

## Overview of the State aid rules and public service obligations rules applicable to the air transport sector during the COVID-19 outbreak

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### 1. Introduction

#### 1.1. General

The COVID-19 outbreak is having a major impact on European transport and mobility. It caused massive negative demand shocks due to the necessary containment measures along with voluntary efforts of individuals to practice social distancing, minimize commuting and avoid travel. These have led to supply chain disruptions, steep reductions in tourism, and overall reduced mobility.

EU State aid rules enable Member States to support companies affected by the outbreak, including those in the transport sector. The aim is to safeguard and restore the connectivity underpinning the free movement of people and goods while keeping in mind that a competitive internal market is our best asset to bounce back strongly afterwards.

Any public intervention in the transport sector should be designed to avoid undue distortions of competition during and after the crisis and to preserve efficient transport ecosystems. To this end, all undertakings, including transport operators, related services providers and infrastructure managers, should have access to the necessary support to protect and restore connectivity for European citizens and businesses – including the integrity and good functioning of the supply chains. In the interest of the EU economy and consumers, Member States should design their measures on a non-discriminatory basis and in a way which preserves the pre-crisis market structures and paves the way for a speedy economic recovery. A reduction in the number of economic actors in the internal market post-crisis may have a negative impact on competition in the transport markets, on connectivity, quality of service and prices.

## 1.2. Air Transport

Temporary restrictions on extra-EU and intra-EU air travel have started to leave a significant mark: compared to the same time last year, there are over 80% fewer flights across the European network,<sup>1</sup> Europe's largest airports are operating less than 75% of flights and the number of bookings continues to decrease. As around 50% of air freight is carried in the bellies of passenger aircraft, the drop in passenger traffic has led to a significant drop in air cargo capacity, negatively impacting the transport of medical supplies, perishables and other time-sensitive cargo.

Member States are faced with the need to ensure basic connectivity during the COVID-19 outbreak both for passenger transport and for security of supply of essential items, including food and medicine, to keep essential airports open and to plan for ensuring connectivity in the recovery phase.

In particular, Member States may need to put urgently in place public services to respond to specific needs or to replace commercial offers that have become unavailable due to the COVID-19 outbreak. In the field of transport, these public services could include services aiming at ensuring basic connectivity needs across the territories (e.g. islands, remote areas); ensuring security of supply for essential products (e.g. food, drugs, medical equipment); or operating specific flights related to the COVID-19 outbreak. The undertakings providing such public services may include both the service providers (e.g. an airline flying to an island), and the underlying necessary infrastructure (e.g. an airport remaining open to traffic in order to ensure basic servicing).

This note provides guidance on the various support measures Member States may use in line with EU State aid rules and Public Service Obligations rules in the exceptional context of the COVID-19 outbreak. The *first section* will describe the measures that do not constitute State aid within the meaning of Article 107(1) TFEU and, therefore, do not need to be notified to the Commission. The *second section* will describe the measures that constitute State aid but may be exempted from notification to the Commission if they fulfil certain requirements. The *third section* will describe the measures that constitute State aid and need to be notified to the Commission.

This document does not deal with the exit plans and post-crisis return to normal activities.

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<sup>1</sup> Eurocontrol

## 2. Measures that do not constitute State aid

### 2.1. General measures

Member States may wish to adopt measures applying to all economic actors in order to stabilise the economy, prevent impeding unemployment waves and provide immediate relief across all sectors. General measures applicable to all economic sectors, such as wage subsidies, suspension of corporate tax and VAT or social contributions payments, do not constitute State aid and do not need to be notified to the Commission.<sup>2</sup>

### 2.2. Public remit

To the extent COVID-19 related emergency activities fall within the public remit, i.e. concern activities that the State normally performs in the exercise of its public powers, the public funding of such activities does not fall under the State aid rules. In the air transport sector, such activities may include operating special flights for the purpose of repatriation of nationals, transporting people for medical reasons, by military aircraft or similar.

