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**Subject: State Aid SA.108173 (2023/NN) – Austria  
COVID-19: Damage Compensation Scheme under Article 107(2)(b)  
TFEU**

Excellency,

**1. PROCEDURE**

- (1) By electronic notification of 23 June 2023, the Austrian authorities notified a scheme for the compensation of damages incurred in the context of the COVID-19 pandemic (“Richtlinien zum Schadensausgleich durch die COVID-19 Finanzierungsagentur des Bundes (Richtlinien zum Schadensausgleich)”; hereafter “the Directives”) (“the measure”) on the basis of Article 107(2)(b) of the Treaty on the Functioning of the European Union (“TFEU”). The Commission services asked for additional information on 30 June 2023 and on 10 July 2023. Austria provided this information on 7, 13 and 17 July 2023.
- (2) Austria exceptionally agrees to waive its rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation 1/1958 <sup>(1)</sup>, and to have this Decision adopted and notified in English.

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<sup>(1)</sup> Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

Seiner Exzellenz Herrn Alexander Schallenberg  
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## 2. DETAILED DESCRIPTION OF THE MEASURE

### 2.1. COVID-19 pandemic in Austria and the official reaction of the Austrian authorities

- (3) In response to the COVID-19 outbreak, Austria<sup>(2)</sup> imposed the first measures on 10 March 2020 with immediate effect: travel restrictions, closure of universities and a ban of all events with an audience of more than 100 people. As a result, cinemas and theatres closed, music, cultural and sports events were cancelled. Cross border road transport and other economic activities were severely hampered, as Austria imposed medical controls on the border with Italy on 11 March 2020, with Switzerland on 14 March 2020, and with Germany on 19 March 2020. Other neighbouring Member States imposed similar measures on their borders with Austria restraining all forms of cross border economic activities.
- (4) In order to curb the spread of COVID-19, a series of far reaching restrictive legislative measures were announced by the Austrian government on 13 March 2020 and entered into force on 16 March 2020. This package of measures imposed massive restrictions on the freedom of movement throughout Austria causing an effective standstill of almost the entire Austrian economy. Under the restrictive legislative measures, leaving the house was only admitted in exceptional cases: for work engagements and activities that could not be delayed or carried out from home, to make purchases of food or seek medical assistance or to assist other people in urgent need. As an immediate result of these restrictions, shops, bars, cafés, restaurants and other premises open to clients were closed. Only supermarkets, food shops and groceries, pharmacies, post offices, petrol stations, banks, tobacconists and animal feed stores were allowed to remain open, but with restrictions concerning opening hours and measures to avoid close contact. Schools and nursery schools had to close as from 16 March 2020. All tourism activities completely stopped as well.
- (5) On 21 March 2020, the Austrian Parliament adopted the second COVID-19 package, which led to further restrictions of social contacts: the prohibition of gatherings of more than five people in public places and on private premises - except for people living in the same household-, as well as a minimum distance of at least one metre which had to be observed.
- (6) Even though Austria lifted the severest confinement measures and allowed facilities to reopen in the course of April and May 2020, Austria highlights that for all facilities which were allowed to open again to the public, strict measures concerning hygiene and social distancing (minimum one meter distance, ensure 10 m<sup>2</sup> per customer, if not possible, only one customer at a time allowed) were put in place and had to be complied with<sup>(3)</sup>. As the lifting of confinement measures was gradual, some facilities like swimming baths, hotels and hostels remained prohibited from operating until the end of May 2020. Facilities allowed to reopen were still subject to restrictions concerning opening hours which remained limited.

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<sup>(2)</sup> “Austria” or “the Austrian authorities” refers to the federal or regional governments.

<sup>(3)</sup> COVID-19 Relief Regulation („COVID-19 Lockerungs-Verordnung“), BGBl. II, Nr. 197/2020 as amended.

