

## 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 containment measures,<sup>1</sup> 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.

From September 2020 onwards, the resurgent COVID-19 pandemic has led Member States to prolong or re-introduce containment measures. These vary in scope and timing. However, they all have the effect of limiting, directly or indirectly, the movement of the general public. Therefore, the Commission services find that the conditions for providing COVID-19 related emergency support to the air transport sector may continue to be present. To this end, the Commission services wish to update this guidance issued in April 2020, based on the experience gained with the support measures put in place by Member States since the pandemic outbreak.

Moreover, the experience from the first wave of the pandemic has shown that passenger air transport services are able to pick up quickly as soon as the epidemiological situation improves. It is therefore important to stress that it is the Member States that remain responsible to ensure that the conditions of public support to air transport remain in compliance with all applicable provisions of the Treaty on the Functioning of the European Union (“TFEU”) and secondary legislation, all as interpreted by the Union courts.

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<sup>1</sup> It is important to note that in view of the developments in the pandemic and the improved knowledge of the risk of transmission of the disease since the beginning of the COVID-19 crisis, containment measures which take the form of travel or flight restrictions which were deemed necessary by the Member States in the early stages of the COVID-19 outbreak may no longer be justified and proportionate.

EU State aid rules enable Member States to support undertakings 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 service 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 to the greatest extent possible on a non-discriminatory basis and in a manner which preserves the pre-crisis market structures and paves the way for 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

Compared to March-April 2020, where the number of flights operated in the European airspace fell by up to 90% compared to the same period in 2019, the situation has overall slightly improved. In February 2021, there were 73% fewer flights in the EU compared to February 2020. The cargo sector has well recovered (5.5% more flights in February 2021 compared to the same period in 2020) after measures were taken at an early stage at EU level to restore connectivity for the transport of goods, in particular essential goods.<sup>2</sup>

However, while air traffic levels have increased compared to spring 2020, Member States may still be 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 still need to put urgently in place public services to respond to specific needs or to temporarily replace commercial offers that have become unavailable due to the resurgent COVID-19 outbreak and related containment measures. In the field of air 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

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<sup>2</sup> Eurocontrol

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. *Section 2* 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. *Section 3* will describe the measures that constitute State aid but may be exempted from notification to the Commission if they fulfil certain requirements. *Section 4* 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 recovery.

## 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 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 contribution payments, do not constitute State aid and do not need to be notified to the Commission.<sup>3</sup>

Moreover, such measures of general application would allow ensuring an equitable support to the economy as a whole.

### 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,<sup>4</sup> transporting people for medical reasons, by military aircraft or similar.

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<sup>3</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>4</sup> The Commission services note that, unlike in the first half of 2020 when lockdowns were introduced overnight and travel bans prevented people from returning home, knowledge of the disease and its transmission has improved since the first wave of the pandemic and Member States have adopted comprehensive health and safety measures which should ensure the necessary movement of people. Therefore, it is expected that expatriation flights will not be necessary anymore with the same scope and frequency as before.

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>5</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>6</sup>

### 2.3. Public service compensation constituting no-aid<sup>7</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 minimum

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<sup>5</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>6</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.

<sup>7</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.

connectivity. Some of the flights to ensure connectivity may also cover freight services, insofar as the passenger aircraft are used for air cargo.<sup>8</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>9</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 obligations (the “PSO”) under the conditions set out in Regulation 1008/2008<sup>10</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>11</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.

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<sup>8</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>9</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.

<sup>10</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>11</sup> This does not cover PSO flights to third countries (if any).

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 an almost complete halt across the EU Member States in the early stages of the outbreak, and given that the COVID-19 outbreak has been recognised by the Commission as an exceptional occurrence, the Commission services considered that 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.

At this stage of the development of the COVID-19 outbreak, this may still be necessary, in certain specific and exceptional instances, to be assessed on a case-by-case basis.

This guidance summarises 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 PSO routes that had been served by a previously selected carrier but whose services have been suddenly interrupted, and other cases.

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

Regulation 1008/2008 explicitly provides for a special procedure in case of sudden interruption of service by the 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 emergency, to select by mutual agreement a *different* air carrier to operate that PSO route, for a period of up to seven months, not renewable. In this case, and under the further conditions of Article 16(12), the Member State 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 general 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 (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 (i.e. granted under Articles 16 and 17 of Regulation 1008/2008) 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 procedure as applicable for new PSO routes (see section 2.3.1.2). In other words, these would be treated as COVID-19 emergency PSOs.

Last, experience shows that there may be situations where there was an existing PSO contract on a route prior to the COVID-19 outbreak, but that such PSO is no longer needed, in particular due to extremely low demand, containment measures (such as universities closure), and economic downturn. In such a situation, and depending on national law and contract provisions, the public authorities retain the option of either changing the contract within the limits of the public procurement directives as set out below under Section 2.3.3. Alternatively, the public authorities may decide to terminate the PSO contract early. Last, public authorities may decide to temporarily suspend the PSO contract, without any PSO in place for the time being (i.e. not an emergency PSO either).

