] million will be financed effectively by the State with resources stemming from the rescue aid loan. Hence, the part of labour restructuring indemnities that is not financed by State aid, neither from the equity nor from the State guaranteed loan, can be considered as the beneficiary's own contribution to these costs and can be regarded as real, that is to say actual, within the meaning of point 63 of the R&R Guidelines.
- (254) Similarly, the payment of contingencies associated with the divestment [...] EUR [...] million (recital (43)f)), refers to contingencies (in particular, [...] % [...], [...] % [...], [...] % [...]), which in the context of the divestment via sale of this asset will be paid by TAP SGPS and will not be passed on to the acquirer. They constitute a pre-defined amount of exposure that the beneficiary will assume from its own resources, for an amount affordable with its immediate –and much larger- revenues in 2022 from its revenues and not from State aid. The Commission therefore considers that they may also be included as own contribution and that they are real and actual, given the commitment for the divestiture of this asset within 2022 set forth in the restructuring plan (recital (29)).
- (255) With regard to contributions from third parties or cost-efficiency measures totalling EUR [...] million (recital (43)), the Commission notes that permanent cost reductions borne or made possible by external suppliers or clients with the beneficiary may amount to real and actual sources of own contribution, provided they result from binding agreements and are effective and not reversible. In particular, cost reductions borne by stakeholders in relation to this kind of cost savings must be effective, lasting and not reversible to amount to real and actual source of own contribution⁶⁸. The Commission has already considered that reductions of contractual liabilities set out in renegotiated agreements with suppliers and lessors amount to real sources of own contribution: compared to the terms of the

⁶⁸ Commission Decision of 30 April 2021 in case SA.58101 (2020/C) and SA.62043 (2021/N) – Portugal - Rescue aid and Restructuring aid to SATA Group (OJ C 223, 11.6.2021, p.37), recital 72; Commission Decision of 26 July 2021 in case SA.63203 (2021/N) – Germany - Restructuring aid for Condor (not yet published),, recital 132 c); Commission Decision of 12 May 2016 in case SA.40419 (2015/NN) – Restructuring aid for Polzela (OJ C 258, 15.7.2016, p. 3), recital 119.

initial agreements, they free resources that are available for financing restructuring costs which otherwise would have to be spent on repaying the associated payables.⁶⁹ The same is true with regard to suppliers and buyers that firmly commit or amend the terms of their contracts freeing resources from the beneficiary.⁷⁰

- (256) In the light of the fact that the over [...] contracts renegotiated by TAP Air Portugal are grounded in legally binding acts, of which EUR [...] million represented by contracts already implemented and EUR [...] million represented by contracts already committed, these operational restructuring measures can be considered real and actual contributions. Indeed, such measures share the financial burden of TAP SGPS's restructuring costs with suppliers that would be otherwise entitled to higher payables on its positive operating results.
- (257) Likewise, the contributions linked to asset phase-outs and renegotiations with original equipment manufacturers (notably [...]) for up to EUR [...] million (recital (43)d), represents the proceeds of the sale of assets, namely [...] ([...]), [...]. Indeed, as these measures are cash proceeds and contributions from own resources of the beneficiary stemming from buyers of equipment or assets, they can be considered as real resources contributed to the restructuring. Furthermore, such contributions can be considered as actual, given that they are already implemented through contracts signed with the beneficiary's counterparts. The same reasoning applies to the finance obtained to lease new aircraft up to EUR [...] million (recital (43)c)), taken into account the evidence submitted by Portugal of the commitments on finance regarding nine tails and two engines signed as part of the restructuring plan.
- (258) In respect of partial State guarantees provided in the context of a restructuring operation, the Commission has considered that the remaining portion of risk borne by market actors amounts to a valid and real contribution to restructuring costs⁷¹. Hence, the portion ([...])% of the EUR [...] million financing, which is non-guaranteed by the State, namely EUR [...] million (recital (43)e)), may be considered as a real and actual contribution of a market lender to the restructuring costs. Likewise, the fresh funding negotiated with a private financial institution ([...]) for up to EUR [...] million amounts to a real and actual contribution, which can be executed [...] onwards, contingent on liquidity needs exceeding operating cash flows (recital (43)e)).
- (259) In the case of bonds and syndicated loans for a total amount of EUR [...], mentioned in recital (43)g), the deferrals provide the benefit of postponing payments that were due and would have been otherwise enforceable. Regarding agreed restructuring operations with deferrals of debt that maintain an obligation to reimburse the principal amount owed, the Commission considers, contrary to the initial contention of the Portuguese authorities, that the contribution to restructuring costs is lower than the nominal amount deferred and consists of the net present value of the agreed rescheduling of payments⁷². The deferrals involve a total value amount of EUR [...]

⁶⁹ Commission Decision of 8 June 2015 on the State aid which Slovenia is planning to implement for the Cimos Group (SA.37792 (2014/C) (ex 2013/N)) (OJ L59, 4.3.2016, p. 168), recital 80.

⁷⁰ Commission Decision of 20 August 2018 in case SA.51408 (2018/N) – Aid to Terramass B.V. (OJ C 406, 19.11.2018, p. 10), recitals 22 and 71.

⁷¹ Commission Decision of 27 August 2021 in case SA.64175 (2021/N) – CNIM – Aide à la restructuration (OJ C 450, 5.11.2021, p. 2), recitals 18 and 71.

⁷² Commission Decision of 9 July 2014 in case SA.38324 (2014/N) – Spain – Restructuring aid for Alestis (OJ C418, 21.11.2014, p. 6), recital 82.

million of real contribution. The amount is estimated by calculating the difference in net present value between repayment at maturity date or immediate repayment in application of the covenants waived, discounted at the market interest rate ([...]) [...]: EUR [...] million [...], EUR [...] million [...], [...] EUR [...] million [...].