- (7) In addition, Austria underlines that large gatherings of more than 1000 people remained prohibited until the beginning of September 2020. This impacted all kinds of cultural and sports events as well as all economic sectors linked to it and caused, for instance, the cancellation of major Austrian culture festivals, such as the Bregenzer Festspiele.
- (8) Due to the resurgence of COVID-19 infections in autumn 2020, on 3 November 2020, the Austrian government announced confinement measures during the night between 20.00 until 6.00, severely restricting the freedom of movement to prohibit private and social gatherings during these hours to cut infection chains. Due to the increase in COVID-19 infections, the Austrian government decided to enlarge the confinement measures to a nationwide lockdown on 17 November 2020 which lasted until 6 December 2020, and which severely impacted the entire economy. On 7 December 2020, these severe restrictive measures were lifted, but confinement measures during the night hours remained in place until 23 December 2020. Those restrictive measures severely affected several sectors, including the gastronomy and tourism sector, leisure and event organisers. In addition, the Minister of Foreign Affairs issued a general travel warning on 19 December 2020 as regards non-essential and touristic travels to all countries due to the extensive spread of the COVID-19 virus. Due to the volatile development of the COVID-19 pandemic, those general travel warnings largely remained in place until end of June 2021, for several countries outside the EEA, including Switzerland and the United Kingdom, travel warnings remained in place until the end of 2021 <sup>(4)</sup>. Travel warnings are a sharp measure available to the Austrian government if it seeks to limit travel. The consequences of a travel warning are very concrete: for the customers a lack of travel insurance and no systematic assistance in the countries where such travel warnings apply, and for the travel sector operators it leads to an obligation to reimburse the costs of the booking to customers cancelling their booking, without a cancellation fee.
- (9) The Austrian authorities highlight that also in 2021 and at the beginning of 2022 Austria was faced with a resurgence of COVID-19 infections, making the announcement of another series of restrictive measures necessary. In particular, as a response to the increase of COVID-19 infections after the Christmas break, nationwide confinement measures were announced as of 5 January 2021 until 7 February 2021. They were followed by the decision to limit the confinement measures only during the night hours between 20.00 and 6.00. These restrictions, which started on 8 February 2021, lasted until 31 March 2021, and were followed by more granular, regional restrictions of movement taken in the Eastern and Western regions of Austria and which lasted until 15 May 2021.
- (10) Due to another resurgence of COVID-19 infections in November 2021, the Austrian government announced a fourth COVID-19 package, confining, as of 15 November 2021, non-vaccinated and non-recovered persons and restricting their free movement. Due to the rapid increase in COVID-19 infections nationwide, confinement measures for the entire public were considered necessary and were announced on 22 November 2021. These severe restrictions to the freedom of movement of the public lasted until 11 December 2021. Since

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<sup>(4)</sup> For some countries like Italy and Sweden the travel warning were lifted in the first half of 2021 (January and March 2021 respectively), however for most of the countries including the Member States of the European Union travel warnings remained in place until end of June 2021.

the number of COVID-19 infections decreased again in the second half of December 2021, the Austrian government limited confinement measures again to non-vaccinated and non-recovered persons, starting from 12 December 2021. These restrictive measures were in place until 31 January 2022 <sup>(5)</sup>.

- (11) The Austrian government points out that the COVID-19 pandemic and the governmental measures adopted affected the real economy, as numerous cancellations of cultural events, restaurant visits, temporary closure of shops and businesses, etc. have had a significant negative effect on the businesses concerned and caused a significant economic impact on the Austrian economy. As a direct consequence, these businesses have actively sought to mitigate their losses, which caused knock-on effects in many sectors of the Austrian economy.
- (12) According to the Austrian authorities, Austria's economic performance fell sharply in 2020 and 2021 due to the COVID-19 pandemic. In particular, in the second quarter of 2020, the GDP has shrunk by about 13.2% and in the third quarter it has shrunk by about 4.3%. This trend continued also for the fourth quarter of 2020 (by about 5.1%) and in the first quarter of 2021 (by about 5.4%). The tourism, hospitality and accommodation sectors as well as the retail trade were particularly affected by the pandemic. Lockdown decisions and comparable prohibitions of economic activities (for example as a result of travel restrictions or travel warnings) limited and restricted the country's economic performance.
- (13) On 9 May 2020, Austria notified a compensation scheme "Directive for fixed cost subsidies" <sup>(6)</sup> on the basis of Article 107(2)(b) TFEU for companies having suffered substantial damage due to the COVID-19 outbreak. The purpose of the "Directive for fixed cost subsidies" was to compensate for the economic damage of the containment and lockdown measures adopted in Austria from mid-March 2020. The measure applied within the compensation period from 16 March 2020 until 15 September 2020 for a maximum of three eligible months. Application for compensation could be submitted no later than 31 August 2021. The eligible costs for companies were determined based on their fixed costs. Furthermore, on 23 June 2021 Austria notified a damage compensation scheme regarding compensation for damages due to the cancellation of events <sup>(7)</sup>.
- (14) In addition to the measures referred to in recital (13) above, and in the light of the severe damages suffered by the undertakings during the pandemic, the Austrian authorities decided to establish the measure assessed in this decision.

## 2.2. Legal basis

- (15) The legal bases for the measure are (1) Federal Law concerning the creation of a Federal Abbaubeteiligungsaktiengesellschaft (ABBAG-Act) <sup>(8)</sup>; (2) Ordinance of

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<sup>(5)</sup> In the national legal basis of the measure, Austria introduced a comprehensive list of lockdown measures taken, see footnote 1 of the Directives.

<sup>(6)</sup> Commission Decision C(2020) 3483 final of 23 May 2020 not to raise objection on the State aid n° SA.57291 (2020/N) - Austria – COVID-19; Compensation Scheme: Directive for fixed cost subsidies.

<sup>(7)</sup> Commission Decision C(2021) 5067 final of 5 July 2021 not to raise objections on the State aid n° SA.63287 (2021/N) – Austria – COVID-19: Support Scheme for Events II under Article 107(2)(b) TFEU.

