

**An ‘obligation’ to provide air travel:  
In the  
Covid-19 era  
(A European perspective)**

**ABSTRACT**

This paper takes the reader on a circular journey. The setting is the European Union with the primary focus exploring the ‘vital’ need for transport and mobility, specifically the *obligation* to ensure the provision of air transport services.

Historical contextualization is firstly provided, which reveals a background of State protectionism in the field of aviation, including the use of subsidies to national airlines. The internal liberalization of the market through a series of packages is then considered. The key emphasis of this research is to investigate the Public Service Obligation (PSO) mechanism – which includes a case study as applied to cross border PSO use.

The latter part of the paper discusses the Covid-19 pandemic – the consequences and implications to airlines, passengers and national governments are all discussed. This includes the restriction to individual movement and the impact to airline businesses. In this current environment and a post Covid-19 world, the research concludes that there will be an increased need to support airlines through bailouts and that there is a likelihood that more routes will necessitate the use of PSOs. However, there is recognition given to the fact that this potentially will risk a return to an anti-competitive environment and the liberalized internal market.

**1. INTRODUCTION: *The right to travel***

Mobility enables social, cultural, political and economic activities to take place. Society relies on transport. As the United Nations acknowledged, ‘*transport drives development, links people, connects local communities to the world, builds markets and facilitates trade.*’<sup>1</sup> It is key to our very survival. It is arguably a fundamental right to be able do so.<sup>2</sup>

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<sup>1</sup> MOBILIZING for DEVELOPMENT: Analysis and Policy Recommendations from the United Nations Secretary-General's High-Level Advisory Group on Sustainable Transport. New York City, October 2016. <https://sustainabledevelopment.un.org/content/documents/2375Mobilizing%20Sustainable%20Transport.pdf>

<sup>2</sup> See linked discussions: Sarah Jane Fox (2017) ‘Mobility and Movement Are ‘Our’ Fundamental Rights’. . . Safety & Security – Risk, Choice & Conflict! *Issues in Aviation Law and Policy*. Volume 17 No. 1. Autumn, 2017, pp 7-43.

Transport modes have evolved and become more accessible to the global population. From a European perspective, the chapter on transport was a founding, cornerstone of the Treaty establishing the now European Union. As was more recently stated, *mobility is vital to the .... quality of life of citizens as they enjoy their freedom to travel....*<sup>3</sup>

In recognition to this principle, in terms of the key enabler of transport to individuals and community lives and livelihoods, the European Union (EU) has enshrined the principle of a Public Service Obligation (PSOs) within legislation. PSOs are a mechanism used by governments in many countries, not just within Europe,<sup>4</sup> to mandate a minimum level of commercial transportation service, especially for small or rural communities, where they may otherwise not be (commercially) viable. PSOs maybe applied to land, sea or air transport services. This particular research paper however is limited to the latter - air transport services.<sup>5</sup> So as not to be abused and distort the market, PSOs are strictly overseen and in Europe, there are a number of provisions utilised to do so. Given this, there are limitations applied as to what qualifies as a PSO transport eligible route, accepting that many routes are highly competitive and, therefore, financially sustainable.....*That is until 2020*; a year of challenge to the whole world due to SARS-CoV-2 (herein - Covid-19<sup>6</sup>). The Covid-19 pandemic continues to adversely affect the lives of so millions globally, turning *'the world upside down.'*<sup>7</sup> The asset – *transport*, and the whole ethos (i.e. mobility) was challenged, not just in Europe but worldwide, due to this pandemic that affected and infected the globe. As a consequence, certainly in Europe, the ability to access transport, to even move, was greatly restricted, as, one-by-one, nations asserted various limitations that compromised the concept of free movement. From the perspective of aviation – the impact to this mode of transport has been disastrous, with it being described as the *"deepest crisis ever in the history of aviation."*<sup>8</sup>

The primary focus (of this research paper) is to review the importance of transport – specifically, the use of aviation (air transport) within the EU. As part of this, discussion is given to the *'vital'* need for transport and mobility, and, therefore, the concept of the *'right of movement.'* This includes, in particular, considering what is an *'acceptable level of air services'*<sup>9</sup> and the key means to ensure that there is accessibility (by/to air transport) and hence equity to EU citizens, particularly, through the utilization of PSOs.