- (260) In the light of the above, the total amount that can be considered real and actual contribution by the beneficiary is EUR [...] million, equal to [...] % of the restructuring costs. Of these, EUR [...] million stem from fresh finance at market conditions provided by the proceeds from sale of [...], finance lease covering [...] aircraft and engines and new finance from [...] (recital (43)). These amounts may increase within the duration of the restructuring plan with proceeds from the [...] but, the amount of which, however, cannot be estimated and established with sufficient certainty to be deemed an actual own contribution from the beneficiary to restructuring costs.
- (261) In line with point 64 of the R&R Guidelines, the Commission may accept a contribution that does not reach 50% of the restructuring costs only in exceptional circumstances and in cases of particular hardship, if the amount of that contribution remains significant.
- (262) In the current circumstances following the outbreak of the COVID-19 pandemic, the Commission considers that it may be justified, depending on the individual case, that own contributions remain below the threshold of 50% of the restructuring costs, as long as they remain significant and include additional fresh funding at market conditions⁷³. By way of indication of a level which the Commission would consider appropriate in the present case, in its case practice, the Commission has considered that an own contribution amounting to 24% of the restructuring costs may be significant and, thus, that restructuring aid amounting to 76% of the restructuring costs may be proportionate⁷⁴.
- (263) The Commission considers that Portugal has demonstrated the presence of exceptional circumstances. In particular, the Commission acknowledges that the COVID-19 pandemic and the measures taken to contain it have created exceptional circumstances for the beneficiary, in the context of a serious disturbance of the economy within the meaning of Article 107(3)(b) TFEU, with immediate impact on the mobility and air transport sectors and its ability to raise market funding. Since the own contribution amounts to [...] % of the restructuring costs and half of it is provided as fresh finance, the Commission concludes that in the present case an amount of contribution lower than 50% is acceptable.
- (264) Pursuant to points 65 to 67 of the R&R Guidelines, State support given in a form that enhances the beneficiary's equity position can have the effect of protecting shareholders and subordinated creditors from the consequences of their choice to invest in the beneficiary, thus creating moral hazard and undermining market discipline. Consequently, aid to cover losses should only be granted on terms that involve adequate burden sharing by existing investors and State intervention should

⁷³ Temporary Framework as amended, points 3 and 14 bis.

⁷⁴ Commission Decision of 24 April 2007 relating to the aid measure implemented by Belgium in support of Inter Ferry Boats (C 46/05 (ex NN 9/04 and ex N 55/05)) (OJ L 225, 27.8.2009, p. 1), recitals 348-350. In that case, the Commission applied the 1999 R&R Guidelines which required that the own contribution ought to be significant, without specifying a minimum threshold of application, which was set to 50% in the 2004 R&R Guidelines.

take place after losses have been fully accounted for and attributed to the existing shareholders and subordinated debt holders. Adequate burden sharing will also mean that any State aid that enhances the beneficiary's equity position should be granted on terms that afford the State a reasonable share of future gains in value of the beneficiary, in view of the amount of State equity injected in comparison with the remaining equity of the company after losses have been accounted for.

- (265) In this respect, whilst the restructuring aid mainly consists of injections or conversion of debt instruments into equity, the Portuguese State exercised joint control over the beneficiary as shareholder before the rescue aid was granted and now holds a controlling interest on both the beneficiary and in TAP Air Portugal (recitals (8) to (12)). It follows that the Portuguese State has been closely associated to the strategic and financial choices described in recitals (19) to (22) that led the beneficiary to become an undertaking in difficulty. Accordingly, with a view to averting moral hazard through adequate burden sharing, it is pertinent to note that the intervention of the State as provider of restructuring aid addresses a situation of financial imbalances and losses to which the State was associated as shareholder with joint control over the beneficiary. As indicated by Portugal, TAP SGPS will [...] (recital (45)).
- (266) It follows that existing shareholders of the beneficiary, including the Portuguese State, will adequately share the burden of the restructuring because, in practice, the value of their present holdings will be reduced to zero in the loss absorption. Moreover, TAP SGPS will progressively divest its operating subsidiaries Cateringpor, Groundforce, M&E Brazil, emptying it of commercial activities. As a result, the restructuring aid in the form of State equity will be granted on terms that afford the State all future gains in value of the beneficiary, in comparison with the remaining equity, thus satisfying the condition of adequate burden sharing of existing shareholders set out in point 67 of the R&R Guidelines.
- (267) As a matter of fact, the financial institutions and investors holding bonds that are creditors of the beneficiary and/or its subsidiaries referred to in recitals (67)a) and (43)g) hold senior debt that is neither subordinated to the payment of other financial debt but before shareholders in case of insolvency or liquidation nor loss-absorbing. Whilst the R&R Guidelines do not require that senior creditors share the burden of a restructuring operation, in the present case, bondholders and financial institutions actually contribute to covering the restructuring costs of the beneficiary (recital (259)).
- (268) Furthermore, as regards bond holders and with a view to averting moral hazard, it is appropriate to note that the bond issuances of the beneficiary took place in June and in December 2019 (recital (23)), relatively close to the pandemic. Accordingly, these investors or lenders have not financed or otherwise incentivised excessive risk-taking or expansion or commercial behaviour having contributed to the difficulty of the beneficiary. It follows that the burden sharing provided by existing shareholders of the beneficiary is adequate and sufficient.
- (269) The Commission therefore concludes that the restructuring aid is proportionate and involves appropriate burden sharing.