<sup>(8)</sup> Bundesgesetz über die Einrichtung einer Abbaubeteiligungsaktiengesellschaft des Bundes (ABBAG-Gesetz idgF (BGBl. I Nr.228/2021)).

the Federal Minister of Finance based on §3b Section 3 of the ABBAG-Act concerning the establishment of the Directives to compensate for damages which is implemented by the COVID-19 Finanzierungsagentur des Bundes (“COFAG”).<sup>(9)</sup>

### **2.3. Objective of the measure**

- (16) The objective of the measure is to compensate the damages suffered by undertakings whose activities were prohibited by specific lockdown decisions<sup>(10)</sup> which were in place due to the COVID-19 pandemic in the period between 16 March 2020 until 31 March 2022 (“compensation period”). The notion of a prohibition extends in this context to cover activities *de facto* prohibited<sup>(11)</sup> (see recital (26)).
- (17) The Austrian authorities argue that the lockdown decisions adopted at the federal and regional level as a reaction to the exceptional occurrence of the COVID-19 pandemic, directly caused a damage to the undertakings carrying out the activities defined in recital (26).

### **2.4. Budget and duration of the measure**

- (18) The Austrian authorities notified a budget of EUR 750 million for the compensation period covered by this Decision.
- (19) Based on information submitted by Austria, aid applications had to be submitted in the period from 16 March 2020 until 30 September 2022. However, if for aid applications submitted during this period some additional information is still outstanding, this outstanding information will have to be submitted to Austria until 31 December 2024. The aid has already been granted.<sup>(12)</sup>

### **2.5. Geographical scope**

- (20) The measure applies to the whole territory of Austria.

### **2.6. Form of aid**

- (21) The measure provides aid in form of direct grants.

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<sup>(9)</sup> These Directives („Richtlinien zum Schadensausgleich durch die COVID-19 Finanzierungsagentur des Bundes (Richtlinien zum Schadensausgleich)“) stipulate the eligibility conditions of the measure.

<sup>(10)</sup> This Decision refers to lockdown decisions on federal level as well as lockdown decisions on regional level, collectively “the lockdown decisions”. Besides lockdown decisions in the sense of a *de iure* or *de facto* prohibition of the activities, also other restrictive measures that led to a comparable prohibition of activities (e.g. travelling restrictions) are covered by the measure and included in the definition of “lockdown decisions” for the purpose of this decision.

<sup>(11)</sup> Austria considers here a *de facto* prohibited activity, an activity which is significantly affected by a *de jure* prohibition directly affecting a sector/activity relevant for that activity (for example a ski-lift operator not prohibited to be open, but impacted by the lockdown decisions concerning the hotels present in that ski resort).

<sup>(12)</sup> Austria confirmed that for the sector of primary production of agricultural products, it is ensured that the aid under the measure is provided within three years from the date of the occurrence of the event, and that the aid is paid out within four years from that date, and it does not go beyond that deadline.

## 2.7. Administration of the measure

- (22) The measure is managed by COFAG, a federal agency of Austria.

## 2.8. Beneficiaries

- (23) The eligible beneficiaries of the measure are undertakings which have their registered office or a permanent establishment in Austria and which carry out an operational activity in Austria which gives rise to income pursuant to Paragraphs 21, 22, or 23 of the Austrian Income Tax Act <sup>(13)</sup>, with the exception of banks and other financial institutions.
- (24) Aid may not be granted under the measure to medium <sup>(14)</sup> and large enterprises that were already in difficulty within the meaning of the General Block Exemption Regulation (“GBER”) <sup>(15)</sup> on 31 December 2019. Aid may be granted to micro and small enterprises that were in difficulty within the meaning of the GBER on 31 December 2019, if those enterprises, at the moment of granting the aid, are not subject to collective insolvency procedure under national law and they have not received rescue aid <sup>(16)</sup> or restructuring aid. <sup>(17)</sup> Undertakings being subject to an outstanding recovery order following a decision of the European Commission declaring the aid granted unlawful and incompatible with the internal market, unless the undertaking has reimbursed or paid into a blocked account the total amount of unlawful and incompatible aid and the corresponding recovery interest, are excluded from the measure.

## 2.9. Basic elements of the measure

- (25) The measure is intended to contribute to compensating damages directly caused by the lockdown decisions due to the COVID-19 pandemic precluding the beneficiary, *de jure* or *de facto*, from operating its full economic activity or a specific and severable part of its activity.
- (26) Pursuant to point 2.3.6 of *the Directives*, the activities eligible for compensation are the following economic activities:
- a) Activities explicitly prohibited by the lockdown decisions (they can concern the entire business or a targeted activity), or

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<sup>(13)</sup> Austrian Income Tax Act “Einkommenssteuergesetz 1988“.

<sup>(14)</sup> As defined in Annex I to Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

<sup>(15)</sup> As defined in Article 2(18) of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

<sup>(16)</sup> Alternatively, if they have received rescue aid, they have reimbursed the loan or terminated the guarantee at the moment of granting of the aid under the notified measure.

<sup>(17)</sup> Alternatively, if they have received restructuring aid, they are no longer subject to a restructuring plan at the moment of granting of the aid under the notified measure.