If the beneficiary does not perform any economic activity at all, State aid rules do not impose any kind of control of the level of funding that it receives for public remit operations (e.g. in case the army or the police performs such operations without any involvement of undertakings). However, if the beneficiary does not only perform public remit operations but also economic activities, the public funding must not exceed what is necessary to compensate the extra costs related to the public remit activities.<sup>3</sup> For instance, in a situation where an airport is required to stay open to accommodate certain flights during the COVID-19 outbreak, if the Member State compensates the airport operator for the variable costs related to those public remit activities (i.e. difference between costs that would be borne in case the airport was closed down and the costs borne in the situation where the airport remains open to accommodate the requests by the Member State), this would a priori not fall under State aid rules. In case a Member State requires public remit activities from several operators (e.g. several airports or several airlines), the compensation should be calculated in a non-discriminatory way (i.e. the compensation should cover the same types of cost, the same methodology for the calculation of the compensation should be used).<sup>4</sup>

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<sup>2</sup> See points 40 and 42 of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 911, 20.3.2020, p. 1-9), as amended from time to time (the “Temporary Framework”). For latest courtesy consolidated version, see [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/covid\\_19.html](https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html).

<sup>3</sup> For further details on the existence of State aid for airport infrastructure (notably for public remit), see the guidance provided by the Commission services in the State aid analytical grid for airport infrastructure.

<sup>4</sup> Otherwise, when it is normal under a given legal order that airports have to bear certain costs inherent to their operation, whereas other airports do not, the latter might be granted an advantage, regardless of whether or not those costs relate to an activity, which in general is considered to be of a non-economic nature. In that case, there is State aid that is notifiable to the Commission. See point 37 of the Communication from the Commission: Guidelines on State aid to airports and airlines (2014), OJ C 99/03, 4.4.2014, p. 3-34.

### 2.3. Public service compensation constituting no-aid<sup>5</sup>

Member States may wish to safeguard air services which, whilst falling outside of the public remit, are still considered as essential to fulfil a specific public need (e.g. providing connectivity across territories). Such services qualify as services of general economic interest (“SGEI”). Public service compensation granted for the execution of SGEI can either be qualified as (i) no aid, (ii) State aid exempted from notification to the Commission or (iii) State aid to be notified to the Commission.

This section will highlight the conditions under which public service compensation for SGEI does not constitute State aid under the exceptional circumstances created by the COVID-19 outbreak. This note focuses on passenger air transport services aimed at ensuring connectivity. Some of the flights to ensure connectivity may also cover freight services, insofar as the passenger aircraft are used for air cargo.<sup>6</sup>

The conditions for the support of airport infrastructure differ from those for air services and will be specified in the text as relevant. In particular, the Commission services note that it may be necessary in certain circumstances to also designate certain services in some airports as SGEI for the duration of the COVID-19 outbreak to enable the airport to remain open. This should, however, never include the full management of the airport.<sup>7</sup> Any such SGEI designation related to the COVID-19 outbreak should be strictly limited in time and in scope to what is absolutely necessary and only if absolutely needed to ensure the connectivity of the region in which the airport is located. Member States are invited to contact the Commission services of the Directorate General for Competition, should they envisage any such designation.

In the passenger air transport sector, public service compensation is generally granted to air carriers entrusted with the provision of air transport services under specific public service

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<sup>5</sup> For further guidance related to no aid classifications under the State aid rules, please see the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, p. 1-50.

<sup>6</sup> For air freight, imposing a PSO only for the purpose of ensuring the transportation of cargo and mail is also possible (see point 41 of the Interpretative Guidelines on Regulation 1008/2008). [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0617\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0617(01)&from=EN).

<sup>7</sup> In exceptional circumstances, an airport operator can be entrusted with an SGEI for the overall management of airport infrastructure, in cases where, without the airport, the area it serves would be secluded from the rest of the EU. There are currently very few SGEI- designated airports within the EU.

obligations (the “PSO”) under the conditions set out in Regulation 1008/2008<sup>8</sup> (“Regulation 1008/2008”).

