

Drawing Borders in the Sky:

Operating Licence as Eligibility Criterion for Pandemic State Aid in the Air Transport Sector

1. Introduction

The COVID-19 pandemic significantly impacted all societal domains, with the air transport sector being one of the most affected segments of the internal market of the European Union (the EU). The industry's growth was abruptly halted, and major airlines struggled, prompting EU Member States to provide state aid based on nationality, therefore mainly to the benefit of legacy air carriers. This prompted Ryanair, a new-age low-cost carrier with weaker national affiliations, to challenge the European Commission's (the Commission) approvals of these aids, alleging substantive and procedural errors.

This paper focuses on a key aspect central to cases C-210/21 P¹ and C-209/21 P²: the selectivity criterion of requiring an operating license from a particular Member State to receive aid. The central argument is that an operating license links an air carrier primarily to the EU and only secondarily, administratively to the issuing Member State. It therefore challenges the reasoning of the European Court of Justice (the Court), which upheld the Commission's approvals of these nationally selective aid schemes. The paper questions the Court's undifferentiated assessment of the legal bases and the proportionality principle.

The paper is structured as follows: an overview of pandemic state aid in the air transport sector and Ryanair's litigation campaign (section 2), justification arguments for the operating license as a selective eligibility criterion in the mentioned cases (section 3), and a critical analysis of these arguments (section 4).

¹ Case C-210/21 P *Ryanair v Commission* [2023] ECLI:EU:C:2023:908.

² Case C-209/21 P *Ryanair v Commission* [2023] ECLI:EU:C:2023:905.

2. Pandemic State Aid in the Air Transport Sector

The voluntary social distancing and restrictive measures by Member States during the COVID-19 pandemic brought the European air transport sector to a halt. The drop in passenger numbers led to widespread downsizing³ and an urgent need for financial support. Air carriers struggled to secure market-based funding,⁴ prompting Member States to intervene and provide financial aid.⁵ Accordingly, the Commission immediately vowed 'to enable Member States to use the full flexibility foreseen under State aid rules to support the economy in the context of the COVID-19 outbreak'⁶ by adopting the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (Temporary Framework)⁷ on 19 March 2020. In addition to providing clarity on how the Commission intended to exercise its discretionary powers, the Temporary Framework importantly allowed for a relaxation of procedural rules in the context of the pandemic.⁸

The air transport sector became the largest beneficiary of this state aid,⁹ with Commission approvals being issued in record times, sometimes within 48 hours.¹⁰ However, the eligibility criteria for these aids, particularly the requirement for an operating license from the granting Member State, sparked controversy. Most aid schemes individually favoured national flag carriers, other schemes established a national selectivity criterion by limiting aid to holders of an operating licence under the provisions of Regulation 1008/2008¹¹ of the particular Member State granting the aid, the eligibility criterion in focus in this paper.

³ Layoffs in the air transport sector accounted for almost a quarter of all pandemic related layoffs in the EU. See more in Dubravka Aksamovic and Lidija Simunovic, 'The EU scheme for the state aid rules in the air transport sector during the Covid-19 crisis' (2022) 12 *Juridical Trib* 51, 53; Krisztina Széles, 'New Challenges Of EU State Aid Law: The Impact Of The Pandemic On Competition Between Member States' (2022) 88 *Curentul Juridic* 49, 57.

⁴ Petar Petrov, 'State Aid and COVID-19: With a Particular Focus on the Air Transport Sector' (2021) 20 *Eur St Aid LQ* 461, 469.

⁵ José Luis Buendía and Angela Dovalo, 'State Aid Versus COVID-19: The Commission Adopts a Temporary Framework' (2020) 19 *Eur St Aid LQ* 3, 3.

⁶ 'State aid: Commission adopts Temporary Framework to enable Member States to further support the economy in the COVID-19 outbreak' (European Commission Press Corner, 19 March 2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_496> accessed 5 July 2024.

⁷ *Communication from the Commission - Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak* [2020] OJ C 91I with subsequent amendments.

⁸ Buendía and Dovalo (n 5) 3; Kevin Kasser and Maria Claudia Solarte-Vasquez, 'Neutrality and Equality Aspects in the EU State Aid Temporary Framework 2020: The Case of the Airline Industry' (2022) 12 *TalTech Journal of European Studies* 99, 108; Széles (n 3) 51.