6.4.2.4. Negative effects

- (270) Pursuant to point 38(f) of the R&R Guidelines, when restructuring aid is granted, measures must be taken to limit distortions of competition, preferably structural in the form of divestments of self-standing activities favouring expansion of small

competitors or cross-border activity. Moreover, to reduce negative effects on competition and trade, recipients of rescue or restructuring aid should in principle also not have received similar aid in the past ten years. For, otherwise recurrent rescue or restructuring plans cast doubts on the ability of the beneficiary to contribute aggregate productivity and thus, the development of the economic activities or regions at hand, whereas more efficient competitors in the internal market face subsidised competition from a company that would otherwise disappear freeing market to grow and take up.

6.4.2.5. 'One time, last time' principle

- (271) 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. Therefore, where less than ten years have elapsed since rescue aid, restructuring aid or temporary restructuring support were granted to the beneficiary in the past, 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).
- (272) In addition to the declaration of Portugal to that effect, the verification of the Commission records shows that during the past 10 years, none of the companies within the beneficiary economic unit (comprising TAP SGPS, its current sister company TAP Air Portugal, and all their controlled subsidiaries), has benefited from any other rescue aid, restructuring aid or temporary restructuring support. The EUR 1.2 billion rescue aid which has been approved by the Commission decision of 16 July 2021 forms part of the single restructuring operation supported by the restructuring aid, in accordance with point 72(a) of the R&R Guidelines.
- (273) In April and in December 2021, the Commission raised no objections to damage compensation under Article 107(2)(b) TFEU to TAP Air Portugal (footnote 14). However, as noted in point 15 of the Temporary Framework, the principle of 'one time last time' laid down in the R&R Guidelines does not cover aid that the Commission declares compatible under Article 107(2)(b) TFEU, since the latter type of aid is not "rescue aid, restructuring aid or temporary restructuring support" within the meaning of point 71 of the R&R Guidelines.

6.4.2.6. Measures limiting distortions of competition

- (274) As explained in points 87 to 93 of the R&R Guidelines, competition measures should be set out in proportion to the distortive effects of the aid, and in particular: (i) to the size and the nature of the aid and the conditions and circumstances under which it is granted; (ii) to the size and relative importance of the beneficiary in the market and the characteristics of the market concerned and (iii) to the extent to which moral hazard concerns remain following the application of the own contribution and burden sharing measures.
- (275) The structural measures might include divestment of assets, reducing capacity or market presence. They should favour the entry of new competitors, the expansion of existing small competitors or cross-border activity, taking into account the market or markets where the beneficiary will have a significant market position after the restructuring, in particular those with excess capacity. Behavioural measures should ensure that aid finances only the restoration of long-term viability.
- (276) As set out in detail in recitals (75) to (98), Portugal commits that TAP SGPS will take the following measures during the restructuring period in order to limit the distortion of competition brought by the aid:

- (a) divestiture of the stakes held by TAP SGPS in non-core businesses, i.e., ground handling (Groundforce), maintenance (M&E Brasil) and catering (Cateringpor);
- (b) cap on the aircraft fleet not exceeding a maximum of [90-100] aircraft;
- (c) transfer of up to 18 daily slots to one actual or potential competitor at Lisbon airport;
- (d) acquisition ban and
- (e) advertising ban.

i) Assessment of the divestiture of non-core businesses

(277) The Commission observes that Groundforce and Cateringpor were profit-making and viable companies until 2019. The difficulties those companies are currently experiencing are only due to the COVID-19 crisis, which has negatively affected the aviation sector at large. In addition, the Commission positively notes a EUR [...] million estimate of the value of TAP SGPS' stake in [...], as well as the interest of potential investors in the acquisition of [...]. Such interest from investors suggests that the sale of [...] as a going-concern, followed by its restructuring and return to viability as the aviation market recovers, is a realistic scenario. For these reasons, the Commission concludes the divestment of TAP SGPS's stakes in Cateringpor and Groundforce meets the requirements of point 80 of the R&R Guidelines, as those two companies, which are currently experiencing financial difficulties due to the COVID-19 induced crisis in the aviation sector, will be able to effectively compete in the long term, if operated by a suitable purchaser able to restructure them and make them return to viability in the long term.

(278) The Commission also considers the divestment of TAP SGPS's stakes in Cateringpor and Groundforce as a measure limiting distortions of competition. The reasons for that assessment is that both of the abovementioned companies are vertically integrated within the TAP SGPS group and represent its main supplier of catering and ground handling services. The divestment of Cateringpor and Groundforce will therefore allow other companies than TAP SGPS to compete in their respective markets and serve the large demand for services of TAP SGSP. Accordingly, those divestments constitute valid measures mitigating distortions of competition.

(279) By contrast, the Commission does not accept the divestment of M&E Brasil as a measure limiting distortions of competition, because it is a historically loss-making company whose difficulties predate the COVID-19 crisis (recital (77)). As such, the divestment of such company is rather a measure to restore long-term viability, in line with point 78 of the R&R Guidelines.

ii) Assessment of the aircraft fleet cap

(280) Among the measures to reduce market presence or capacity is the fleet size cap of [90-100] aircraft until 2025. Such cap represents a reduction of [...] aircraft, compared to TAP Air Portugal's fleet size in 2019. Portugal demonstrates that cap is effective in limiting the market presence of TAP Air Portugal, which will not dispose of a sufficient number of aircraft to meet in full the traffic demand in 2025 according

to the October 2021 IATA forecasts⁷⁵ in the baseline scenario. As a result, the beneficiary will have a reduced market presence not only by reference to the aircraft fleet before restructuring but also by reference to its probable market position at the end of the restructuring period. Furthermore, this reduction in aircraft fleet is in line with competition measures that the Commission has deemed adequate in the case of the restructuring of airlines⁷⁶.