Viewed another way, the research considers the *obligation to ensure air service provisions.*

In the latter part of the paper, discussion is given to Covid-19 and the implications in terms of this pandemic that is causing worldwide pandemonia – with specific focus predominantly on the EU and the implications to mobility and aviation.

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<sup>3</sup> Emphasis added. COM (2011) 144 (final) 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system.' Brussels, 28.3.2011.

<sup>4</sup> Examples include the United States and Australia. For a discussion and comparison of PSO schemes in the European Union, United States (Essential Air Service (EAS)), and Australia (Regional Aviation Access Programme (RAAP)), see Martin Hromádka, *Definition of Public Service Obligation Potential in the New EU Member States*, 12 Transp. Probs. 5 (2017).

<sup>5</sup> Noting that, where applicable, reference is also made to other transport PSOs that serve to provide clarity, an illustrative example/added dimension.

<sup>6</sup> Technically SARS-CoV-2 causes the COVID-19 disease.

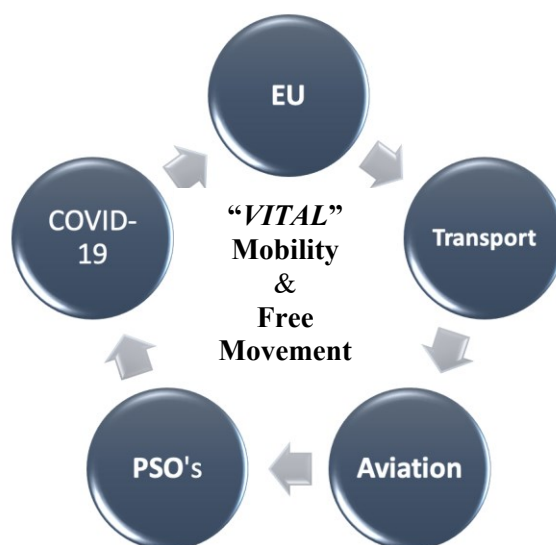
<sup>7</sup> <https://unstats.un.org/unsd/ccsa/documents/covid19-report-ccsa.pdf>

<sup>8</sup> <https://unstats.un.org/unsd/ccsa/documents/covid19-report-ccsa.pdf>

<sup>9</sup> See discussions within section 3.2 of this paper.

### 1.1. Research Design: setting the scene

This paper takes the reader on a circular journey..... (Diagram 1).



**Diagram 1: Scope** (research design) of paper  
(Source: Author)

Firstly, the scene is set in terms of providing contextualization as to the European Union and integration intentions of providing a united European Community with ease of access and increased opportunities for EU citizens (and businesses). As part of this, the importance of transport is discussed, before turning to aviation and identifying the progressive measures taken from the mid-1980's to drive forward the principle of one internal EU (free) market.

Directed discussion is then given to the aspect of PSOs with specific case studies relating to cross border PSOs and the compatibility (conflict) with State aid/assistance.

In the last section the implications of Covid-19 are considered (to general movement and chiefly to aviation) before returning to consider PSO and the future of aviation within the EU.

## 2. EU – a united Europe

Barnard states,

*“the driving force behind the European Union.... [was] the consolidation of a post-war system of inter-state co-operation and integration that would make pan-European armed conflicts inconceivable.”*<sup>10</sup>

The primary purpose of the Treaty Establishing the European Community<sup>11</sup> was to bring about the gradual integration of the States of Europe and to establish a common market founded on the four freedoms of movement (for goods, services, people, and capital) and on

<sup>10</sup> Catherine Barnard, *The Substantive Law of the EU – The Four Freedoms*. (Oxford University Press, 2004).

<sup>11</sup> Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EC Treaty] (now TFEU).

the gradual approximation of economic policies. Whilst the principle respects the individualism of the nations, it is based upon removing boundaries (and even borders).

The objective behind a single European market was always to unify and simplify rules, thus enabling EU citizens to be able to make the most of the opportunities offered to them by having direct access to the now 27 Member States that form today's European Union.<sup>12</sup> Essential to this is 'transport' which has always played a key part in realizing this goal. Ultimately, "*there can be no market without transport!*"<sup>13</sup> And, consequently, without an efficient and effective transport policy, the Internal Market could not have been achieved.

## ***2.1. The EU Transport Chapter***

Since the Treaty of Rome (1957) the transport chapter has remained virtually unchanged by subsequent Treaty revisions. The current, Treaty of Lisbon,<sup>14</sup> specifically, the Treaty on the Functioning of the European Union (TFEU), contains only a few minor amendments from that of the original wording.