⁹ Kasser and Solarte-Vasquez (n 8) 100.

¹⁰ Carole Maczkovics, 'How flexible should State aid control be in times of crisis?' (2020) 19 *Eur St Aid LQ* 271, 279.

¹¹ 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 [2008] OJ L293/3.

This brought the risk of wealthier, ‘deep-pocket’ Member States potentially outspending less wealthy ones, leading to an unbalanced internal market and reversing liberalization efforts.¹² In the worst case scenario this could result in the reemergence of monopolistic market structures spearheaded by national flag carriers,¹³ rather than allowing market forces to eliminate inefficient firms.¹⁴

2.1. Ryanair’s litigation campaign

In the wake of the Commission’s lenient approach to approving pandemic state aid schemes Ryanair launched an extensive litigation campaign at the Court of Justice of the European Union (CJEU) seeking to annul the individual decisions of the Commission that authorized financial aid to its competitors during the pandemic, which by its own accounts cumulatively amounted to more than 40 billion EUR.¹⁵ If successful, this would ultimately mean that the granting Member States would have the obligation to claw back the illegal aid from the beneficiaries.

At the time of writing Ryanair had launched 28 annulment actions¹⁶ under Article 263 TFEU¹⁷ at the General Court (GC). The GC has decided in 24 cases, most pending an appeal decision of the Court of Justice (ECJ). The ECJ has thus far issued 6 appeal judgements, all of them confirming the decisions of the GC and the Commission. Ryanair has thus far only been successful with annulment in 7 cases at the first instance (marked with an asterisk), 5 cases are still pending an appeal decision. The cases marked red signify challenges to aid schemes that included the eligibility criterium of holding an operating licence of a specific Member State.

¹² Buendía and Dovalo (n 5) 7; Maczkovics (n 10) 271 and 282; Alessandro Rosanò, 'Adapting to change: COVID-19 as a factor shaping EU State aid law' (2020) 5 European Papers 621, 630; Széles (n 3) 55-58.

¹³ Petrov (n 4) 478.

¹⁴ Maczkovics (n 10) 275 and 283; Rosanò (n 13) 631.

¹⁵ 'RYANAIR WELCOMES EU COURT RULING ON AIR FRANCE-KLM STATE AID' (Ryanair Corporate, 7 February 2024) <<https://corporate.ryanair.com/news/ryanair-welcomes-eu-court-ruling-on-air-france-klm-state-aid/>> accessed 5 July 2024.

¹⁶ Further 5 cases (T-185/22, T-164/22, T-499/21, T-444/21 and T-340/21) were launched but later discontinued on 14 December 2023.