(281) Considering the size and duration of the fleet reduction and the limitations it imposes on the beneficiary's operations, the Commission considers the [90-100] aircraft fleet size cap as a valid measure to reduce market presence and capacity.

iii) Assessment of the commitment to transfer slots at Lisbon airport

(282) As recalled in point 78 of the R&R Guidelines, measures to limit distortions of competition should take place in particular in the market or markets where the undertaking will have a significant market position after restructuring. Considering that TAP Air Portugal currently has and will retain a significant market position at Lisbon airport after restructuring (see recital (32)), Portugal has proposed a specific structural measure to limit distortions of competition entailed by the aid on passenger air transport services to and from Lisbon airport.

Scope of the commitment to transfer slots at Lisbon airport

(283) Pursuant to point 80 of the R&R Guidelines, structural measures to limit distortions of competition should normally take the form of divestments on a going concern basis of viable stand-alone businesses that, if operated by a suitable purchaser, can compete effectively in the long term.

(284) On 3 December 2021, Portugal proposed a structural commitment, by which TAP Air Portugal would transfer to a remedy taker up to 18 daily slots at Lisbon airport on the basis of Article 8b of the Slot Regulation. The remedy taker will be approved following a call for proposals published by the monitoring trustee.

(285) The main purpose of the structural commitment at Lisbon airport is to ensure that TAP Air Portugal transfers the slots (rights) necessary for the establishment or expansion of an operating base by a competitor at the congested airport where TAP Air Portugal has a significant market position (Lisbon airport) and to create conditions to sustain effective competition in the longer term at that airport.⁷⁷ As further detailed below, the Commission considers that such a purpose is achieved, as the structural commitment combines (i) a significant volume of slots (i.e. up to 18 daily slots), while no such a volume of slots is normally available for entry or

⁷⁵ See footnote 34.

⁷⁶ Commission Decision of 7 March 2007 in case SA.20100 (C10/2006, ex N555/2005) Restructuring to Cyprus Airways (OJ L49, 22.2.2008, p. 25),, recitals 129 to 133; Commission Decision of 19 September 2012 in case SA.30908 (2011/C, ex N 176/2010) implemented by the Czech Republic for České aerolinie, a.s. (OJ L 92, 3.4.2013, p. 16),, recital 139; Commission Decision of 27 June 2012 in case SA33015 (2012/C, ex 2011/N) Air Malta plc. (OJ L301, 30.10.2012, p. 29),, recital 130; Commission Decision of 26 July 2021 in case SA.63203 (2021/N) – Germany - Restructuring aid for Condor, not yet published, recital 145; Commission Decision of 11 December 2020 in case SA 58463 (2020/N) – Restructuring aid for Corsair (OJ C41, 5.2.2021, p. 8), recitals 5, 34, 88 b) and 93.

⁷⁷ The Commission notes that there is an aircraft parking stands shortage at Lisbon airport, resulting in a local rule (<https://www.nav.pt/en/slot-coordination-portugal/local-rules>). On 1 December 2021, the Portuguese authorities confirmed that they had been informed by the manager of Lisbon airport that access to airport infrastructure (including parking stands) would be available for the remedy taker.

expansion at Lisbon airport, notably at peak day times or peak weeks;⁷⁸ and (ii) adequate conditions for the transfer of slots to a remedy taker (i.e. free and unconditional transfer).

- (286) According to the Explanatory Memorandum for the Commission Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports,⁷⁹ *“the emergence of a strong competitor at a given airport requires it to build up a sustainable slot portfolio to allow it to compete effectively with the dominant carrier (usually the “home” carrier).”*
- (287) Lack of access to slots constitutes a significant barrier to entry or expansion at Europe’s busiest airports.⁸⁰ By virtue of the Slot Regulation, slots are essential for airlines’ operations as only air carriers holding slots are entitled to get access to the airport infrastructure services delivered by airport managers of coordinated airports and, consequently, to operate routes to or from these airports. Under the Slot Regulation, slots can only be exchanged or transferred between airlines in certain specified circumstances, subject to the explicit confirmation from the slot coordinator under the Slot Regulation.
- (288) The commitment consisting in transferring slots at Lisbon airport therefore removes the main barrier to entry and expansion of TAP Air Portugal’s competitors at that heavily congested airport. The data collected from the Portuguese slot coordinator (Navegação Aérea de Portugal – NAV Portugal) demonstrate that the requests for slots at Lisbon airport exceed the available capacity,⁸¹ and that requests for additional slots necessary to materially increase operations at Lisbon airport cannot be accommodated through the normal workings of the general slot allocation procedure, due to an insufficient pool of unused slots and the fragmented allocation of the slot pool, which makes it unlikely to trigger the emergence of a strong competitor.
- (289) The Commission considers that a commitment that TAP Air Portugal would transfer slots at the congested airport where it has a significant market position, to allow competitors to set up or expand a base, is the most effective competition measure in order to minimise distortions of competition. Furthermore, given for instance the crisis of the aviation industry, which may result in the other assets necessary to operate the transferred slots (e.g. aircraft) being available in the market at attractive terms for the full period of implementation of the commitments, the focus on slots in the scope of the package to be offered by TAP Air Portugal does not affect its viability and competitiveness.⁸²

⁷⁸ As examples, according to NAV Portugal, [...].

⁷⁹ COM/2011/827 final of 1 December 2011.

⁸⁰ See e.g. Case SA.57153 – *Germany – COVID-19 – Aid to Lufthansa*, recital (224).

⁸¹ As an example, according to NAV Portugal, the requests initially submitted by all airlines at Lisbon airport for Summer 2020 IATA Season represented 167 264 slots, while at the start of the season, 121 331 slots were allocated.

⁸² The Commission has in its decisional practice in merger and antitrust cases accepted other commitments (e.g. special prorata agreements or access to frequent flyer programmes), aiming at removing certain barriers to entry or expansion on specific routes, such as the lack of access to feeder traffic or to business passengers (often members of frequent flyer programmes). In the case at hand, the relevant barrier consists of the lack of access to the airport’s congested infrastructure, which only a transfer of slots can effectively remedy.