While Article 91 TFEU re-emphasizes the "distinctive features of transport," Article 100 TFEU, of the Transport Title, emphasizes that it "*shall apply to transport by rail, road and inland waterways.*" Therefore, there are some distinct differences in terms of both air and sea modes, as, the "*European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport.*"

### *2.1.1. Historic Challenges – effects to aviation The internal dimension*

During the first 30 years, of the, then, European Community, the transport policy<sup>15</sup> remained largely within the control of the individual governments, although technically this should not have been the case. In many ways it was a retained legacy, that saw a protectionism approach being applied.<sup>16</sup>

As a consequence of the lack of joint action, aviation remained subject to individual Member States regulating their own domestic aviation policy. Subsidies by each country to its State flag carrier were also commonplace, which inevitably went against the policy direction for

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<sup>12</sup> As will be referred to later, as of the 23:00 GMT on January 31, 2020 UK stopped being a member of the European Union. Currently it is the transition period which is due to end on December 31, 2020.

<sup>13</sup> EUROPEAN COMM'N, ROAD TRANSPORT, EUROPE ON THE MOVE I (2004) (emphasis added).

<sup>14</sup> [Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007](#) OJ C 306, December 17, 2007 (signed on 13 December 2007, which entered into force on 1 December 2009).

The Treaty of Lisbon amended the EU's two core treaties, the Treaty on European Union and the Treaty establishing the European Community. The latter was renamed the Treaty on the Functioning of the European Union. In addition, several Protocols and Declarations are attached to the Treaty.

<sup>15</sup> Consolidated Version of the Treaty on the Functioning of the European Union, arts. 90–100, OJ C 202, June, 7 2016 (C 326) 47, 85 (Ex. EC Treaty arts. 70–80).

<sup>16</sup> Discussed within; Sarah Jane Fox, (2016) 'Aviation: a risky business: green and level playing fields? A paradox of virtues 'dumping' – anti-competitiveness!', *Int. J. Public Law and Policy*, Vol. 5, No. 4, pp.333–367.

one internal, single market, allowing equal access and competition. Two consequences of this was higher fares, as well as market distortion.<sup>17</sup>

In essence, the European Community had been either unwilling or unable to implement the Common Transport Policy (CTP) as stipulated within the Treaty of Rome.<sup>18</sup> Hence, during this period, liberalization was slow and inconsistencies across the EU inevitably remained. It eventually took the intervention of the Court of Justice,<sup>19</sup> (now, referred to as the CJEU) in 1985, for progress to be made. Up until the mid-1980s/early 1990s, intra-EU aviation was not under the control of a single agency, as had been the case across the states within the U.S.; whereby, this had subsequently led to a more united and consistent approach.

The Court of Justice of the European Union (CJEU) recognized, in the 1985<sup>20</sup> landmark case, that there was not a coherent set of rules and that, with regard to certain aspects of the transport policy, the Council had failed to fulfill its obligations.<sup>21</sup> This resulted, within a month, to a program of legislative measures, the objective being to achieve an internal market by the end of 1992.<sup>22</sup>

The EU, (similar to the U.S. initiative of deregulation<sup>23</sup>) thereafter began to adopt a series of packages to liberalize the EU internally (Table 1: Summary of EU Deregulation Packages). This was also arguably influenced by consumer demands, given that global communications which had enabled European customers to witness the benefits of liberalization in the U.S. air transport market.

Consequently, this led to more willingness by the Member States to embrace the concept of a more open environment within a democratic European Union.

<b>First Package: (adopted in December 1987)</b> <ul style="list-style-type: none"><li>- <b>Council Regulation 3975/87 on the Application of the Competition Rules to Air Transport</b></li><li>- <b>Council Regulation 3976/87 on the Application of the Treaty to certain categories of agreements and concerted parties</b></li><li>- <b>Council Directive 601/87 on Air Fares</b></li></ul>	<b>Summarized:</b> <p>This introduced the relaxation of established rules – for intra-EU traffic, limiting government rights re opposing new fares. It extended flexibility to airlines re seat capacity-sharing.</p>
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<sup>17</sup> *Id.*

<sup>18</sup> *European Transport Policy for 2010: Time to Decide*, COM (2001) 370 final (Sept. 12, 2001). Policy guidelines of the White Paper, at 6.

