

Introduction

The COVID-19 pandemic¹ had serious repercussions on air transport: carriers have been facing a crisis that cannot be compared to those, albeit significant, of past decades. In the most serious phases of the emergency, the disruption to air connectivity due to travel restrictions left millions of passengers on ground and caused also severe problems to the weaker category of persons travelling by air, preventing many of them to enjoy even their fundamental rights².

During the pandemic, the collapse in passenger demand resulted in a full-blown sector crisis. European Union (EU) Member States, as well as other jurisdictions, such as the United States of America, the Gulf States and China, chose to subsidize carriers in order to ensure their financial survival.

As a general rule, State aid is prohibited within the EU (Article 107(1) TFEU), so any financial support to airlines must comply with limited exemptions, applicable *de jure* (Article 107(2) TFEU) or after the Commission's discretionary assessment (Article 107(3) TFEU).

Should an external shock break out such as a pandemic, aid can be awarded as compensation for damage caused by «exceptional occurrences» (Article 107(2)(b) TFEU), as a remedy to «a serious disturbance of the economy of a Member State» (Article 107(3)(b) TFEU) or as a measure that supports «the development of certain economic activities» (Article 107(3)(c) TFEU). The European Commission provided further guidance pertaining to these provisions

¹ As well known, severe acute respiratory syndrome by coronavirus 2 (SARS-CoV-2) is the pathogen responsible for the new coronavirus disease of 2019 (COVID-19): World Health Organization (WHO), *Naming the Coronavirus Disease (COVID-19) and The Virus That Causes It*, Technical guidance, 11.2.2020, [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it).

² Air travel disruption, for example, impacted on seafarers: after some months of quarantine spent onboard vessels, hundreds of thousands of them were forced to stay on their vessels much beyond the term of their working periods due to the impossibility to repatriate and to being replaced by their colleagues. On the legal implications deriving from this issue, see: F. MUNARI, *To What Extent Do the Contemporary International Law of the Sea, International Maritime Law, and International Labor Law Address Public Health Threats such as Pandemics?*, in *Ocean Yearbook*, vol. 35, 2021, p. 388-422.

in its *Temporary Framework for State Aid Measures to Support the Economy in the Current Emergency of COVID-19* (hereinafter: ‘Temporary Framework’ or ‘TF’)³, which has been amended several times and is applicable to various sectors of the economy, including air transport.

Between 2020 and 2022, the European Commission approved 94 aid measures to airline industry⁴. In most cases, the beneficiaries were carriers with a stable relationship to the Member State granting aid (i.e., former flag carriers). As a consequence, competitors not receiving public support – especially, low-cost carriers – sought annulment of these decisions before the General Court of the Court of Justice of the European Union (CJEU): in the first rulings on the matter, the EU General Court (GC) endorsed the Commission’s policy, although it did highlight some weaknesses in the reasoning supporting the decision-making, resulting in some decision being annulled.

As a new State aid policy is taking shape, a revised level playing field for European airlines is needed. Due to the different levels of fiscal capacity in the Member States, competition may be distorted if the aid granted are subject to nationality requirements. Similar risks arise when an airline group receives aid from multiple Member States or when aid is given to airlines already in difficulty before the outbreak of the pandemic.

In any case, taxpayer support in favour of EU carriers seems *prima facie* justified by the exceptional nature of the pandemic. Recovery after pandemic, however, resulted in profits for both airlines receiving and not-receiving the aid⁵, shedding doubts on the need to foster an industry which was growing at an unsustainable rate even before the coronavirus pandemic⁶.

³ Commission, Communication of 19 March 2020, 2020/C 91 I/01, amended last on 28 October 2022, OJ C 423, 7.11.2022, p. 9. Consolidated text is available at the following address https://competition-policy.ec.europa.eu/state-aid/coronavirus/temporary-framework_en.

⁴ Excluding amendments and prolongations, 42 decisions were adopted in 2020, 35 decisions in 2021 and 17 in 2022: European Commission, Staff Working Document Accompanying the Report on Competition Policy 2020, SWD(2021) 177 final, 7.7.2021, p. 82; Id., Staff Working Document Accompanying the Report on Competition Policy 2021, SWD(2022) 188 final/2, 26.8.2022, p. 76; Id., Staff Working Document Accompanying the Report on Competition Policy 2022, SWD(2023) 76 final, 4.4.2023, p. 84. In 2020-2021, the Commission approved a total of approximately 700 pandemic-related measures (excluding extension decisions), amounting to EUR 3.13 trillion (Id., SWD(2022) 188 final/2, cit., p. 24), while other 217 decisions were adopted in 2022, corresponding to EUR 29 billion (Id., SWD(2023) 76 final, cit., p. 25).

⁵ See International Air Transport Association (IATA), Airline Profitability Outlook Strengthens, press release no. 26, 5.6.2023; carriers not benefitting from aid, such as Ryanair, recorded in the first half of 2022 its biggest after-tax profit until then: G. DUTHEIL, *Ryanair puts the global pandemic behind it*, in *Le Monde*, 9.11.2022. https://www.lemonde.fr/en/economy/article/2022/11/09/ryanair-puts-the-global-pandemic-behind-it_6003521_19.html.

⁶ If the past few decades are examined, the number of passengers transported has grown

By considering both the economic and the environmental perspective, these doubts seem to be justified: to effectively combat climate change, States should also consider the environmental impact of the subsidies they give out. This, coupled with the need to offset risks related to the disruption of air connectivity, points to the need for a new sectoral regulatory framework. As huge investments are required, public spending might overcome market failures in the roll-out of new technologies, whereas a business-as-usual approach to subsidies might reinforce a carbon lock-in effect.

The conundrum between *laissez-faire* and regulation, however, must be assessed considering the specific governance structure of civil aviation and the stakeholders' initiatives too. International instruments such as the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) aim at reducing air transport environmental footprint, but they might be not enough, without putting some constraints to the freedom to conduct business. Technological development in areas such as Sustainable Aviation Fuels (SAFs) and engine design has the potential to reshape the market towards decarbonization, but requires strong financial support by States in order to become commercially viable.

As the link between fair competition and positive actions to fulfil environmental or industrial goals is becoming apparent, EU State aid law can be seen both as a limit and as a tool to allow a possible future turnaround of the airline industry. Therefore, learning from the pros and cons of 'pandemic aid' might help in drawing up the sectoral State aid policy for the next decade.

about 2.6 times that of the GDP: conversely, in the air freight sector the increase has been largely in line with GDP growth. See A. MURPHY, *Aviation and climate: who acts?*, in F. MUNARI (ed.), *Cambiamenti climatici e trasporti. Un approccio interdisciplinare*, Rome, 2017, p. 125 ff.; World Bank-ICAO, *Civil Aviation Statistics of the World and ICAO staff estimates*, 2018, <https://data.worldbank.org/indicator/IS.AIR.PSGR?end=2018&start=1970&view=chart&year=2018>; Boeing, *World Air Cargo Forecast 2018-2037*, 2018, at https://www.boeing.com/resources/boeingdotcom/commercial/about-our-market/cargo-market-detail-wacf/download-report/assets/pdfs/2018_WACF.pdf.