- (290) Additionally, given the fact that the creation or the expansion of a base by a competing carrier implies structural changes in the competitive landscape at Lisbon airport, the Commission acknowledges the structural nature of the commitment submitted by Portugal.
- (291) In light of the above, the Commission concludes that the commitment consisting in a slot transfer is a suitable measure to minimise distortions of competition because it will allow structural competition with TAP Air Portugal for the provision of passenger air transport services to and from Lisbon airport, where it holds a significant market position.
- (292) In addition, the Commission considers that the amount of 18 slots per day is sufficient for the remedy taker to establish or expand viably its based operations at Lisbon airport by, for example, basing three aircraft and operating three rotations per day with each of them.⁸³ If the remedy taker is a long-haul carrier, the 18 slots per day would enable it to base a higher number of aircraft or to get access to the slots needed to operate feeder flights. As slots are not linked to any specific route, airlines can use them according to their business plan (i.e. on any route of their choice). This will allow the remedy taker to achieve economies of scale and scope and to compete more effectively with TAP Air Portugal. The Commission notes in that respect that the addition of three aircraft by either of TAP Air Portugal's two competitors basing the largest fleet at Lisbon airport (i.e. Ryanair and easyJet) would already increase their based fleet by more than 40%, which would bring substantial additional effective competition at Lisbon airport.
- (293) The Commission concludes therefore that the size of the slot package to be transferred under the structural commitment is appropriate and effective to strengthen competition at Lisbon airport by triggering the efficient entry of a newly based competitor or expansion of an already based competitor.
- (294) Finally, the Commission considers that the transfer of slots from TAP Air Portugal to the remedy taker based on Article 8b of the Slot Regulation, as set out in the commitment proposed by Portugal, is appropriate both legally and operationally.
- (295) Article 8b of the Slot Regulation lawfully allows slots to be transferred in certain contexts without monetary compensation being made available to the original slot holder. Those contexts include slots transferred as part of commitments offered by the relevant Member State in a final State aid decision. In such case, the transfer of slots may be considered as being required under Union law. From the perspective of the airline required to transfer slots or directed as to how to use them, the commitment by the Member State or a condition imposed on it has de facto obligatory force for the Member State, since it is only by complying with the commitment or the condition that the airline can receive compatible State aid.⁸⁴

⁸³ Based on the profile of the Lisbon slots used on a Monday in August 2019 by the nine aircraft based at Lisbon airport by Ryanair and easyJet in 2019, Portugal estimates that each of the based aircraft uses on average 5.55 slots per day. TAP's based aircraft would use materially fewer slots per day on average.

⁸⁴ Although Article 8b of the Slot Regulation does not mention explicitly State aid rules, as it does for merger or antitrust rules, Article 8b can be understood as including State aid rules. Indeed, Article 8b covers limitations, restrictions or eliminations of slots imposed under Union law (first sentence) and they include those steps flowing from the application of national competition law, Articles 101 and 102 TFEU and the Merger Regulation (second sentence), but are not limited to those instances, as demonstrated by the first sentence of Article 8b and recital 17 of Regulation (EC) No 793/2004 of the European Parliament and of the Council of 21 April 2004 amending Council Regulation (EEC) No

- (296) From an operational perspective, the slots would be transferred on a free and unconditional basis, enabling the remedy taker to choose the slot times that best fit its new or expanded operations at Lisbon airport and to use the transferred slots flexibly on any route to or from Lisbon airport. The transfer of slots without any condition of use thus enables the remedy taker (i) to allocate the transferred slots in accordance with its business model, thus ensuring a more sustainable growth; (ii) to allocate the slots so as to maximize the economies of scope and density; and (iii) to adjust to the evolution of demand if the services on the routes initially planned are not profitable anymore, which is essential at a time where demand for passenger air transport services is very volatile.
- (297) The Commission acknowledges that the choice of the slot times by the remedy taker may appear constrained by the two safeguard measures aimed at protecting TAP Air Portugal’s hub-and-spoke operations at Lisbon airport, namely: (i) the cap in the number of slots to be transferred before 8:00 local time, in the morning and before 20:00 local time; and (ii) the 20- or 60-minute time-window during which TAP Air Portugal has to transfer slots (see recitals (84) to (85)). However, the Commission considers that those safeguard measures do not materially restrict the ability of the remedy taker to have access to appropriate slot times and to compete effectively with TAP Air Portugal using the remedy slots. With regard to the cap in the number of slots per period of the day, the Commission has used the data provided by Portugal to verify that the ceilings were compatible with the usual rotations of based aircraft, or, where they were not, that they would not apply. As an example, the cap on the number of slots to be transferred before 20:00 local time does not apply to based aircraft using the slots for the operation of long-haul flights, so as to accommodate slot requests by air carriers departing from Lisbon airport during the afternoon and flying overnight. With regard to the time-window, the commitment contains a provision ensuring that TAP Air Portugal cannot exercise its margin for discretion to the detriment of the efficient operations of the remedy taker.⁸⁵
- (298) In light of the above, the Commission considers that the transfer of a 18-slot package meets the conditions of viability and attractiveness of the divested business package, and of the structural reinforcement of effective competition at Lisbon airport.

Duration of the commitment to transfer slots at Lisbon airport

- (299) Pursuant to point 78 of the R&R Guidelines, divestments to limit distortions of competition should take place without undue delay, taking into account the type of asset being divested and any obstacles to its disposal, and in any case within the duration of the restructuring plan.

95/93 on common rules for the allocation of slots at Community airports (“For the avoidance of doubt, it should be specified that the application of the provisions of this Regulation is to be without prejudice to the competition rules of the Treaty, in particular Articles 81 and 82 thereof and Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings”). The State aid rules are found in the chapter of the Treaty on competition, and it is line with a literal interpretation of Article 8b, first sentence, and a teleological interpretation of the provision overall (read in light of the above recital 17), to consider that a transfer of slots can come within that provision where it results from requirements of the public authorities set out in a State aid decision.