<sup>19</sup> Case 13/83, *Parliament v. Council*, 1985 E.C.R. 1513, 46–50.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (“[T]hat in breach of the Treaty the Council has failed to ensure freedom to provide services in the sphere of international transport and to lay down the conditions under which non-resident carriers may operate transport services in a Member State” (as stated in relation to road transport)). The Treaty of Maastricht later reinforced this principle. Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) 1.

<sup>22</sup> *Completing the Internal Market: White Paper from the Commission to the European Council*, COM (1985) 310 final (June 28–29, 1985).

<sup>23</sup> Airline Deregulation Act, 1978. Public Law 95–504, Oct. 24, 1978, 92 Stat. 1705.

<ul style="list-style-type: none"> <li>- <b>Council Decision 602/87 on capacity-sharing and market access</b></li> </ul>	
<p><b>Second Package: (adopted in July 1990)</b></p> <ul style="list-style-type: none"> <li>- <b>Council Regulation 2343/90 on market access</b></li> <li>- <b>Council Regulation 2342/90 on air fares</b></li> <li>- <b>Council Regulation 2344/90 on the application of the Treaty to certain categories of agreement and concerted parties</b></li> </ul>	<p>Summarized:</p> <p>This extended market access, providing greater flexibility over fare-setting and capacity-sharing. This led to the concept of “Community (EU) Carriers” being developed and having the right to carry unlimited cargo and passengers between their home State and other EU countries.</p>
<p><b>Third Package: (adopted July 1992)</b></p> <ul style="list-style-type: none"> <li>- <b>Council Regulation 2407/92 on licensing of air carriers</b></li> <li>- <b>Council Regulation 2408/92 on market access</b></li> <li>- <b>Council Regulation 2409/92 on fares and rates</b></li> </ul>	<p>Summarized:</p> <p>This introduced the freedom to provide services within the EU and in 1997 the freedom to provide “cabotage,” the right of an airline of one Member State to operate routes within another Member State.</p> <p><i>Further reforms re: Public Service Obligation: on routes, regarded as essential for regional development.</i></p>

**Table 1 – Summary of EU Deregulation Packages**  
 (Source: Author)

The Third Package<sup>24</sup> remained applicable for 15 years, being replaced by Regulation 1008/2008 on common rules for the operation of air services in the Community (the Air Services Regulation).<sup>25</sup>

The Air Services Regulation (ASR) added further simplicity and internal liberalization by setting out rules on:

- Market access;
- **Public Service Obligations;**
- The granting of and oversight of operating licenses for Community (EU) Carriers;
- Aircraft registration and leasing;
- Pricing; and
- Traffic distribution between airports.

<sup>24</sup> Replacing Regulations 2407/92, 2408/92, 2409/92 as of Nov. 1, 2008.

<sup>25</sup> Council Regulation 1008/2008, Common Rules for the Operation of Air Services in the Community. *OJL* 293, October 31, 2008, p. 3–20. To be discussed at 3.2.

While, in the last 35 years, the number of Member States has increased, there has been increased unity and readiness to embrace the concept of a borderless internal Europe and, arguably, this had resulted in less national protection – including across the field of aviation.

The ASR remains in force today and hence is relevant to the primary focus of this paper, namely the obligation to provide air transport provisions, Public Service Obligations (PSOs). This said, at times, the identification of routes to which a PSO has been applied is not without challenges in terms of meeting the requirements for such and, hence, not infringing any State Aid and competition elements.

### 3. THE LISBON TREATY

In today's Lisbon Treaty, Article 4 of the Treaty on the Functioning of the European Union (TFEU) refers to shared competences between the Union and the Member States and included amongst these are areas relating to:

- i. the internal market;
- ii. social policy, for the aspects defined in this Treaty;
- iii. economic, social, and territorial cohesion;
- iv. environment;
- v. consumer protection;
- vi. *Transport*,<sup>26</sup>
- vii. trans-European networks;

As can be seen, transport is a specific identified area but invariably also overlaps with many other identified areas listed (including other areas too – such as, energy, and justice, security and freedom).

Article 3 TFEU stipulates the area of exclusive competency, which includes the area of competition rules for the functioning of a (fair and equal) internal market.