Any public support measures shall be assessed under the following relevant rules: (i) EU air transport sectoral rules; (ii) State aid rules and (iii) EU public procurement rules, as applicable. The sections below will focus in particular on the approach to be followed for passenger air transport services. The rules governing measures in favour of air cargo, airport infrastructure and other ancillary air services are included if and when applicable.

### 2.3.1 Air transport sectoral rules

Regulation 1008/2008<sup>9</sup> establishes the principle of freedom for air carriers to provide air transport services within the EU. Public service obligations, and even more so the limitation of access to routes in the context of such obligations, represent restrictions to that freedom.

However, given the exceptional circumstances arising out of the COVID-19 outbreak which impact all of the European Union and which brought the passenger air transport services to almost a complete halt across the EU Member States, and given that the COVID-19 outbreak has been recognized by the Commission as an exceptional occurrence, it may be necessary, in certain instances and with a limited scope, to impose an urgent PSO to ensure basic minimum connectivity of remote areas or islands.

This guidance summarizes the conditions under which such restrictions, in form of a public service contract awarded to the exclusion of carriers other than the selected carrier, is compatible with Union law in the context of the COVID-19 outbreak.

In this respect, a distinction must be drawn between awards to be granted for routes that had been served by a previously selected carrier but whose services have been suddenly interrupted, and other cases.

#### ***Routes served under a PSO prior to the COVID-19 outbreak***

Regulation 1008/2008 explicitly provides for a special procedure in case of a sudden interruption of a service by an air carrier previously selected in accordance with Article 17 of that Regulation to carry out a PSO on a given route. Article 16(12) of Regulation 1008/2008 entitles the Member State, in case of an emergency, to select by mutual agreement a *different* air carrier to operate that PSO route, for a temporary period of up to seven months, not renewable. In this case, and under the further conditions of Article 16(12), the Member State

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<sup>8</sup> Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) (Text with EEA relevance), OJ L 293, 31.10.2008, p. 3–20.

<sup>9</sup> This does not cover PSO flights to third countries (if any).

is not obliged to organise a public tender in accordance with the procedure set out in Article 17.

As Article 16(12) explicitly requires that the Member State must have recourse to a carrier other than the one whose services had been interrupted, it cannot be relied upon to provide an emergency PSO service with different conditions or scope by the *same* operator.

Therefore, the question arises whether it is possible to modify an existing public service contract, specifically in exceptional circumstances such as those arising out of the COVID-19 outbreak.

According to Article 17(3) of Regulation 1008/2008, “*the invitation to tender and the subsequent contract shall cover, inter alia, [...] rules concerning amendment and termination of the contract, in particular to take account of unforeseeable changes*”.

Under the public procurement rules, such modifications are possible. However, any such modifications need to respect the principles of necessity and proportionality and should be limited in time to the period of the crisis. In practical terms, this should mean that any such COVID-19 related modification should be valid for a maximum of three to six months, and, in any case, not beyond 31 December 2020 (see Section 2.3.3 below for further explanations regarding the application of public procurement rules).

If the necessary modifications of an existing PSO contract would go beyond the criteria described above, such modification would not be in line with the public procurement rules. In such situations, a new contract must be awarded instead. This can be done by the same emergency procedures as applicable for new PSO routes (see next section).

### ***New PSO routes***

For routes operated commercially prior to the COVID-19 outbreak, the Commission services consider that Articles 16 and 17 of Regulation 1008/2008 on PSO award do not govern the urgent imposition of a new PSO in a situation where the EU-wide passenger aviation market has come to an almost complete halt because of the containment measures taken by Member State authorities in order to respond to the COVID-19 outbreak.