⁸⁵ “The arrival and departure slot times shall be such as to allow for reasonable aircraft rotation by the remedy taker to the extent possible, taking into account the eligible potential remedy taker’s business model and aircraft utilisation constraints.”

- (300) The commitment submitted by Portugal foresees that the slots will be offered to potential remedy takers until the end of the restructuring period, which means as soon as the Commission approves a remedy taker or until the end of 2025 (see recital (27)), whichever is earlier. Furthermore, the corresponding call for proposals will be published sufficiently in advance of the beginning of the general slot allocation procedure for each IATA Season until a remedy taker is approved. In other terms, the call for proposals will be published in advance of each IATA Season, starting with Winter 2022/2023 IATA Season,⁸⁶ until 2025, unless TAP Air Portugal transfers slots to a remedy taker approved by the Commission before that expiry date.
- (301) The Commission considers that data provided by NAV Portugal on the requests for slots by airlines at Lisbon airport give strong indications that, despite adverse market conditions, competitors would be willing to take up additional slots and enter or expand at Lisbon airport. Therefore, the Commission deems it likely that the slots will be transferred to a remedy taker in advance of the end of the restructuring period. In any case, that time-frame is expected to be sufficiently long for the passenger air transport sector to recover from the COVID-19 crisis and for passenger air traffic to return to pre-crisis levels.
- (302) In light of all the above, the Commission concludes that the duration of the commitment is adequate.
- Eligibility criteria for the remedy taker of the slots at Lisbon airport*
- (303) Pursuant to 80 of the R&R Guidelines, to be suitable, the purchaser of the divested business should ensure that the latter can compete effectively in the long term.
- (304) In accordance with the commitment submitted by Portugal, to be eligible to obtain the slots, a potential remedy taker must:
- (a) be an air carrier holding a valid operating licence issued by an EU/EEA Member State;
 - (b) be independent of and unconnected with TAP Air Portugal;
 - (c) not be subject to competition remedies having received a COVID-19 recapitalisation instrument of more than EUR 250 million;⁸⁷
 - (d) commit to operate the number of aircraft based at Lisbon airport using the remedy slots until the end of the restructuring plan. Potential remedy takers indicate in their proposals the number of aircraft to be based at Lisbon airport using the remedy slots. For that purpose, a potential remedy taker must commit to comply with the applicable EU and national labour laws, as interpreted as relevant by the EU Courts (see e.g. Nogueira, joined cases C-168/16 and C-169/16).
- (305) The eligibility criterion relating to the operating licence is necessary to ensure that the remedy taker has the ability to operate domestic and intra-EU/EEA flights

⁸⁶ Winter 2022/2023 IATA Season is the first IATA Season for which the general slot allocation procedure has not started at the date of adoption of this Decision.

⁸⁷ Under that criterion, the potential remedy takers that fulfil cumulatively the two following conditions are not eligible: (i) they have benefitted from a COVID-19 recapitalisation measure above EUR 250 million; and (ii) they are subject to additional measures to preserve effective competition in the relevant markets where they have significant market power for the purposes of point 72 of the Temporary Framework.

without restriction, thus guaranteeing connectivity at Lisbon airport, which is a key evaluation criterion by the Commission.

- (306) The eligibility criterion relating to independence and lack of connection is necessary to ensure that the remedy taker will compete effectively with TAP Air Portugal.
- (307) The exclusion criterion applying to beneficiaries of a large recapitalisation aid subject to competition remedies is necessary to avoid that companies that have been subject to additional measures aiming at restoring a level playing field, as referred to in point 72 of the Temporary Framework, can obtain a competitive advantage by similar structural measures to limit distortions of competition.⁸⁸
- (308) As regards the final eligibility criterion, relating to the base, it is necessary to allow for effective competition, thus ensuring the effectiveness of these commitments. Furthermore, it supports the entry or expansion of a viable competitor at Lisbon airport and puts TAP Air Portugal under the threat of competition on routes to or from the airport.
- (309) The Commission notes that the eligibility criterion relating to the base is complemented by two provisions in the commitment aiming to maximise the number of aircraft based at Lisbon airport using the remedy slots. The first provision consists in linking the number of slots to be transferred before 8:00 local time, which are commercially highly valuable, to the number of based aircraft. The second provision consists in the ranking criteria, which incentivise remedy takers to base aircraft at Lisbon airport using the remedy slots. Specifically, in case of competing proposals, the Commission will give preference, in decreasing order, to those submitted by potential remedy takers that in particular (i) will provide the largest seat capacity in respect of the based aircraft using the remedy slots from the start of the operations until the end of the restructuring plan; and (ii) will serve the greatest number of destinations by direct flights operated by the based aircraft using the remedy slots from the start of the operations until the end of the restructuring plan (direct connectivity, without taking account of the frequencies).
- (310) For all of the above, the Commission concludes that the eligibility criteria for the potential remedy takers are appropriate, as they (i) allow a sufficient number of airlines that may be interested in the available slots to participate in the call for proposals, and (ii) ensure proportionate requirements to access the slots, thus facilitating the activation of the measures to preserve effective competition.