#### 3.1. *Defining: Public Service Obligations*

The EU (European Commission's Directorate General Mobility and Transport<sup>27</sup>) identifies that the main objectives of the European public transport policy are to provide safe, efficient and high-quality passenger transport services through '*regulated competition*.' However, as part of this, it also takes into account social, environmental and regional development factors so as to "*guarantee.... transparency and performance*."<sup>28</sup>

In explaining what PSOs are, it is stated that;

*“Many public passenger transport services that society needs as part of its general interest cannot be run commercially, so the relevant national, regional or local EU authorities must be able to make certain they are provided.”*<sup>29</sup>

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<sup>26</sup> Emphasis added (Title VI – Transport)

<sup>27</sup> Often referred to as DG Move

<sup>28</sup> [https://ec.europa.eu/transport/themes/pso\\_en](https://ec.europa.eu/transport/themes/pso_en)

<sup>29</sup> *Id.*

‘Services of general (economic) interest’ (SGEI) is a phrase frequently found in connection with PSOs and specifically, Article 14 of the Treaty on the Functioning of the European Union (TFEU) and Protocol No 26 on services of general interest annexed to the TFEU, sets out the general principles of how Member States both define and provide services of general economic interest.

It is said that there are several ways for these to be recognized:

- (i) *“by awarding exclusive rights to those running public services, compensating them financially, and also*
- (ii) by defining rules for how public transport is operated.”*<sup>30</sup>

The European Union has developed legislation to avoid disparities between Member States in the procedures and conditions they apply to the execution of public service obligations. And in this regard, it should be observed that there is a fine line between providing a service under the requirements of a PSO and the infringement (or potential breach) of State aid subsidies.

CJEU rulings have also added clarity in terms of when public service compensation does not constitute State aid within the meaning of Article 107 of the Treaty. In its judgment in the *Altmark* case,<sup>31</sup> the Court of Justice provided that four cumulative criteria need to be met in this respect:

- *First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.*
- *Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.*
- *Third, the compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit.*
- *Finally, where the undertaking that is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs that a typical undertaking, well-run and adequately provided with the relevant means, would have incurred.*<sup>32</sup>

If these criteria are not met (and therefore, the general conditions for the applicability of Article 107(1) of the Treaty are realized) public service compensation constitutes State aid and is subject to Articles 93, 106, 107 and 108 of the Treaty.<sup>33</sup>

Article 106(2) (TFEU), reinforces that providers of services that are of general economic interest are subject to the rules of the Treaties, in particular to the rules governing

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<sup>30</sup> *Id.*

<sup>31</sup> Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark* [2003] ECR I-7747.

<sup>32</sup> 2012/21/EU: 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 (notified under document C(2011) 9380). *OJL 7, 11 Jan 2012, p. 3–10.*

<sup>33</sup> In particular Articles: 107-109 TFEU relate to State aid, and the State aid rules, both substantive and procedural, remain applicable to the PSO routes. The PSO procedure under the Regulation does not substitute a State aid procedure.



competition. However, it should be identified that within the Treaty (and respective legislation) there are minor differences between the different transport types, which is particular so in respect to competition, this takes into account the specific features of each transport mode, including its operational characteristics. Hence, Article 106 does not apply when compensation is paid for public service obligations in respect to land transport.<sup>34</sup>

Therefore, different rules apply to public service compensation in respect to air and maritime operations. The Air Service Regulation (ASR) Regulation (EC) 1008/2008 applies common rules for the operation of air services in the Community.<sup>35</sup>

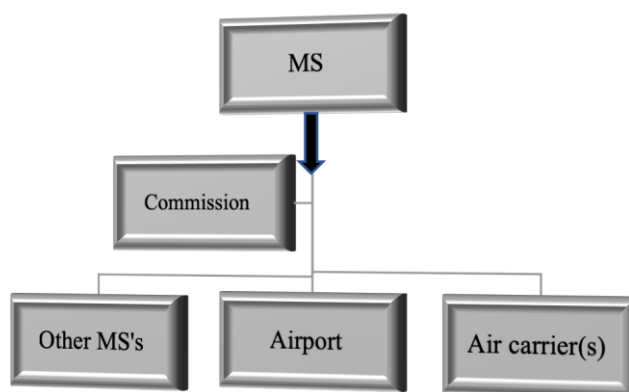
### 3.2. Regulation (EC) 1008/2008 (ASR)<sup>36</sup>

The PSO mechanism (within the ASR) recognizes the need to “ensure access to isolated or developing regions when a Member State finds that objectives of regional development policy will not be met adequately if only left to a free play of market forces as the market itself will not deliver an acceptable level of air services to these regions.”<sup>37</sup>

Thus, PSOs are therefore an exception to the general principle of the freedom to provide air services within the EU, as guaranteed under Article 15(1) of the same Regulation.