- b) Activities of undertakings which achieved at least 80 % of their turnover from business with undertakings whose activities were explicitly prohibited by the lockdown decisions as described in point (a), <sup>(18)</sup> or
  - c) Activities of travel agencies, tour operators and cable car/ski lift operators which lost at least 80 % of their turnover regarding leisure travellers who were prohibited to travel to specific destinations due to travel warnings or travel restrictions or lockdown decisions in the context of the COVID-19 pandemic. Austria submits, since those measures were limited to certain destinations, that the loss of turnover will be determined on a (restricted) destination-by-destination basis <sup>(19)</sup>.
- (27) Pursuant to point 2.3.5 of *the Directives*, the measure covers only damage suffered in respect of the activity or a specific and severable part of activity, eligible for compensation as defined in recital (26), directly resulting from the different lockdown decisions during the COVID-19 pandemic in the period from 16 March 2020 until 31 March 2022. The specific period related to each relevant lockdown measure when the activities of a beneficiary were eligible for compensation is determined to the exact day ex post (“the eligible periods”).
- (28) Pursuant to point 2.3.1 of the *Directives*, the damage suffered is the negative difference between the operating profit/losses <sup>(20)</sup> determined during the eligible periods and the operating profit obtained in the exact corresponding periods of 2019, i.e. the losses in profits suffered due to the respective lockdown decision. <sup>(21)</sup> Pursuant to points 2.2. and 2.3.3 of the *Directives*, the relevant damage is calculated at the level of the individual legal entity. For the determination of the actual damage of the beneficiary concerned by the lockdown decision the situation of the group, it belongs to, does not have to be taken into account.
- (29) Pursuant to point 2.3.1 lit.d. of *the Directives*, if a lockdown decision prohibits *de jure* or *de facto* (as explained in recital (16) and recital (26)) an activity or a specific and severable part of an activity and the income was therefore shifted to another activity, part of activity or source of income of the entity, the operating profit stemming from the latter is to be identified and taken into account in the calculation of the eligible damage restrictively. <sup>(22)</sup> Therefore, it should be avoided that an advantage can be obtained from the fact that only activities

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<sup>(18)</sup> Austria refers, as an example, to a laundry services specialised in dealing with hotels.

<sup>(19)</sup> See point 2.3.6 lit.c of the *Directives*.

<sup>(20)</sup> Operating profit is the sum of net sales, net inventory changes, own work capitalized and other operating income less cost of materials, personnel expenses, depreciation and amortization and other operating expenses.

<sup>(21)</sup> As regards the specific calculation method, point 2.3.1 lit a. of *the Directives* refers for the determination of the losses to the methodology followed in the framework scheme for uncovered fixed costs, approved by Commission decision of 20 November 2020 C(2020) 8317 final, SA.58661 (2020/N), which are taken from the profit and loss statements. .

<sup>(22)</sup> The figures must be confirmed and submitted by a tax consultant, auditor or accountant. Accountants may only issue such confirmation for companies whose balance sheets they are permitted to prepare pursuant to section 2 (1) no. 2 of the Accounting Law (“Bilanzbuchhaltungsgesetz” 2014). The tax consultant, auditor or accountant must maintain his independence via-a-vis the applying company and avoid any bias or conflict of interest.

subject to the lockdown decisions are considered, and the activity is shifted or the capacity is used for other activities or part of activities, which have become more profitable as a result of that shift. To this end, the activity of the legal entity seen in its entirety (i.e. the sum of the damage compensation for the eligible period and the profits derived from the prohibited and non-prohibited activities in the same period) cannot be more profitable than the entire operating profit of those activities of the respective period in 2019. Pursuant to point 2.3.1 lit d. and lit e. of the *Directives*, losses suffered in the eligible period by activities or part of activities not prohibited by the lockdown decisions are excluded from the eligible damage calculation, so as to exclude overcompensation for the damage suffered.

- (30) Pursuant to point 2.3.1 lit.b and point 2.3.3 of the *Directives*, aid received in the same eligible period due to COVID-19 measures in Austria will accordingly reduce the damage calculated according to the methodology described in recital (28) to exclude overcompensation. The beneficiaries must provide details of all aid applied for and received in Austria in the same eligible period. In addition, according to point 3.3 of the *Directives*, the beneficiaries must confirm that the eligible damage covered by the measure was not already compensated by any other source.
- (31) Pursuant to point 3.3 of the *Directives*, the beneficiaries also have to declare that they took all reasonable measures to minimise the damage they incurred as part of an overall strategy, in order to limit the aid to the minimum necessary. Any expenses that have been avoided or savings that have been made or benefits received on any other basis (e.g. by means of short-time allowances) are deducted from the actual damage. This obligation of the beneficiaries to minimise the damages will be verified by the authority based on the information received.
- (32) In addition, the Austrian authorities confirmed that:
- Payment made to beneficiaries will be net of any amount obtained from insurance, litigation, arbitration or any other source for the same damage.
  - No payment under the scheme is possible for any applicant that was responsible for the damage suffered, that did not conduct its activities with due diligence or in compliance with applicable legislation or did not take measures to mitigate the damage.
  - The damage calculation for each eligible period for a beneficiary during the period from 16 March 2020 to 31 March 2022 will be rigorously taking into account the economic effects of declines in demand due to lower aggregate demand, or due to greater customer reluctance, or due to the generally applicable restrictions on capacity and social distancing measures, any of which cannot be taken into account in the calculation of the eligible damage. Pursuant to point 2.3.1 lit c. of the *Directives*, Austria commits to apply a reduction of 5 % (“haircut”)<sup>(23)</sup> to determine the counterfactual profits for the reference periods in 2019, which accordingly