¹⁷ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

Table: Ryanair's litigation campaign

GC	Date of GC Judgement	ECJ	Date of ECJ Appeal Judgement	Legal basis
T-259/20	17 February 2021	C-210/21 P	23 November 2023	107(2)(b) TFEU
T-238/20	17 February 2021	C-209/21 P	23 November 2023	107(3)(b) TFEU
T-378/20	14 April 2021	C-321/21 P	28 September 2023	107(2)(b) TFEU
T-379/20	14 April 2021	C-320/21 P	28 September 2023	107(2)(b) TFEU
T-388/20	14 April 2021	C-353/21 P	30 May 2024	107(3)(b) TFEU
T-643/20	19 May 2021	No appeal	x	107(3)(b) TFEU
T-465/20	19 May 2021	No appeal	x	107(3)(c) TFEU
T-628/20	19 May 2021	C-441/21 P	6 June 2024	107(3)(b) TFEU
T-665/20	9 June 2021	No appeal	x	107(2)(b) TFEU
T-677/20	14 July 2021	C-591/21 P	<i>Pending</i>	107(2)(b) TFEU
T-657/20	22 June 2022	C-588/22 P	<i>Pending</i>	107(3)(b) TFEU
T-111/21	9 November 2022	No appeal	x	107(2)(b) TFEU
T-238/21(*)	10 May 2023	No appeal	x	107(3)(b) TFEU
T-34/21(*) (joined cases T-87/21)	10 May 2023	C-457/23 P	<i>Pending</i>	107(3)(b) TFEU
T-268/21(*)	24 May 2023	C-490/23 P	<i>Pending</i>	107(2)(b) TFEU
T-333/21	18 October 2023	No appeal	x	107(2)(b) TFEU
T-225/21	18 October 2023	No appeal	x	107(2)(b) TFEU
T-14/21	18 October 2023	No appeal	x	107(3)(b) TFEU
T-769/20	18 October 2023	No appeal	x	107(3)(b) TFEU
T-737/20	18 October 2023	No appeal	x	107(3)(b) TFEU
T-216/21(*)	20 December 2023	C-166/24 P C-192/24 P	<i>Pending</i> <i>Pending</i>	107(3)(b) TFEU
T-494/21(*)	20 December 2023	C-167/24 P C-193/24 P	<i>Pending</i> <i>Pending</i>	107(3)(b) TFEU
T-146/22(*)	7 February 2024	C-266/24 P C-269/24 P C-289/24 P	<i>Pending</i> <i>Pending</i> <i>Pending</i>	107(3)(b) TFEU
T-458/22	<i>Pending</i>	x	x	107(3)(c) TFEU
T-366/22	<i>Pending</i>	x	x	107(2)(b) TFEU
T-28/22(*)	8 May 2024	x	x	107(3)(c) TFEU
T-743/21	<i>Pending</i>	x	x	107(3)(c) TFEU
T-398/21	<i>Pending</i>	x	x	107(3)(b) TFEU

2.2. Compatibility of Pandemic State Aid with the Internal Market

Article 107(1) TFEU generally prohibits Member States from adopting measures that would: (A) constitute an intervention by the State or through State resources; (B) be liable to affect trade between Member States; (C) confer a selective advantage on the recipient; (D) distort or threaten to distort competition.¹⁸ Provided these conditions are met the measure constitutes state aid and is consequently incompatible with the internal market. This prohibition is however not absolute, as measures that fall within one of the provisions of Article 107(2) or 107(3) TFEU can be declared compatible with the internal market, despite potentially producing adverse effects generally addressed by the prohibition in Article 107(1) TFEU.¹⁹

A notified aid measure can be declared compatible with the internal market pursuant to one of the derogation clauses of Article 107(2) or 107(3) TFEU provided that its objective falls in line with one of the set out 'compatible' objectives and furthermore adheres to the principle of proportionality. This means that the proposed aid measure needs to be appropriate and necessary to attain the objective set out in a specific derogation and do so in a proportionate manner.²⁰ Three specific provisions were interchangeably used to justify the compatibility of aid measures related to the damages air carriers suffered as a consequence of the COVID-19 pandemic: Articles 107(2)(b), 107(3)(b) and 107(3)(c) TFEU.

The derogation in Article 107(2)(b) TFEU, 'aid to make good the damage caused by natural disasters or exceptional occurrences', is a compulsory derogation, which means the Commission has limited discretion when assessing the compatibility of the measures. If an event is (A) unforeseeable or difficult to foresee, (B) has a significant scale or economic impact and (C) the aid measure is extraordinary to make good the damage caused by such event²¹ such an aid measure is declared to be 'exempted aid' and consequently compatible with the internal market.

Article 107(3)(b) TFEU, allowing for 'aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State', is a facultative derogation, meaning the Commission exercises a wider level of

¹⁸ Case C-209/21 P (n 2) para 27.

¹⁹ Ibid para 30.

²⁰ Case C-209/21 P (n 2) para 31; Case C-210/21 P (n 1) para 36.

²¹ Maczkovics (n 10) 273-275; Rosanò (n 13) 628; Petrov (n 4) 463.

discretion.²² To provide guidance on how the Commission exercises its discretion to declare a measure ‘authorized aid’, the Commission issued the previously mentioned Temporary Framework.