However, in this context, the Commission services consider that the **general public procurement rules** apply and such emergency PSOs can be awarded in line with those rules (see Section 2.3.3 for further guidance on public procurement rules).

The Commission services note that any such COVID-19 PSO should be valid for a maximum of three to six months, and, in any case, not beyond 31 December 2020.

As the award of such PSOs falls outside the scope of application of Articles 16 and 17 of Regulation 1008/2008, the rules contained therein on the need to inform the Commission in advance do not apply. Nevertheless, Member States are kindly requested to inform

Directorate General for Mobility and Transport after the PSO has been imposed, by an email to MOVE-PSO@ec.europa.eu.

### 2.3.2. State aid rules

As regards **State aid rules**, the imposition of a PSO (also by means of the conclusion of a public service contract (“PSC”)) is subject to State aid rules relating to SGEI.<sup>10</sup> These govern the conditions under which a compensation for an SGEI can be granted, including in the air transport sector.

The starting point is the *Altmark* judgment.<sup>11</sup> This judgment sets out four cumulative conditions which, if met, mean that the compensation does not constitute an advantage to the service provider, and, therefore, the measure does not constitute State aid.

The manner in which Member States may impose a PSO or award a PSC during the COVID-19 outbreak differs depending on whether the route in question had a PSO in place prior to the outbreak or whether such route was previously operated on a commercial basis.

#### *For routes with new PSOs*

Given the exceptional circumstances arising out of the COVID-19 outbreak which impacts all of the European Union and given that the COVID-19 outbreak has been recognized by the Commission as an exceptional occurrence, the following text provides guidance how the four Altmark criteria could be fulfilled. It is up to the Member States to self-assess whether the planned measure would comply with the Altmark conditions, and, thus, not constitute aid. In such cases, no formal notification to the Commission (Directorate General for Competition) under State aid rules would be required.

#### *First Altmark criterion: definition of the scope of the public service*

1. Member States need to clearly define:
  - i. The **essential route(s)** to be maintained active (or in the case of airport infrastructure, the essential airport services);
  - ii. The respective minimum required **frequency** (in terms of connections) and **volumes** (e.g. passenger capacity, of freight traffic) or, in the case of airport infrastructure, the quantity and quality of services to be maintained.
2. The **necessity** of the measure could be demonstrated by showing that:

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<sup>10</sup> SGEI rules are available at : [https://ec.europa.eu/competition/state\\_aid/legislation/sgei.html](https://ec.europa.eu/competition/state_aid/legislation/sgei.html)

<sup>11</sup> Judgment of the Court of 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* (‘Altmark’ judgment), C-280/00, EU:C:2003:415, par. 88 to 93.

- i. During the months of the initial containment measures of the COVID-19 outbreak, there has been a severe and unforeseeable *decrease in passenger and/or freight demand*; and
- ii. *Subsequent losses of passenger and/or freight revenue* make the provision of the service *no longer economically viable*.

The description of the scope does not have to be detailed in terms of all qualitative elements, but it does need to be sufficiently clear, so that the undertaking has a clear SGEI obligation to discharge. The contract should have a **limited duration**, which shall not exceed three to six months and, in any case, should not extend beyond 31 December 2020. The contract may be renewed for another three months and beyond 31 December 2020, only provided that such extension is duly justified by the evolution of the COVID-19 outbreak and in line with the principle of proportionality.

In any case, the duration and scope of any PSO should not prevent the restart of normal commercial operations. A gradually rising passenger demand can be an indication that the PSO in favour of a single operator ceases to be justified. Similarly, a plan of commercial operators to enter the route or increase frequencies can be such an indication. Member States are also invited to submit information to the competent Commission services<sup>12</sup> every three months about the emergency PSO contract put in place, including data on the traffic developments.

*Second and third Altmark criteria: ex ante financial parameters and control of overcompensation*

Complying with the compensation mechanism set out in Article 17 of Regulation 1008/2008 by analogy is a starting point in order to meet the criteria as set out by the Court in its Altmark judgment. In the context of the COVID-19 outbreak, the following elements may assist Member States in setting out the compensation mechanism and avoiding overcompensation.