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<sup>(23)</sup> This haircut relates to the average price adjusted GDP year-to-year over the compensation period (see recital 12). The decline of 5% was accepted as a proxy to capture the general economic downturn during the coronavirus pandemic, i.e. capturing in factors that would have negatively impacted the potential operating results of undertakings during the period of the coronavirus pandemic without them being directly affected by the restrictive measures.



reduces the potential damage. In order to adjust for sector specificities of the measure, the haircut that is applied to counterfactual profits may need to be increased, if appropriate.

- If the monthly damage compensation per beneficiary exceeds EUR 4 million on average over each of the eligible periods, the counterfactual profits must be determined on a case-by-case basis. In that analysis for each beneficiary concerned, the individual counterfactual profits have to be adjusted for the economic effects of declines in demand due to lower aggregate demand, or to greater customer reluctance, or the generally applicable restrictions on capacity and social distancing measures. If it is demonstrated that an individual adjustment is not possible in certain cases, a haircut of 20 % <sup>(24)</sup> on the entire corresponding profits of 2019 will be applied <sup>(25)</sup>.
- (33) The aid is granted based on the damage calculated on the basis of audited accounts of the aid applicant. The aid awarded under the measure must not exceed the actual damage suffered by the beneficiaries. Beneficiaries must provide all relevant information and determine the eligible damage in the application and must commit to provide additional information, if considered necessary by the granting authority. The applicant's tax consultant, auditor or accountant must confirm the calculation and amount of the actual damage suffered by the beneficiary. In addition, the tax consultant, auditor or accountant must submit to the authority an attestation, that there are no facts known to him that the information submitted to the granting authority are wrong. The calculation of the damage is based on the reference period in 2019, taking into account economic effects of declines in demand due to lower aggregate demand (see recital (32)).
- (34) The granting authority will verify and approve the amount of the aid on basis of the actual damage evidenced by the submitted documents, including the attestation and confirmation by the expert (see recital (33)).
- (35) In case of false declarations in the audited accounts or correction of the data after the disbursement of the aid, Austria introduced an *ex post* adjustment mechanism, see point 4 of the *Directives*. The granting authority will recover aid awarded in error or in breach of the conditions laid down in the measure with interest. For aid beyond EUR 10 million or undertakings with profits pursuant to § 189a Z 5 Unternehmensgesetzbuch (UGB) <sup>(26)</sup> of at least EUR 50 million, in addition, the authorities will conduct an *ex post* review of the facts and figures on a case-by-case basis; for other beneficiaries this *ex post* reviews take place on a sample basis, see point 4.1 of the *Directives*.

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<sup>(24)</sup> This figure reflects a prudent approach, based on figures relating to the performance of the economy overall and takes into account decline in demand of more than twice the fall in the growth rate of the GDP in 2020 and 2021.

<sup>(25)</sup> Austria confirmed that in order to ensure a rigorous damage quantification which only compensates damages caused by restrictions affecting certain routes, a generalised methodology for the haircut does not apply for transport companies, but a case-by-case assessment will take place to establish the counterfactual profits taking into account these sector specificities.

<sup>(26)</sup> The Austrian Business Code, "Unternehmensgesetzbuch", BGBl. I Nr.63/2019.

## 2.10. Cumulation

- (36) Beneficiaries may apply only once for a subsidy under the measure.
- (37) According to Austria, aid granted under the measure may be combined with other aid for the compensation of eligible damage, and with aid under the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, as amended (“the Temporary Framework”) <sup>(27)</sup>, up to a limit of 100 % of the eligible damage as calculated for the purposes of the measure.
- (38) State aid received in the same period on the basis of COVID-19 measures, will be deducted from the eligible damage (see recital (30)). In accordance with this methodology that for the same period the aid granted prior to the one approved by the present decision is taken into account when assessing the eligible damage, the aid does not lead to overcompensation. A rigorous and precise quantification of such damage will take place (see recitals (28) to (33)) to exclude overcompensation.

## 2.11. Monitoring and reporting

- (39) The Austrian authorities commit to provide a report no later than one year after the date of the Commission decision, as well as a list of all individual aid measures based on the scheme no later than one year after the Commission decision. That list will include the amount of compensation as well as recoveries.

## 3. ASSESSMENT

### 3.1. Existence of State aid

- (40) Article 107(1) TFEU defines State aid as “*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States*”.
- (41) The qualification of a measure as aid within the meaning of that provision therefore requires that the following cumulative conditions be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.
- (42) The measure is imputable to the State as it is based on the acts mentioned in recital (15) and it is implemented by State authorities, more specifically the COFAG. The compensation notified by Austria was paid from the State budget (recital (18)) and is therefore provided through State resources within the meaning of Article 107(1) TFEU.