The third justification used was the derogation clause in Article 107(3)(c) TFEU, allowing for ‘aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest’. This also is a facultative derogation and the basis for another set of Commission Guidelines.²³

3. Operating Licence as an Eligibility Criterion

The following section will examine two ECJ cases that dealt with challenges to aid schemes which relied on the criterion of holding an operating licence issued by the respective Member State as a means to select eligible beneficiaries.²⁴

3.1. C-210/21 P

The French aid scheme allowed for the deferral of payment of the civil aviation and solidarity taxes paid by air carriers operating flights from French airports. This financial relief measure was however limited only to air carriers holding a French operating licence. The objective of the scheme was to ensure that French licenced air carriers would maintain sufficient liquidity until restrictions and prohibitions linked to the COVID-19 pandemic would be lifted and normal connectivity resumed. This would in turn contribute to the preservation of the aviation sector holding a French operating licence.²⁵ The Commission and the GC decided that such a scheme is in line with the derogation in Article 107(2)(b) TFEU as aid to make good the damage caused by an exceptional occurrence and consequently compatible with the internal market.

²² *Aksamovic and Simunovic* (n 3) 57.

²³ *Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty* [2014] OJ C249/1. Aid could however not be granted to undertakings that experienced financial difficulties not caused by the pandemic. See more in *Maczkovics* (n 10) 276-277; *Rosanò* (n 13) 627; *Aksamovic and Simunovic* (n 3) 58-63; *Széles* (n 3) 52.

²⁴ One further scheme made use of the operating licence eligibility criterium. *Ryanair* was successful in its challenge and the Commission was found to have breached its duty to state reasons, the GC however did not decide on the substantive pleas including the selective eligibility criterion. An appeal has been filed against the decision, the case C-490/23 P is nonetheless still pending and will therefore not be the subject of analysis in this paper. See more in *Case T-268/21 Ryanair v Commission* [2023] ECLI:EU:T:2023:279, paras 2-5.

²⁵ *Case C-210/21 P* (n 1) paras 4-8.

Focusing on the argumentation of the ECJ concerning the justification of the French operating licence as an eligibility criterion, the ECJ rejected Ryanair's arguments that the Commission and the GC misinterpreted the link formed by the operating licence between the licence holders and the issuing Member State as established by Regulation 1008/2008 and that the aid measure was therefore not in accordance with the proportionality principle in relation to the objective pursued in Article 107(2)(b) TFEU. Ryanair pleaded that the link established by the operating licence does not grant the issuing authority any increased monitoring or control powers in relation to the granted aid, or guarantee that in this case French licence holders were more severely affected by French travel restrictions than licence holders of other Member States, nor does it mean that non-French licence holders could more easily interrupt routes to and from France.²⁶ The ECJ contrastingly affirmed the reasoning of the GC, that by limiting the benefits to French licence holders France had legitimately sought that there is a permanent link between it and the beneficiaries. It therefore perceived the operating licence as a stable link between the air carrier and the issuing Member State, even though the financial checks do not specifically relate to the aid granted.²⁷ The ECJ also concluded that, in light of the fact that Member State resources are limited they may legitimately be selectively allocated only to air carriers that were most severely affected by travel restrictions and lockdown measures of that Member State. The ECJ agreed the GC therefore correctly relied on the data of the Commission, which showed that Ryanair was only affected in 8.3% of its business, while some beneficiaries were 100% affected.²⁸

3.2. C-209/21 P

Sweden introduced a loan guarantee scheme limited to air carriers that held a Swedish operating licence. The goal of the aid measure was to provide sufficient liquidity to beneficiaries who would likely play a major role in Sweden's connectivity and ensure their viability and continuity of economic activity despite disruptions caused by the pandemic.²⁹ The scheme was found by the Commission and the GC to be in line with the derogation in Article 107(3)(b) TFEU as aid to remedy a serious disturbance in the economy of a Member State, and thus compatible with the internal market.

²⁶ Ibid paras 18-29.

²⁷ Ibid paras 52-56.

²⁸ Ibid paras 60-59.

²⁹ Case C-209/21 P (n 2) paras 3-5.