As the services in question have been so far operated on a commercially viable basis, it is sufficient to base the compensation parameters for each route on the observed profit and loss accounts calculated for the following periods. In particular, Member States should select the last two months before the outbreak of the COVID-19 outbreak (in principle January and February 2020) and/or the months of 2019 covering the corresponding period contemplated for the PSO in 2020 (e.g. April to September 2019 if the PSO is to be put in place from April to September 2020).

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<sup>12</sup> DG Competition/ DG Mobility and Transport.

As the COVID-19 outbreak mainly affects the level of revenues, there is an assumption that the cost structure should be identified as the average (or close to the average) of the amounts reported monthly in the above-mentioned profit and loss accounts and that this cost structure should in principle constitute the ceiling to determine the eligible costs. The compensation should therefore not exceed the difference between the average revenues observed during the selected months and such cost structure. The compensation may be adjusted to take into account the variation of frequencies and any variable costs.

The Commission services observe that a number of Member States are not contemplating the inclusion of any profit in the amount of compensation during the COVID-19 outbreak. Such approach is in line with State aid rules. In other cases, Member States may decide to award a reasonable profit to the air transport operator discharging the PSO in question. In such case, the following methodology may be used to benchmark the level of profit. As the subsidised companies should not be overcompensated, the level of profit could be benchmarked to the level of profit of air transport companies commercially active on similar air routes from/to the Member States before the COVID-19 outbreak. The choice of the financial metrics is left to the discretion of the Member States' authorities. It should correspond to generally accepted standards in the financial industry (return on equity, return on capital employed or similar). The benchmark should help Member States identify a suitable range of values and determine a maximum level of compensation (abnormally high records should be excluded from that range). Last, the set up should include a claw back mechanism which would allow Member States' authorities to check for overcompensation ex post and have any overcompensation monies returned.

*Fourth Altmark criterion: least cost to the community*

The aim of the fourth Altmark criterion is to ensure that any compensation paid corresponds to the least cost to the community. In order to fulfil the fourth Altmark criterion, Member States must either (i) choose the air transport operator pursuant to a public procurement procedure, or (ii) award a public service contract while determining the level of compensation on the basis of an analysis of the costs that a typical air transport company, well run and adequately provided with the relevant means, would have incurred.

Member States are invited to self-assess compliance with these criteria, taking into account the context of the ongoing crisis.

To that end, Member States may consult the guidance related to the emergency **public procurement procedures** in the COVID-19 outbreak set out in the Public Procurement Guidance, as reflected in Section 2.3.3. below.

- *For routes with existing PSCs*

Even if existing PSCs and framework agreements already complied with the first three Altmark criteria, it is the responsibility of Member States to ascertain that the scope of the initial contracts cover the services deemed necessary in the context of the COVID-19

outbreak and that the compensation parameters and the mechanism put in place to avoid overcompensation are still applicable to the financing of the new services.

### 2.3.3. Public procurement rules

Insofar as such contracts take the form of *service* contracts within the meaning of Directive 2014/24/EU, their award must comply with this Directive.

Articles 26 to 32 of this Directive provide for a variety of procedures depending, *inter alia*, on the characteristics of the case, including its urgency. In case of “extreme urgency”, national authorities may, under certain pre-conditions, proceed to a negotiated procedure without prior publication (cf. Article 32(2)(c)). Reference is made more particularly to Section 2 of the Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis.<sup>13</sup> It sheds light on the criteria for choosing and applying the appropriate procedures, including the criteria for determining whether “extreme urgency” justifies recourse to Article 32(2)(c) of the Directive. However, any such cases of “extreme urgency” are generally very limited. Alternative transport possibilities should always be taken into account. For example, it would be easier to prove such urgency for links to islands, than links within mainland where train services (albeit less frequent and/or substantially longer) still operate. In all other instances, tendering procedures, even if accelerated, should be used.