It is, however, not possible to simply prolong the competitively awarded contract.

#### ***2.3.1.2 Routes not served under a PSO prior to the COVID-19 outbreak (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 came to an almost complete halt because of the containment measures taken by Member State authorities in order to respond to the COVID-19 outbreak.

At this stage of the development of the outbreak, there may still be instances where the air passenger traffic suddenly comes to an almost complete halt on a specific route because of Member States' COVID-19 containment measures and where there may be a need to impose an urgent PSO to ensure minimum connectivity of a remote area or island. This is to be assessed on a case-by-case basis.

In this context, the Commission services consider that the **general public procurement rules** apply as such (for public service contracts), or should be used as a source of inspiration (in case of public service concessions) and that such emergency COVID-19 PSOs can be awarded accordingly (see Section 2.3.3 for further guidance on public procurement rules).

The Commission services note that any such emergency COVID-19 PSO should be valid for a maximum of three to six months. Any such emergency COVID-19 PSO may be *prolonged* only once for three months with a simple change of contract *with the same operator*. In case

an emergency COVID-19 PSO is needed for a longer period (i.e. beyond the maximum 6 +3 months), a *new award* for a new emergency COVID-19 PSO of up to three to six months (the “Renewed Emergency COVID-19 PSO”) can be done under certain conditions (see Section 2.3.2 below).

Member States should not have recourse to emergency COVID-19 PSOs in a situation where the imposing authorities would have had or would have enough time to organise a new tender under Regulation 1008/2008, taking into account the development of the COVID-19 outbreak.

Therefore, if a Member State envisages that the market is unlikely to satisfy the minimum connectivity needs as of the end of a renewed emergency COVID-19 PSO, the Member State should start organising a fully-fledged tender pursuant to Article 17 of Regulation 1008/2008. This Regulation 1008/2008 tender should be launched at such time that the time limits of Article 17 are complied with (i.e. essentially at the same time as the emergency COVID-19 PSO tender). The purpose of the six months publication period in Regulation 1008/2008 is to test whether there is any potential market interest to start operating the route previously closed to competition due to the PSO. In order *not* to foreclose the market for a long time, the duration of such PSOs tendered in line with Regulation 1008/2008 should be limited to one or two years maximum.

As the award of such emergency COVID-19 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>12</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>13</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.

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<sup>12</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>13</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.



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.

### ***2.3.2.1 For routes with new emergency COVID-19 PSOs***

This section applies to the imposition of new emergency COVID-19 PSOs on routes which were served on commercial basis prior to the COVID-19 outbreak. It also applies to the possible Renewed Emergency COVID-19 PSOs (see Section 2.3.1.2 for further explanation on the latter).<sup>14</sup>

Given the exceptional circumstances arising out of the COVID-19 outbreak which impact all of the European Union and given that the COVID-19 outbreak has been recognised by the Commission as an exceptional occurrence, the following text provides guidance on how the four Altmark criteria could be fulfilled in an emergency scenario. 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:

- i. Due to the resurgent COVID-19 outbreak and the re-introduction of containment measures, 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 Member States must continue to be able to ensure that the conditions for any imposition of emergency COVID-19 PSOs are still met, especially in terms of the threat of a sudden loss of connectivity, which would justify emergency measures. These conditions are unlikely to be fulfilled if the public measure aims at restoring the previous air transport services offer, e.g. in

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<sup>14</sup> As clarified above under Section 2.3.1.2, the “prolongation” refers to a prolongation of an emergency PSO with the same operator. A “renewal” refers to a new emergency PSO through a new procedure.

terms of number of routes or frequencies served; if the measure aims at ensuring that traffic recovers in a regular and sustained way; or if such measure is not linked to any current containment measures.

The requirement of demonstrating that the conditions for an emergency COVID-19 PSO are still met is of particular importance both in case of any *prolongation* of an existing emergency COVID-19 PSOs of up to three months (beyond the initial three to six months) or in case of its *renewal* by a new award of a new emergency PSO of up to three to six months (i.e. the latter is a Renewed Emergency COVID-19 PSO).<sup>15</sup> In both cases, the Member State must be able to demonstrate that there is a continued need to have a emergency COVID-19 PSO in place and why it has not been possible to foresee such need and to conduct a regular tendering procedure in line with Regulation 1008/2008.

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. As mentioned above under Section 2.3.1.2, the contract should have a **limited duration**. Any such emergency COVID-19 PSO contract may be *prolonged or renewed* only provided that such prolongation or renewal 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. To that end, Member States may include, in the invitation to tender and the subsequent contract, rules concerning an early termination of the contract, in particular to take account of a substantial change in market conditions. Member States are also invited to submit information to the competent Commission services<sup>16</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.

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<sup>15</sup> Footnote 17.

<sup>16</sup> DG Competition/ DG Mobility and Transport.

When the services in question were operated on a commercially viable basis before the COVID-19 outbreak, 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 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 was to be put in place from April to September 2020).

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.