Impact of the transfer of slots at Lisbon airport on the prospects of TAP Air Portugal's return to viability

- (311) Pursuant to point 92 of the R&R Guidelines, measures limiting distortions of competition should not compromise the prospects of the beneficiary's return to viability, which might be the case if a measure is very costly to execute or, in exceptional cases duly substantiated by the Member State concerned, would reduce the activity of the beneficiary to such an extent that its return to viability would be compromised, nor should they come at the expense of consumers and competition.
- (312) In this context, the Commission has assessed the extent to which the transfer of 18 daily slots at Lisbon airport would (i) reduce TAP Air Portugal's operations, taking

⁸⁸ As the number of potential remedy takers subject to competition remedies under the Temporary Framework is expected to be limited, that exclusion criterion does not diminish the effectiveness of the commitment to transfer slots at Lisbon airport.

account of its hub-and-spoke business model at the airport; and (ii) affect TAP Air Portugal's return to viability at the end of the restructuring period (2025).

- (313) With regard to the operational impact of the transfer of 18 daily slots, the Commission notes that the commitment proposed by Portugal is designed taking into consideration TAP Air Portugal's long-haul transatlantic strategic and hub model. In particular, the commitment contains two measures to avoid the concentration of the slots to be transferred during the hours that are crucial for the Lisbon hub (mainly morning hours) but are not critical for non-hub operations. The first measure consists in capping the number of slots to be transferred during three periods of the day. Specifically, TAP Air Portugal shall not be obliged to transfer: (i) more than one slot before 08:00 (local time) per aircraft based by the remedy taker at Lisbon airport using the remedy slots; (ii) more than half of the total remedy slots before 12:00 (local time); and (iii) more slots before 20:00 (local time) than the total remedy slots minus one slot per aircraft based by the remedy taker at Lisbon airport using the remedy slots for the operation of short-haul flights. The second measure consists in giving some flexibility to TAP Air Portugal as to the exact times of the slots to be transferred, provided that the adjustment to the requested times does not negatively affect the planned operations of the remedy taker, hence the effectiveness of the competition brought about by the commitment. Specifically, TAP Air Portugal shall transfer slot corresponding to the slot times requested by the remedy taker within +/- 20 minutes for short-haul flights and within +/- 60 minutes for long-haul flights, unless TAP Air Portugal does not have slots within the relevant time-window. In addition to those two specific measures, the Commission notes that potential remedy takers are incentivised to use the remedy slots for based operations, which further reduces the risks of requests for slots concentrated during a limited number of morning hours.
- (314) As a consequence, the commitment proposed by Portugal contains provisions that usefully mitigate the risk that the slot transfer would damage TAP Air Portugal's network and contribution to Lisbon's hub connectivity, without unduly constraining the operations of a remedy taker.
- (315) With regard to the financial impact of the transfer of 18 daily slots, the Commission has assessed whether TAP Air Portugal would return to viability at the end of the restructuring, as defined to in point 52 of the R&R Guidelines,⁸⁹ in an adverse scenario in which TAP Air Portugal's operations following the slot transfer would be structurally reduced compared to the notified restructuring plan. For that purpose, the Commission has relied on the financial projections for 2025 provided by Portugal as part of the sensitivity analysis, adjusted to factor in the estimated reduction in revenues⁹⁰, EBIT and net income entailed by the transfer of 18 slots.
- (316) The Commission has applied the standard tests for the return to viability based on indicators of ROCE, ROE, indebtedness and creditworthiness. On that basis and as

⁸⁹ Pursuant to point 52 of the R&R Guidelines, long-term viability is achieved when the beneficiary is able to provide an adequate projected return on capital and is able to compete on the market place on its own merits.

⁹⁰ The reduction in revenues entailed by the slot transfer corresponds to the revenue deficit for operating fewer short-haul flights than without the slot transfer. As short-haul flights operated by TAP Air Portugal also feed its global network, the reduction in revenues encompasses both the loss of direct revenues from passengers carried on short-haul flights and of connecting revenues from passengers connecting from the short-haul flights onto long-haul flights.

detailed in Table 3 below, the Commission has found that, at the end of the restructuring period, TAP Air Portugal would:

- (a) provide a return on capital employed slightly above the (opportunity) cost of raising more capital and debt (test 1);
- (b) provide an adequate return on shareholder equity above the (opportunity) cost of raising more capital (test 2);
- (c) have restored its (positive) equity and achieved a much better indebtedness position than the current one of an undertaking in difficulty (test 3); and
- (d) have a creditworthiness ratio allowing access to capital markets without need of any State aid (guarantee) (test 4).

Table 3: Impact of the transfer of 18 slots on TAP Air Portugal’s return to viability

2025	Restructuring plan <i>No transfer of slots</i>	Sensitivity analysis <i>Transfer of 18 slots</i>
Viability test 1: ROCE > WACC of 7.5%-8%; test 2: ROE > cost of equity of 10.5%-11%		
ROCE (= (1-21%)*EBIT/CE)	[...]	[...]
ROE (=Net Income/Equity)	[...]	[...]
Indebtedness and creditworthiness: test 3 in difficulty (UiD) if EBITDA/Interest < 1 and Debt/Equity > 7.5; test 4: Debt/EBITDA < 3-3.5		
Net Debt/Equity	[...]	[...]
EBITDA/Interest Expense	[...]	[...]
Net Debt/EBITDA	[...]	[...]

- (317) The Commission has also tested that, in more adverse scenarios (sensitivities), TAP Air Portugal would not require further aid (e.g. net income still positive and ability to access financial markets still proven).
- (318) In light of the above, the Commission finds, on the one hand, that the commitment to transfer 18 slots at Lisbon airport does not compromise TAP Air Portugal’s return to viability.
- (319) On the other hand, the Commission acknowledges that TAP Air Portugal would operate at the end of the restructuring period at a positive, yet relatively low, margin (approximately [...] % in 2025). In addition, its level of indebtedness as measured by reference to its equity base would be [...]. Furthermore, while the sensitivity analysis relies on stressed market conditions, such as rising fuel costs and inflation, it does not provide for the impact on TAP’s viability of unpredictable dramatic demand shocks like the ones resulting from the pandemics. Considering that the reduction of TAP Air Portugal’s operations beyond the one undertaken as part of its restructuring would disproportionately affect TAP Air Portugal’s net income, the transfer of more than 18 slots may call its return to viability into question in the most adverse market circumstances.