On substance, these procedures provide for (i) reduced deadlines to accelerate open or restricted procedures for the conclusion of a public service contract; and/or (ii) a negotiated procedure without publication, including, if duly justified and proportional, the direct awarding of a public service contract. Member States are free to choose among several procedures to award the public service contract, in accordance with the applicable conditions. Nevertheless, they may retain minimum transparency and use (even simplified) calls for expressions of interest for the selected public procurement procedure in order to have sufficient certainty that the first option of the fourth Altmark criterion was fulfilled under the exceptional circumstances created by the COVID-19 outbreak.<sup>14</sup>

If the conditions described above are fulfilled for *new* public service obligations, no formal notification to the Commission under the State aid rules would be required as the presence of State aid would be excluded.

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<sup>13</sup> OJ C 108I, 1.4.2020.

<sup>14</sup> Unless it is manifest that only one operator can provide the service under the current circumstances.

Insofar as the contracts concerned take the form of **service concessions**, neither Directive 2014/24/EU nor Directive 2014/23/EU apply.<sup>15</sup> However, the award of PSCs in the form of concessions would remain subject to the general principles developed by the Court of Justice, in respect of procurement of services that do not fall under specific rules of secondary law. Directive 2014/23/EU would apply by analogy only. The concrete application of these principles depends on a number of factors, including the urgency of the situation.

As regards **existing PSOs** granted under Articles 16 and 17 of Regulation 1008/2008 in the form of **public service contracts**, the Commission services consider that, pursuant to Directive 2014/24/EU, such public service contracts may be modified without a new procurement procedure, and thereby still comply with State aid rules (if the initial contracts already complied with those rules), where they comply with Article 72(1)(c) of Directive 2014/24/EU, i.e. where all of the following conditions are fulfilled:

- (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;
- (ii) the modification does not alter the overall nature of the contract; and
- (iii) any increase in price/value is not higher than 50 % of the value of the original contract or framework agreement/concession. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing the Directive.

The modifications must be **justified to the extent that they are needed to mitigate** the consequences of the outbreak in the execution of public contracts and only to that extent.

In the COVID-19 situation, it can be retained that a decrease in number of passengers to be transported or frequencies to be operated does not alter the overall nature of the contract, in any event if the following conditions are fulfilled:

- The decrease in passengers or frequencies is a direct consequence of and proportionate to the change in demand due to the exceptional circumstances referred to in point (c)(i) of the Article 72(1);
- There are no other changes in the type of services to be provided, the way in which they are carried out or the way in which they are remunerated.

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<sup>15</sup> Article 10(3) excludes the application of Directive 2014/23/EU to air transport.

On the basis of these provisions, a public service contract for air transport may be amended provided that all the conditions laid down in the applicable provision mentioned above are fulfilled.

If one or several of the above-mentioned conditions are not fulfilled, the contract may still be terminated in accordance with Article 73 (a) of Directive 2014/24/EU and a new contract can be awarded on the basis of the rules for new emergency PSOs described above.

As regards **concession contracts**, Article 43(1)(c) of Directive 2014/23/EU contains provisions corresponding in essence to those set out, for public service contracts, in Article 72(1)(c) of Directive 2014/24/EU. It is true that Directive 2014/23/EU does not directly apply to air transport covered by Regulation 1008/2008, i.e. to concessions awarded in this area. However, it is appropriate that the principles regarding changes in concession contracts, as set out in that Directive, be applied by analogy.

In this context, it is important to note that where a concession contract is modified in such a way that the Member States assumes all commercial risks, the contract is no longer in the nature a concession contract but rather a public service contract. Such change then constitutes an alteration of the “overall nature” of the contract. Such modification is therefore not covered by the principles established in Article 43(1)(c) of Directive 2014/23/EU, and a new award procedure is required instead.