Articles 16-18 of the ASR relate to the general principles for PSOs.

Article 16 details the stages that a Member State (MS) must first take (Figure 1).



**Figure 1:** Stages a MS must take before imposing a PSO  
(Source: Author)

Therefore, the Member State firstly needs to inform the Commission, and, before entering into consultation with other Member States, the airports concerned and air carriers operating

<sup>34</sup> Instead, this type of compensation is covered by Article 93 TFEU as a 'lex specialist' and is applied according to the rules of Regulation 1370/2007 relating to (public) passenger transport services by rail and by road.

<sup>35</sup> Regulation (EEC) No 3577/92 applies the principle of freedom to provide services to maritime transport within Member States (maritime cabotage).

<sup>36</sup> Note there have been several amendments made to the original version:

1. Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018
2. Regulation (EU) 2019/2 of the European Parliament and of the Council of 11 December 2018
3. Regulation (EU) 2020/696 of the European Parliament and of the Council of 25 May 2020

<sup>37</sup> Commission Information Notice: INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES: Interpretative guidelines on Regulation (EC) No 1008/2008 of the European Parliament and of the Council — Public Service Obligations (PSO). June 17, 2017 O.J. C 194/01.

on the proposed route. After this the Member State may impose a public service obligation in respect of

*“scheduled air services between an airport in the Community and an airport serving a peripheral or development region in its territory or on a thin route to any airport on its territory any such route being considered vital for the economic and social development of the region which the airport serves”*(Article 16.1).

**Definitions:**<sup>38</sup>

- (i) **A peripheral region** is typically recognized to be ‘a remote region or a region accessible with difficulty from the capital and other main cities in the Member State.’

The remoteness and isolation should be considered with regard to the territory of the Member State, its ‘administrative, business, education and medical centres’ and also with regard to the territory and such as within other Member States to which it shares a border.

- (ii) **A development region** is ‘lagging behind economically,’ as measured, for example by GDP per capita or by the unemployment rate.

- (iii) **A thin route** – as the Commission makes reference to, the Regulation fails to provide a defined ‘quantified criterion’ to assess this.

The Commission identifies that there is no one size fits all and that various situations may prevail in different Member States. However, it is reasoned, *“based on the Commission's experience in a large number of PSO cases, it appears safe to say that a route with traffic of more than 100 000 passengers per year cannot normally be considered as a thin route within the meaning of the Regulation.”*

The Commission then publishes an information notice, relating to the PSO, in the Official Journal (O.J.) of the European Union. This notice identifying the two airports connected by the route concerned and possible intermediate stop-over point(s);

It mentions the date of entry into force of the public service obligation; and indicates the complete address where the text and any relevant information and/or documentation related to the public service obligation ‘shall be made available without delay and free of charge by the Member State concerned’ (Article 16.4).

It is stipulated that the PSO shall only be imposed to the extent necessary to ensure, on that specific identified route, the minimum provisions which air carriers would not assume if they were solely considering their commercial interest. These scheduled air services provided need to satisfy:

- i) fixed standards of continuity,
- ii) regularity,

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<sup>38</sup> As explained within the Interpretative Guidelines (*Id*).

- iii) pricing or minimum capacity.

And, the fixed standards imposed on the route must also be set in a transparent and non-discriminatory way.

In respect to the frequency of the service – it is stated, that this must be uninterrupted with at *least two daily frequencies*. However, when this cannot be satisfied there is a requirement that the Community air carrier gives a guarantee that it will operate the route for a certain period, to be specified, in accordance with the other terms of the public service obligation. Both the necessity and adequacy of the PSO shall be assessed with regard to the following by the Member State (as per Article 16.3):

- (a) the proportionality between the envisaged obligation and the economic development needs of the region concerned;
- (b) the possibility of having recourse to other modes of transport (with the ability of such modes to meet the transport needs under consideration, in particular when existing rail services serve the envisaged route with a travel time of less than three hours and with sufficient frequencies, connections and suitable timings);
- (c) the air fares and conditions which can be quoted to users;
- (d) the combined effect of all air carriers operating or intending to operate on the route.