The argumentation of the ECJ was similar to the previous case concerning the French aid scheme. The ECJ sided with the Commission and the GC by maintaining that the Swedish operating licence guarantees that the air carrier has its principal place of business in Sweden which therefore creates a permanent link between the benefitting air carrier and Sweden, the licence issuer. Swedish licence holders contribute the most to the Swedish economy, therefore such a scheme is appropriate, necessary and proportionate to achieve the set objective of remedying a serious disturbance in the Swedish economy caused by the COVID-19 pandemic by ensuring Sweden's connectivity.³⁰ The ECJ dismissed Ryanair's arguments that called into question the strength of the link between the licence holders and the issuing Member State, especially the proximity of the specific air carriers to the economy of the issuing Member State and the causal link between having a Swedish licence and guaranteeing service on Swedish territory, a link Ryanair pleaded was entirely hypothetical and contradicted by data.³¹ Ryanair to this end focused on the fact that Swedish licence holders only accounted for the minority of Sweden's regular air services in certain sectors.³²

3.2.1. Opinion of the Advocate General

Advocate General Pitruzzella also sided with the conclusions of the Commission and the GC, albeit with a more insightful argumentation.³³ He initially clarified that while state aid rules generally aim to keep discrimination in check, they themselves do not contain any hard rule of non-discrimination.³⁴ Drawing on jurisprudence in *International Jet Management*³⁵, the aid scheme has to be justified on the basis of objective considerations, independent of the nationality of the persons concerned.³⁶ The Swedish aid scheme employed an eligibility criterion that has the same effect as a discriminatory criterion based on nationality.³⁷ However,

³⁰ Ibid paras 40-57.

³¹ Ibid paras 18-20.

³² Ibid para 21.

³³ Contrary to both Courts the Advocate General maintained that the Commission is required to weigh the beneficial effects of aid against the adverse effects on trading conditions and the maintenance of undistorted competition to ensure that aid measures are in accordance with the common European interest. See more in Case C-209/21 P *Ryanair v Commission* [2023] ECLI:EU:C:2023:905, Opinion of AG Pitruzzella, paras 88-95.

³⁴ Ibid para 15.

³⁵ Case C-628/11 *International Jet Management* [2014] OJ C142/2.

³⁶ Opinion of AG Pitruzzella (n 34) para 12.

³⁷ Ibid para 22.

depending on the nature of the measure at issue and the objective pursued by it, the requirement of a link with the national territory for the purposes of eligibility for the aid may be both necessary and proportionate, so that even a distinguishing criterion (...) based, in essence, on the company's seat, may, depending on the circumstances, be justified and non-discriminatory.³⁸

Such a selection criterion may therefore be used if it is geared towards pursuing the set-out objective and constitutes the means to achieve it according to the principle of proportionality.³⁹ In addition, the objective of preserving Sweden's connectivity could furthermore constitute an objective consideration, independent of nationality in the sense of *International Jet Management*.⁴⁰

For the Advocate General the reciprocal regulatory obligations embodied in the operating licence pursuant to Regulation 1008/2008 create a 'link with the national territory' that would be difficult to impose on air carriers contractually.⁴¹ While the operating licence does not impose any obligation on air carriers to provide certain services to or from the issuing Member State, or make it harder for those air carriers to interrupt such services, the link it establishes makes instances where an air carrier would establish its principal place of business somewhere where it had no intentions to operate, or would eventually cease all of its activities, highly unlikely.⁴² This was factually the true in the present case, since all Swedish licence holders provided services to and from Sweden and Ryanair, while carrying the majority of its passengers outside of Ireland, regularly recognizes its contribution to the Irish economy over the past 35 years.⁴³

The Advocate General agreed that Ryanair was right to challenge the GC's statement that the Commission is not required to abstractly consider other possible alternative measures, as this is the essence of proportionality.⁴⁴ In his view the aid measure and its selective criterion

³⁸ Ibid para 23.

³⁹ Ibid para 29.

⁴⁰ Ibid para 25.

⁴¹ Ibid paras 32 and 39.

⁴² Ibid paras 39-42 and 48.

⁴³ Ibid para 42.

⁴⁴ Ibid para 64.

however did not go beyond the proportionality principle *vis-à-vis* the pursued objective of remedying a serious disturbance in the Swedish economy.⁴⁵

4. Analysis

Summing up the arguments used to justify the operating licence of a particular Member State as an eligibility criterion to benefit from COVID-19 related state aid, the ECJ and the Advocate General relied on the permanent and stable link the operating licence establishes between the air carrier and the issuing Member State. In addition to the reciprocal regulatory obligations, the operating licence necessarily means the air carrier's principal place of business is established on the territory of the issuing Member State, which therefore creates a territorial link. This makes a strong connection between the air carrier and that Member State's economy likelier while possibly also exposing the air carrier more to that Member State's particular restrictive measures related to the pandemic.