### 3. State aid exempted from notification

#### 3.1. Aid exempted under the General Block Exemption Regulation

Member States are exempted from the obligation to notify certain types of State aid in the air transport sector, provided that the conditions detailed in the General Block Exemption Regulation (“GBER”)<sup>16</sup> are fulfilled. The GBER covers a wide range of horizontal aid categories and provides also specific provisions for the air transport sector, in particular in relation to social aid granted for the transport of residents of remote regions, investment aid for airports and operating aid for regional airports.

#### 3.2. Public service compensation exempted from notification

Public service compensation that qualifies as State aid (typically in the case of direct award of PSCs not complying with the fourth Altmark criterion) can be exempted from notification if it complies with the conditions set out in the SGEI Decision.<sup>17</sup> For the air sector, the SGEI

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<sup>16</sup> 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. 1–78.

<sup>17</sup> Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to

Decision is applicable to public compensation granted for the provision of SGEIs as regards air links to islands and airports for which the average annual traffic during the two financial years preceding that in which the SGEI was assigned does not exceed 300 000 passengers in the case of air links to islands, and 200 000 passengers in the case of airports.

### 3.3. De minimis aid<sup>18</sup>

Public funding granted to a company not exceeding EUR 200 000 over three fiscal years is not regarded as State aid, provided the other conditions of the *de Minimis* Regulation<sup>19</sup> are also fulfilled.

Public funding granted for the provision of a SGEI not exceeding EUR 500 000 over three years is not regarded as State aid, provided the other conditions of the SGEI *de minimis* Regulation<sup>20</sup> are also fulfilled.

## 4. Notifiable aid

### 4.1. The Temporary framework for State aid measures to support the economy in the COVID-19 outbreak

On 19 March 2020, the Commission adopted a Temporary Framework for State Aid measures to support the economy in the current crisis. The Temporary Framework sets out *inter alia* the compatibility conditions the Commission will apply for the assessment of measures under Article 107(3)(b) TFEU which allows for State aid to remedy a serious disturbance in the economy of a Member State.<sup>21</sup> The Temporary Framework applies to almost all sectors and undertakings including transport undertakings, mentioning transport as one of the most affected sectors. It aims to remedy the liquidity shortages faced by companies by allowing for instance direct grants, tax advantages, State guarantees for loans and subsidised public loans.

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certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.1.2012, p. 3–10.

<sup>18</sup> Whilst *de minimis* may apply to certain undertakings in the aviation transport chain, it should be noted that *de minimis* aid or SGEI *de minimis* aid cannot be given to airlines for the provision of air services. Any such payment represents a limitation to the freedom to provide air services and, therefore, cannot be awarded outside of the context of a validly assigned PSO in line with applicable rules.

<sup>19</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1–8.

<sup>20</sup> Commission Regulation No 360/2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

<sup>21</sup> The Temporary Framework also includes certain categories of aid for COVID-19 relevant production, research and development and testing and upscaling infrastructures, which are based on Article 107(3)(c) TFEU, but which do not seem relevant regarding aid to the aviation sector.

To address urgent liquidity needs in particular of small and medium-sized enterprises in a speedy manner Member States may give, support of up to the nominal value of EUR 800 000 per undertaking in the form of direct grants, loans, tax and payment advantage, or other forms such as guarantees on loans covering 100% of the risk. This State support can be combined also with so-called de minimis aid<sup>22</sup> and with other types of aid, provided the cumulation rules are respected. In addition, it provides for possibilities of aid covering liquidity needs beyond the EUR 800 000 per undertaking in the form of guarantees and interest rate subsidies, subject to, inter alia, minimum pricing conditions under sections 3.2 and 3.3 of the Temporary Framework. Section 3.9 of the Temporary Framework provides for schemes deferring tax and/or social security contributions, which may also cover undertakings in the aviation sector. The same applies for section 3.10 of the Temporary Framework, which provides for aid in the form of wage subsidies for employees to avoid lay-offs during the COVID-19 outbreak. Section 3.11 of the Temporary Framework enables Member States to provide public support in the form of equity and/or hybrid capital instruments to undertakings facing financial difficulties due to the COVID-19 outbreak, including undertakings in the aviation sector.