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<sup>(27)</sup> Communication from the Commission - Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak, (OJ C 91I, 20.3.2020, p. 1), as amended by Commission Communications C(2020) 2215 (OJ C 112I, 4.4.2020, p. 1), C(2020) 3156 (OJ C 164, 13.5.2020, p. 3), C(2020) 4509 (OJ C 218, 2.7.2020, p. 3), C(2020) 7127 (OJ C 340I, 13.10.2020, p. 1) and C(2021) 564 (OJ C 34, 1.2.2021, p. 6) and C(2021) 8442 (OJ C 473, 24.11.2021, p.1).

- (43) The measure confers an advantage on its beneficiaries in the form of direct grants (recital (21)). The measure thus relieves those beneficiaries of damage that they would have to bear under normal market conditions. The advantage corresponds to the amount of compensation paid under the scheme.
- (44) The advantage granted by the measure is selective, since it is awarded only to certain undertakings, excluding the financial sector (see recital ((23))).
- (45) The measure is liable to distort competition, since it strengthens the competitive position of its beneficiaries. As the scheme covers sectors and undertakings involved in trade between Member States (see recital (23)), there is a risk that the aid could affect such trade.
- (46) The notified measure, therefore, constitutes State aid within the meaning of Article 107(1) TFEU.

### **3.2. Lawfulness of the measure**

- (47) The Commission notes that the Austrian authorities have put the aid into effect in contravention of Article 108(3) TFEU. Austria has not respected its obligation under Article 108(3) TFEU, and the aid must be regarded as being granted unlawfully.

### **3.3. Compatibility of the measure**

- (48) The Commission has examined the notified scheme pursuant to Article 107(2)(b) TFEU.

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

- (49) Article 107(2)(b) TFEU provides that aid to make good damage caused by natural disasters or exceptional occurrences shall be compatible with the internal market. Neither the TFEU nor other Union legislation contains a precise definition of the notion of exceptional occurrence. As aid based on Article 107(2)(b) TFEU constitutes an exception to the general prohibition of State aid within the internal market laid down in Article 107(1) TFEU, the Commission, in line with the consolidated Union case-law, <sup>(28)</sup> has consistently held that the notions of ‘natural disaster’ and ‘exceptional occurrence’ referred to in Article 107(2)(b) TFEU must be interpreted restrictively.
- (50) The characterisation of an event as being an exceptional occurrence is made by the Commission on a case-by-case basis, having regard to its previous practice in the field <sup>(29)</sup>.

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<sup>(28)</sup> Judgment of the Court of Justice of 11 November 2004, *Spain v Commission*, C-73/03, EU:C:2004:711, paragraph 37 and judgment of the Court of Justice of 23 February 2006, *Atzeni and others*, in *Joined Cases C-346/03 and C-529/03*, EU:C:2006:130 paragraph 79.

<sup>(29)</sup> Exceptional occurrences which have been accepted in the past by the Commission include war, internal disturbances and strikes, and, with certain reservations and depending on their extent, major industrial accidents which result in widespread economic loss, see *Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020*, paragraph 330 (OJ C 204, 1.07.2014, p. 53).

- (51) In that regard, the following indicators relating to the event concerned must be cumulatively met: (i) unforeseeable or difficult to foresee<sup>(30)</sup>; (ii) significant scale/economic impact<sup>(31)</sup>, and (iii) extraordinary<sup>(32)</sup>.

### **COVID-19 pandemic as an exceptional occurrence**

- (52) Following the first reports of cases of acute respiratory syndrome (COVID-19) in the Chinese Wuhan municipality at the end of December 2019, the Chinese authorities identified a novel coronavirus (SARS-CoV-2) as the main causative agent, which had not been previously identified in humans. The outbreak has rapidly evolved, affecting not only other parts of China but has also spread to the majority of countries worldwide, including all Member States. Outbreaks of novel virus infections among people are always of public health concern and can have a significant economic impact. Specific sectors and areas were particularly affected by the outbreak and by governmental restrictions and recommendations, be it directly or indirectly.
- (53) The declaration of the World Health Organization of a pandemic associated with the public health risk deriving from the absence of therapeutics or vaccines for COVID-19 determined the exceptional nature of the circumstances. The rapidity of the spread caused enormous consequences both in terms of fatal outcomes in high-risk groups and in terms of economic and societal disruption. The necessity to adopt and encourage the respect of measures aimed at interrupting transmission chains stems from that acknowledgement. Such measures resulted in far-reaching disruption of various economic sectors, which was clearly outside the normal functioning of the market.
- (54) In view of the above, this event qualifies as an exceptional occurrence because: (i) it was not foreseeable; (ii) it was clearly distinguishable from ordinary events by its character and effects on both the undertakings directly affected and the economy as a whole; and (iii) it lied outside of the normal functioning of the market.<sup>(33)</sup>
- (55) In that context, the COVID-19 pandemic can be considered as an exceptional occurrence within the meaning of Article 107(2)(b) TFEU.