Conclusion on the commitment to transfer slots at Lisbon airport

- (320) In light of all the above, the Commission concludes that the commitment proposed by Portugal to limit distortions of competition at Lisbon airport where TAP Air Portugal will have a significant market position after restructuring complies with and will be enforced as the conditions of acceptability set out in the R&R Guidelines.

- iv) Assessment of the acquisition ban and the advertising ban

- (321) With regard to behavioural measures, Portugal commits to those in point 84 of the R&R Guidelines, namely: (i) acquisition ban regarding shares in any company during the restructuring period, except where indispensable to ensure its long-term viability and subject to Commission approval, and (ii) to refrain from publicising State support as a competitive advantage when marketing its products and services (recital (98)). In line with point 83 of the R&R Guidelines, those measures will ensure that “*aid is used only to finance the restoration of long-term viability and that it is not abused to prolong serious and persistent market structure distortions or to shield the beneficiary from healthy competition*”.
- (322) Therefore, the Commission considers that the measures to limit the restrictions of competition are appropriate for reducing the negative effects of the restructuring aid.

6.4.2.7. Transparency

- (323) 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 will make the relevant information available on the website:

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

6.5. Conclusion on compatibility

- (324) Pursuant to Article 9(6) of Council Regulation (EU) 2015/1589⁹¹, decisions closing the formal investigation procedure shall be taken as soon as the doubts raised on the compatibility with the internal market of a notified measure have been removed.
- (325) In light of the above, the Commission concludes that, whilst the doubts it raised in the opening decision have been removed, the negative effects of the restructuring aid on the air transport sector are limited, given in particular the measures limiting the distortions of competition, of which Portugal should ensure implementation. Consequently, the positive effects of the restructuring aid on the development of the economic activity of air transport ensuring connectivity of Portugal and related activities in the tourism sector benefitting therefrom, provided Portugal ensures implementation of the restructuring plan, outweigh the remaining negative effects on competition and trade, which are therefore not adversely affected to an extent contrary to the common interest. The commitments provided by Portugal should be laid down, therefore, as conditions for the compatibility of the aid.
- (326) In its overall assessment, the Commission therefore concludes that the restructuring aid complies with Article 107(3)(c) TFEU as it facilitates the development of air transport and related activities and does not distort competition to an extent contrary to the common interest.
- (327) Finally, the Commission considers it necessary for Portugal to provide regular reports on the implementation of the restructuring plan every six months until the end of the restructuring period. Those reports will specify, in particular, the dates of disbursement of the funding committed by Portugal and of the own contribution of

⁹¹ 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 (OJ L 248, 24.9.2015, p. 9).

the beneficiary, the developments on the aircraft and capacity of TAP Air Portugal's fleet, any deviations from the financial or operational trajectories of the restructuring plan in terms of revenues, containment of cost and cost reductions from the restructuring measures and earnings, and the corrective measures envisaged or taken by Portugal or the beneficiary where appropriate.

HAS ADOPTED THIS DECISION:

Article 1

The restructuring aid that the Portuguese Republic is planning to implement for the benefit of the economic unit, currently under the sole control of the Portuguese State, comprising Transportes Aéreos Portugueses SGPS S.A., Transportes Aéreos Portugueses S.A.-TAP Air Portugal and all their controlled subsidiaries, in the form of measures amounting to EUR 2 550 million, is compatible with the internal market, subject to the conditions set out in Article 2.

Article 2

- (1) The Portuguese Republic sees to it that Transportes Aéreos Portugueses SGPS S.A., Transportes Aéreos Portugueses S.A.-TAP Air Portugal or their subsidiaries as appropriate fully implement, within the relevant timelines, the measures included in the restructuring plan as described in this Decision.
- (2) The Portuguese Republic sees to it that Transportes Aéreos Portugueses SGPS S.A., Transportes Aéreos Portugueses S.A.-TAP Air Portugal or their subsidiaries as appropriate fully implement, within the relevant timelines of the restructuring plan, the measures limiting the distortions of competition as described in this Decision, namely:
 - (a) fully divesting the shareholding in SPdH–Serviços Portugueses de Handling, S.A. and Catering de Portugal, S.A.;
 - (b) limiting the fleet of Transportes Aéreos Portugueses S.A.-TAP Air Portugal to a maximum of [90-100] aircraft;
 - (c) offering for transfer eighteen daily slots at the Lisbon airport;
 - (d) refraining from acquiring shares in any company except where indispensable to ensure the long term viability of Transportes Aéreos Portugueses SGPS S.A., Transportes Aéreos Portugueses S.A.-TAP Air Portugal or their subsidiaries as appropriate and, in this case subject to the Commission approving the acquisition and
 - (e) refraining from publicising State support as a competitive advantage when marketing their products and services.
- (3) The Portuguese Republic provides to the Commission regular reports on the implementation of the restructuring plan every six months starting from the date of adoption of this Decision until the end of the restructuring period on 31 December 2025. Those reports will specify, in particular, the dates of the actual disbursement of the funding committed by State and the own contribution of the beneficiary, the developments on the network, market position, aircraft and capacity of Transportes Aéreos Portugueses S.A.-TAP Air Portugal's fleet, any deviations from the financial or operational trajectories of the restructuring plan in terms of revenues, containment of costs and cost reductions and earnings achieved by the restructuring measures, and

the corrective measures envisaged or taken by the Portuguese Republic or the beneficiary where appropriate.

Article 3

The Portuguese Republic shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to The Portuguese Republic.

Done at Brussels, 21.12.2021

For the Commission
Margrethe VESTAGER
Executive Vice-President