The following section will demonstrate three arguments that oppose the view that the operating licence creates a strong national territorial link.

4.1. Nature of the Link – Opposing View

First, to assess the nature and the strength of the link, the provisions of Regulation 1008/2008 have to be analysed. Article 2(11) Regulation 1008/2008 introduces the concept of 'Community air carrier' (also 'EU air carrier') which refers to an air carrier with a valid operating licence granted by a competent licencing authority, the designated authority of a Member State. This concept is indicative of the overarching spirit of the regulation, which strives for the homogenous application of EU legislation relating to the internal aviation market.⁴⁶ This goal of homogeneity is clearly visible in Articles 3 to 14 Regulation 1008/2008, which leave little to no room for discretion of Member State licencing authorities, who are thus only required to uniformly apply the said provisions. Considering the concept of the Community air carrier and the requirement of uniform application of relevant rules by Member State authorities we can therefore conclude that Regulation 1008/2008 aims to, in effect, establish a link between the Community air carrier and the Community (the EU) by mobilizing established Member State administrative mechanisms, effectively outsourcing the

⁴⁵ Ibid para 67.

⁴⁶ See for example Recital 18 of Regulation 1008/2008.

administrative load via de-concentration. This supranational link between air carriers and the EU is furthermore reflected in Article 4(1)(f) Regulation 1008/2008, which establishes as one of the operating licence requirements the majority ownership and effective control of the undertaking by EU Member States and/or nationals of EU Member States, as opposed to the specific Member State and/or its nationals. This goes to show that the relevant distinction in Regulation 1008/2008 is between EU and non-EU rather intra-EU. Therefore, from the intra-EU perspective, the primary link the operating licence establishes is one between the Community air carrier and the EU, with the secondary link between the Community air carrier and the specific Member State limited to a predominantly administrative nature.

Second, the internal aviation market has undergone significant transformation since the start of the liberalization process in the 1990s, which has generated new and dynamic competitive conditions. Incumbents were faced with and to some extent beaten by more efficient entrants adopting to the low-cost carrier business model.⁴⁷ Traditional flag carriers had to adapt as the passenger transportation market transformed into a rapidly growing commodity market.⁴⁸ This meant that many legacy carriers de-nationalized and moved away from traditional corporate structures that gave dominant power to their Member States of origin.⁴⁹ Free to exercise the cabotage freedom,⁵⁰ Community air carriers were encouraged to make use of it and pursue profitable business strategies to beat their competitors. While it seems plausible to maintain that licence holders are unlikely to decide not to operate in the territory of their principal place of business, it has become significantly more likely that air carriers, especially new-age carriers like Ryanair, will meet their operation decisions like any other private company on a competitive market, maximizing shareholder value rather than catering to public objectives based on historic territorial affiliations.

Third, the EU has increasingly shown the willingness and the ability to impose its significance on the internal aviation market, displacing Member State power. This is evident in Recital 18 of Regulation 1008/2008:

⁴⁷ Fabio Domanico, 'The European airline industry: law and economics of low cost carriers' (2007) 23 *European Journal of Law and Economics* 199, 206.

⁴⁸ *Ibid* 214.

⁴⁹ Pablo Mendes de Leon, 'Establishment of air transport undertakings—Towards a more holistic approach' (2009) 15 *Journal of Air Transport Management* 96, 100-101.

⁵⁰ Domanico (n 48) 201.

Since the objective of (...) homogeneous application of Community legislation with regard to the internal aviation market cannot be sufficiently achieved by the Member States because of the international character of air transport, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity (...).⁵¹

One such example is EU's expansion into external aviation policy since the so called 'Open Skies' judgements in 2002.⁵² Since the specifics of this are beyond the scope of this paper it suffice to say that the EU is having an increasingly central role in the internal aviation market it created and has therefore been replacing the formerly strong territorial link between Member States and national flag carriers with the concept of Community air carriers.