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<sup>(30)</sup> Commission Decision of 1 August 2008, case SA.32163, Remediation of damage to airlines and airports caused by seismic activity in Iceland and the volcanic ash in April 2010, Slovenia, recital 31.

<sup>(31)</sup> Elements taken into account by the Commission to consider that the occurrence reached a significant scale: negative consequences cannot be contained (Commission Decision of 4 October 2000 on case NN 62/2000, Régime temporaire d'aides aux entreprises victimes des intempéries et de la marée noire –France), or because of the number of dead or injured people (Commission Decision of 11 April 2012 on case SA.33487, Agricultural and fisheries aid to compensate for damage due to exceptional occurrence (red mud "Aluminium accident"), Hungary, recital 35; Commission Decision of 2 May 2002 on case N241/2002, Régime en faveur des entreprises victimes de la catastrophe industrielle de Toulouse, France, recital 19), the immense ecological and economic damage (Commission Decision of 11 April 2012 on case SA.33487, recital 36), the amount of material damage despite the local character of the industrial accident (Commission Decision of 2 May 2002 on case N 241/2002, recital 19).

<sup>(32)</sup> In its Decision of 19 May 2004 in case C-59/2001 (OJ L 62, 2007, p. 14), the Commission considered that the (alleged) fall in sales of poultry meat in a Member State not directly affected by the dioxin contamination, did not constitute in itself an exceptional occurrence. It was yet an unforeseeable event, but formed part of the normal commercial risks to which an undertaking is exposed.

<sup>(33)</sup> See judgment of 17 February 2021, *Ryanair v Commission*, T-259/20, EU:T:2021:92, paragraph 26.

### **Causal link between COVID-19 pandemic and damage compensated by the measure**

- (56) As an immediate consequence of the COVID-19 pandemic in Austria, the Austrian authorities adopted several lockdown decisions.
- (57) Under the lockdown decisions, most economic activities have been prohibited in Austria for the lockdown periods due to the COVID-19 pandemic. Those measures were a reaction to the exceptional occurrence and resulted in a loss of profit incurred in the periods covered by the lockdown decisions.
- (58) Only damages stemming from the prohibition of activities imposed by the lockdown decisions which precluded the beneficiary, either *de jure* or *de facto*, from operating its economic activity or a specific and severable part of its activity are eligible for compensation under the measure.
- (59) First, that notion of a prohibition of activities includes measures which explicitly require the cessation of activities of a beneficiary and where the measures, therefore, result in the complete cessation of an economic activity. This is so independently of whether the beneficiary continued to operate other activities not prohibited by the lockdown decisions.
- (60) Second, it includes measures *de facto* precluding a beneficiary from operating its economic activity, or parts of its economic activities, because of its direct dependency to different activities prohibited *de jure*, as described in recital (26). In that situation, it will be for the beneficiary to show that it faces a prohibition of its activities, based on evidence of a direct dependency between its activities concerned and another, prohibited, activity. This is done by showing that 80% of the turnover of the activity of the beneficiary in question under normal circumstances stem from business with undertakings carrying out prohibited activities..
- (61) Third, that notion of a prohibition of activities also includes measures *de facto* precluding the beneficiary from operating its economic activity in the travel sector (including the ski lift and cable car operations), because of the cessation of leisure travel activities as the direct consequence of the travel restrictions contained in the lockdown decisions and/or the travel warnings due to the ongoing COVID-19 pandemic (see recital (26)). The direct dependency between the activities concerned and the travel restrictions or warnings or lockdown decisions must be demonstrated by showing that 80 % of the turnover of the travel/hospitality activity under normal circumstances stem from leisure travellers being prohibited from travelling to certain destinations due to travel restrictions or travel warnings (destination-by-destination approach).
- (62) The period for damage is limited to the prohibition periods of the activities banned due to the lockdown decisions for which a beneficiary can prove a direct causal link with regard to its own situation (see recital (27)).
- (63) The notion of a prohibition of activity does not cover any situations other than those described in recitals (58) to (61).

- (64) Therefore, the lockdown decisions and the consequent prohibition of activities by the Austrian authorities are sufficient to provide a direct link between the COVID-19 pandemic and the damage suffered.