The list of decisions approved by the Commission under the Temporary Framework is updated every day, so that Member States can be informed of the Commission decision-making practice in a comprehensive manner and in real time.

More information on the possibilities for State support under the Temporary Framework are contained under the following link:

[https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/covid\\_19.html](https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html)

#### 4.2. Aid granted under Article 107(2)(b) TFEU

According to Article 107(2)(b) TFEU, aid to make good the damage caused by natural disasters or exceptional occurrences is compatible with the internal market.

In its Decision of 12 March 2020 related to a Danish State aid scheme,<sup>23</sup> the Commission concluded that the COVID-19 outbreak qualifies as an “exceptional occurrence” for the purpose of Article 107(2)(b) TFEU. Pursuant to the case-law, only damage having a direct causal link with the exceptional occurrence, such as the COVID-19 outbreak, can be

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<sup>22</sup> With the exception of airlines for the provision of air transport services (see footnote 18).

<sup>23</sup> State Aid SA.56685 (2020/N) – DK – Compensation scheme for cancellation of events related to COVID-19.

compensated by State aid under Article 107(2)(b) TFEU.<sup>24</sup> On that basis, Member States can compensate companies for damages caused by the COVID-19 outbreak including for lost revenues, provided they notify the contemplated support measure to the Commission, including appropriate evidence of the damage suffered as well as of the direct causal link between the exceptional occurrence and the damage. The information that should be provided for notifications of aid under Article 107(2)(b) TFEU is listed in the following document.

[https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/Notification\\_template\\_107\\_2\\_b\\_PUBLICATION.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/Notification_template_107_2_b_PUBLICATION.pdf).

The list of decisions approved by the Commission under Article 107(2)(b) TFEU is in the following document: [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/covid\\_19.html](https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html). It is updated every day, so that Member States can be informed of the Commission decision-making practice in a comprehensive manner and in real time.

State aid decisions in the transport sector can be found using the search box, by choosing the relevant scroll-down NACE code and desired time period.

#### 4.3. Public service compensation

Public service compensation that qualifies as State aid and does not fall within the scope of the SGEI Decision or the SGEI De minimis Regulation needs to be notified to the Commission, which will assess its compatibility under the SGEI Framework.<sup>25</sup>

#### 4.4. Other applicable rules

In addition, aid measures other than public service compensations could be notified and their compatibility could be assessed under the State aid Aviation Guidelines,<sup>26</sup> or under the applicable State aid guidelines for horizontal support measures not specific to the air transport sectors, such as the Rescue and Restructuring Guidelines. The currently applicable rules are available on the following link:

[https://ec.europa.eu/competition/state\\_aid/legislation/legislation.html](https://ec.europa.eu/competition/state_aid/legislation/legislation.html)

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<sup>24</sup> Judgment in Case C-73/03 Spain v Commission EU:C:2004:711, paras 36-37. Judgment in Case C-346/03 Atzeni EU:C:2006:130, para. 79. Judgment in Case C-278/00 Greece v Commission EU:C:2004:239, paras 81-82. Judgment in Case T-268/06 Olympiaki Aeroporia Ypiresies v Commission EU:T:2008:222, para. 49.

<sup>25</sup> Communication from the Commission — European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, p. 15–22.

<sup>26</sup> Communication from the Commission: Guidelines on State aid to airports and airlines (2014), OJ C 99/03, 4.4.2014, p. 3-34.

The list of Commission decisions in the field of State aid can be retrieved through the case search engine available on the following link:

<https://ec.europa.eu/competition/elojade/isef/index.cfm?pa=2>