### ***2.3.2.2 For routes with existing PSCs***

Even if PSCs and framework agreements in force before the COVID-19 outbreak 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**

The peculiarity of the current crisis situation is that demand has drastically fallen, across the market. This drastic fall is not due to fluctuations inherent in or typical for the market itself, but rather to pervasive confinement measures Member States had to take, in order to contain a serious infectious disease. The very demanding procedures set out in Articles 16 to 18 of Regulation (EC) are not meant for this kind of situation. It is therefore justified to resort to generally applicable rules and principles in the area of public procurement.

Insofar as the contracts in question 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>17</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 or coach services (albeit less frequent and/or substantially longer) still operate. In all other instances, tendering procedures, even if accelerated, should be used.

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<sup>17</sup> OJ C 108I, 1.4.2020.

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 procedures 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>18</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.

Insofar as the contracts concerned take the form of **service concessions**, neither Directive 2014/24/EU nor Directive 2014/23/EU apply.<sup>19</sup> However, even in exceptional circumstances in which Articles 16 to 18 of Regulation (EC) No 1008/2008 do not apply (see above), 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

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<sup>18</sup> Unless it is manifest that only one operator can provide the service under the current circumstances.

<sup>19</sup> Article 10(3) excludes the application of Directive 2014/23/EU to air transport.

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.

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 COVID-19 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>20</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>21</sup> For the air sector, the SGEI 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>22</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>23</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>24</sup> are also fulfilled.

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<sup>20</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>21</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 certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.1.2012, p. 3–10.

<sup>22</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>23</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.

## 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 based on Article 107(3)(b) TFEU (the “Temporary Framework”). The Temporary Framework has been regularly updated (lastly on 28 January 2021) to reflect the evolution of the pandemic and the EU economy.

In this last revision, the Commission has decided to prolong and extend the scope of the Temporary Framework. All sections of the Temporary Framework are prolonged until 31 December 2021. The objective is to enable Member States to support businesses in the context of the COVID-19 crisis, especially where the need or ability to use the Temporary Framework has not fully materialised so far, while protecting the level playing field. 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>25</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, subsidised public loans and recapitalisation. 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 1 800 000 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 under section 3.1 of the Temporary Framework. This State support can be combined also with so-called *de minimis* aid<sup>26</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 1 800 000 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

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<sup>24</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>25</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.

<sup>26</sup> With the exception of airlines for the provision of air transport services (see footnote 25).



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. Under section 3.12 of the Temporary Framework Member States can provide public support to companies facing a decline in turnover during the eligible period of at least 30% compared to the same period of 2019 due to the COVID-19 outbreak. The support will contribute to a part of the beneficiaries' fixed costs that are not covered by their revenues, up to a maximum amount of EUR 10 million per undertaking.

The information that should be provided for notifications of aid under the Temporary Framework is listed in the following documents:

- [Amended notification template for the Temporary Framework after the fourth amendment](#) - This form covers sections 3.1-3.10 and should be annexed to the standard notification form in the electronic notification to the Commission (using the SANI2 platform);
- [Amended notification template for section 3.11 Recapitalisation of non-financial undertakings after the fourth amendment](#) - This form together with [Annex II](#) for equity instruments and [Annex III](#) for hybrid instruments should be annexed to the standard notification form in SANI2.

Clarifications on the application of section 3.12 of the Temporary Framework are provided in the following documents:

- [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/application\\_section\\_3\\_12\\_TF.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/application_section_3_12_TF.pdf)
- [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/exit\\_decision\\_under\\_TF\\_graph\\_2.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/exit_decision_under_TF_graph_2.pdf)

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 Communication of 13 March 2020, “Coordinated economic response to the Covid-19 outbreak”,<sup>27</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 compensated by State aid under Article 107(2)(b) TFEU.<sup>28</sup> In the Temporary Framework, the Commission has explained how it will apply aid notified under Article 107(2)(b) TFEU.<sup>29</sup> Certain exceptional occurrences may not directly cause an economic damage to undertakings. In such circumstances, the Courts have accepted that the damage suffered by undertakings actually results from restrictive measures taken by the competent public authorities in reaction to the exceptional occurrence. Therefore, the Commission, during the COVID-19 outbreak, has assessed under Article 107(2)(b) TFEU compensation granted by Member States to companies to the extent that these companies were prevented by the competent authorities from carrying out their business activity (including companies in financial difficulties). Upon approval by the Commission, Member States have compensated companies for damage caused by the COVID-19 outbreak. Evidence of the damage suffered, of the direct causal link between the exceptional occurrence and the damage and of the absence of overcompensation, must in any event be provided by the Member State. The information that should be provided for notifications of aid under Article 107(2)(b) TFEU is included 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 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 Article 107(2)(b) TFEU 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)

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.

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<sup>27</sup> Communication from the European Commission of 13 March 2020, COM(2020) 112 final, p.6.

<sup>28</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>29</sup> Par. 15, 15 *bis* and 15 *ter*.

#### 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>30</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>31</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)

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>

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<sup>30</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>31</sup> Communication from the Commission: Guidelines on State aid to airports and airlines (2014), OJ C 99/03, 4.4.2014, p. 3-34.