### **Proportionality of the aid measure**

- (65) In order to be compatible with the internal market based on Article 107(2)(b) TFEU, the aid must be proportional to the damage caused by the exceptional occurrence. Aid must not result in overcompensation of damage; it should only make good the damage caused by the exceptional occurrence.
- (66) The Commission considers that Austria put in place an objective, evidence-based, system for the damage calculation. Beneficiaries will be required to provide all necessary documentation in that regard and evidence of the damage actually incurred must be submitted to the granting authority in writing. The calculation of damage will be confirmed by a tax consultant, auditor or accountant, as described in recital (33). The competent authority will verify that all conditions under the measure are fulfilled.
- (67) The measure ensures that the aid is limited to the minimum necessary and avoids overcompensation. As explained in recital (31), the beneficiaries have an obligation to declare that they have taken all reasonable measures to minimise the losses that they incur and to deduct from the damage any expenses that have been avoided or savings that have been made or any benefits received on any other basis.
- (68) A rigorous damage calculation under the measure is further ensured by the following elements. The economic effects of declines in demand due to lower aggregate demand, or to greater customer reluctance, or the generally applicable restrictions on capacity and social distancing measures, will be taken into account by adjusting the counterfactual profit by 5% (see also recital (32)). In order to adjust for sector specificities of the measure, the haircut that is applied to counterfactual profits may need to be increased, if appropriate. In addition, if the monthly damage compensation per individual beneficiary exceeds EUR 4 million, on average over the eligible period, the counterfactual profits must be determined on a case-by-case basis. In that analysis for each beneficiary concerned, the individual counterfactual profits have to be adjusted for the economic effects of declines in demand due to lower aggregate demand, or to greater customer reluctance, or the generally applicable restrictions on capacity and social distancing measures. If it is demonstrated that an individual adjustment is not possible in certain cases, a haircut of 20 % on the entire corresponding profits of 2019 will be applied.
- (69) In addition, as explained in recital (29), to exclude overcompensation, any loss caused by an activity not prohibited by the lockdown decisions of the Austrian authorities is not eligible for aid. In addition, profits shifted from a prohibited activity to activities not covered by the lockdown decisions reduce the possible amount of damage (see recital (29)).
- (70) The granting authority has put in place an *ex post* adjustment mechanism in case of false declarations in the audited accounts or corrections of the data submitted after the aid has been disbursed. In case this *ex post* adjustment mechanism leads to the finding that aid was granted in excess of the actual damage resulting

directly from the lockdown decision, the granting authority will recover the excess including interest (see recital (35)).

- (71) In addition, the Austrian authorities have put in place the following safeguards, so that the compensation under the notified measure does not exceed what is necessary to make good the damage:
- Any payment made to beneficiaries is net of any amount recovered by insurance, litigation, arbitration or other source of compensation for the same damage, in addition to which the economic effects of declines in demand when computing the damage must be taken into account (recital (32));
  - In addition, there is an exclusion of any applicant responsible for the damage suffered, or that did not conduct its activities with due diligence or in compliance with applicable legislation, or that did not take any measure to mitigate its damage (recital (32)).
- (72) Since the measure ensures that the aid will not exceed the actual damage suffered by the aid beneficiaries and all other aid received by the beneficiary is taken into account restrictively for the determination of the eligible damage (see recitals (30), (37) and (38)), the aid is considered to be proportional to the damage caused by the exceptional occurrence. In light of the above-mentioned safeguards, the Commission considers that the compensation under the measure will not exceed the damage directly suffered by each beneficiary from the COVID-19 pandemic as a result of the related measures taken by the public authorities.
- (73) To the extent that the scheme applies in the sectors of primary production of agricultural products, the Commission recalls that it adopted guidelines on the interpretation of Article 107(2)(b) TFEU in those sectors<sup>(34)</sup>. Those guidelines reflect the general principles of interpretation of Article 107(2)(b) TFEU. As already recalled, that provision must be subject to a narrow interpretation (recitals (49) and (50)). It applies in situations of exceptional occurrence; in the present case, the Commission concludes in this decision that the COVID-19 pandemic constituted such an exceptional occurrence (recital (55)). The present scheme aims at compensating the damage resulting from the exceptional occurrence. The aid benefits directly each undertaking concerned. Austria confirmed that the measure will only provide for aid within three years from the date of the occurrence of the event, and that the aid must be paid out within four years from that date. Damage that will be open to compensation must be directly linked to the exceptional occurrence and compensation cannot exceed the damage suffered by the beneficiary. The methodology for setting the amount of the compensation ensures that it is directly linked to the damage suffered by each company as a result of the exceptional occurrence (recitals (28) to (33)); it is calculated by comparing the operating profits during the compensation period to a reference period before the event, on the basis of audited statements ensuring that the aid remains proportionate and that no company could benefit from overcompensation (recitals (37) to (38)). The Commission therefore considers that the scheme, to the

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<sup>(34)</sup> See Part II, Chapter I, Section 1.2.1.1. of the Guidelines for State aid in the agricultural and forestry sectors and in rural areas, of 1 July 2014, OJ C 204, p.1-97; since 21 December 2022, the updated Guidelines are applicable for the granting of aid to these beneficiaries, see OJ C 485, p.1-90;

extent it applies in the sectors of primary production of agricultural products fulfils the conditions of those guidelines and is compatible with Article 107(2)(b) TFEU.

- (74) In view of the above, the Commission considers that the measure is compatible with the internal market in accordance with Article 107(2)(b) TFEU.

#### **4. CONCLUSION**

The Commission regrets that Austria put the aid into effect in breach of Article 108(3) TFEU.

However, it has decided, on the basis of the foregoing assessment, not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(2)(b) of the Treaty on the Functioning of the European Union.

The decision is based on non-confidential information and is therefore published in full on the Internet site: <https://competition-cases.ec.europa.eu/search?caseInstrument=SA>.

Yours faithfully,

For the Commission

Margrethe VESTAGER  
Executive Vice-President