4.2. Critical Assessment of the Analysed Decisions

With this opposing view on the nature and strength of the link an operating licence creates between the licence holding air carrier and the issuing Member State, we can turn to the decisions presented above and critically assess their persuasiveness.

Accordingly, the first takeaway is that the ECJ did not differentiate the assessment of the compatibility of the operating licence eligibility criterium, and the overall measure based on the differing legal basis on which the respective aid measures were approved by the Commission. Assessing the proportionality of the aid measure with such an eligibility criterium should logically be different depending on whether the measure claims to pursue the objective of remedying the damage caused by an exceptional occurrence or remedying a serious disturbance in the economy of a Member State. Showing that aid granted to the selected beneficiaries is appropriate, necessary and proportionate to remedy a disturbance of a national economy should require more evidence that the selected beneficiaries are more closely linked with the economy than showing that the aid granted was appropriate, necessary and proportionate to remedy (some of) the pandemic damage sustained by selected air carriers.

⁵¹ Recital 18 of Regulation 1008/2008.

⁵² See more in *Communication From The Commission - Developing the agenda for the Community's external aviation policy* (COM(2005) 79) [2005] <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52005DC0079>> accessed 6 July 2024.

The second takeaway is that while the approved measures are appropriate to achieve the objectives that fall in line with the respective derogation clauses in Article 107 TFEU, their necessity and proportionality are more questionable. The ECJ could have examined other potential measures with alternative eligibility criteria, like for example market shares or routes serviced, to determine which alternative would have been the most effective in satisfying the objective, while keeping the level of distortion of competition to a minimum. While the exact assessment of the proportionality of both analysed schemes is beyond the scope of this paper, Ryanair has presented persuasive arguments that point towards the possibility of other proportionate alternative schemes that forego the operating licence-based eligibility criterium of the two analysed aid schemes.

5. Conclusion

There are many different aspects of pandemic state aid in the air transport sector that deserve critical attention. While some shortcomings, especially on part of the Commission, might be understandable given the crisis circumstances and short timeframe for decision-making, Ryanair's comprehensive litigation campaign undoubtedly raises many valid points for judicial consideration. A prudent and measured approach of the Courts, balancing the interests of the Member States and the interest of a functioning internal market, is not only necessary from the ex post, but furthermore from the ex ante perspective *vis-à-vis* potential future crises. The courts have thus far left little room for the application of the principle of non-discrimination on grounds of nationality by endorsing selective eligibility criteria based on operating licences.⁵³

This paper attempted to show that there are indeed valid arguments that speak against aid measures delimiting beneficiaries based on such eligibility criteria, by relying on the provisions and the spirit of Regulation 1008/2008, the contemporary market dynamics on the liberalized and competitive internal aviation market and the general trends of an ever-tighter EU integration. These arguments can be applied to the two relevant cases analysed in this paper, C-210/21 P and C-209/21 P, to show that the ECJ firstly failed to consider the subtleties of

⁵³ François-Charles Laprèvote and others, 'Any Room Left For Non-Discrimination On Grounds Of Nationality And The 'Balancing Test' In Crisis Aid? Ryanair v. Commission (Swedish And French Schemes; COVID-19)' (Cleary Antitrust Watch, 23 November 2023) <<https://www.clearyantitrustwatch.com/2023/11/any-room-left-for-non-discrimination-on-grounds-of-nationality-and-the-balancing-test-in-crisis-aid-ryanair-v-commission-swedish-and-french-schemes-covid-19/>> accessed on 6 July 2024.

different derogation clauses in Articles 107(2)(b) and 107(3)(b) TFEU respectively, and secondly that the nature of the link the operating licence creates between the air carrier and the issuing Member State might not be enough to make this selectivity criterion necessary and proportionate to attain the set-out objective of the aid measure.

Considering the amounts of aid pumped into the air transport sector in the COVID-19 context market distortions are inevitable. While the real extent of these repercussions will probably never be known, the jurisprudence of the CJEU might result in ‘deep-pocket’ Member States with nationalist and protectionist motives feeling less restricted to make use of state aid mechanisms to the potential detriment of the EU internal market. It remains to be seen whether this will be limited to the air transport sector, or spill over and cause the fragmentation of other markets, especially in the context of potential future crises.⁵⁴

⁵⁴ Ibid.