Article 17 goes onto detail the tender process and details the requirement in terms of compensation made to an air carrier (imposed under Article 16). It is stated that such compensation ‘*may not exceed the amount required to cover the net costs incurred in discharging each public service obligation, taking account of revenue relating thereto kept by the air carrier and a reasonable profit*’ (Article 17.8). The tender process invites operators from other Member States (MS’s) to bid for the respective PSO contract, in compliance with the concept of being European airlines (and a united but competitive and open union).

Article 18 (entitled examination of public service obligations) really concerns the oversight mechanism of PSOs so as to confirm compliance with the requirements for a PSO; and, therefore, to ensure that there is no infringement of Community law or national rules implementing Community law. This may be at the request of another Member State or through the Commissions own initiative. In response, and within two months, the Member State must:

- (a) supply a document justifying the need for the public service obligation and its compliance with the criteria mentioned in Article 16; plus, several analytical documents, namely:
  - (b) ‘*an analysis of the economy of the region;*
  - (c) *an analysis of the proportionality between the envisaged obligations and the economic development objectives;*

(d) *an analysis of the existing air services, if any, and of the other modes of transport available which could be considered a substitute for the envisaged imposition.*<sup>7</sup>

### 3.2.1. Case Studies: PSOs across borders

As of 18 September 2019, there were 176 recognised PSO routes across the EU<sup>39</sup> (see Table 2). This is a small decrease of the 179 previously recorded.<sup>40</sup> Comments will therefore be made on this latest data as below, accepting that there are likely to have been some minor changes since this date.

MS Code <sup>41</sup>	HR	CY	CZ	EE	FI	FR	EL	IE	IT	LT	PT	ES	SE	UK <sup>42</sup>
No.	10	1	3	3	3	37	28	3	11	1	20	23	11	22

**Table 2:** Member States listed with PSOs (as of 18 September 2019)  
 (Source: Authors<sup>43</sup>)

As can be seen in Table 2, not all then 28 Member States have PSOs; and, in fact, this was shown to be limited to just half of the (then) EU States. The ones listed are notably those with coast lines and/or have remote (normally island) communities/territories; or, are themselves Islands (for example Cyprus, Eire (southern Ireland) and technically the UK – which has a number of peripheral islands – including Northern Ireland<sup>44</sup>). So, from this perspective, it would be logical and predictable to see most of these States being identified. Likewise, given this, it is not surprising to note that most PSOs are operated by national airlines (rather than an airline from another Member State).

While the vast majority of PSOs are operated within the same Member State, there are also a number that link Member States to other Member States – that is are cross-border.

There are a few that are particularly worthy of comment:

<sup>39</sup> Taken from the DG Move database.

<sup>40</sup> Commission Information Notice: INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES: Interpretative guidelines on Regulation (EC) No 1008/2008 of the European Parliament and of the Council — Public Service Obligations (PSO). June 17, 2017 O.J. C 194/01.

<sup>41</sup> The two-letter ISO code is used (ISO 3166 alpha-2) except for Greece for which the abbreviation EL has to be used. For details of the MS as expressed by the abbreviation see: [https://ec.europa.eu/eurostat/statistics-explained/index.php/Tutorial:Country\\_codes\\_and\\_protocol\\_order#Codes.2C\\_names\\_and\\_protocol\\_order\\_of\\_European\\_Union\\_.28EU.29\\_Member\\_States](https://ec.europa.eu/eurostat/statistics-explained/index.php/Tutorial:Country_codes_and_protocol_order#Codes.2C_names_and_protocol_order_of_European_Union_.28EU.29_Member_States)

<sup>42</sup> Noting as of the 23:00 GMT on January 31, 2020 UK stopped being a member of the European Union.

<sup>43</sup> Based on data from Taken from the DG Move database.

<sup>44</sup> NOTE: these are not the focus of this paper – whereby the case study relates to the more unusual example of PSOs which go across-borders (from one Member State into another).

The following however serves an illustrative example of such:

- There are also many smaller islands off the UK mainland – e.g. around Scotland for example, the Western Isles, the Hebrides the Northern Islands, etc.
- Spain and Italy, while forming part of the mainland of Europe both have communities located on island archipelagos (Spain – has the Canary Islands and Balearic Islands; and Italy has not only Sardinia and Sicily, etc., but a number of much smaller islands too, as does Greece).
- Other remote regions which are served by PSOs tend to be located on peripheral areas – such as in the UK – e.g.
  - Cornwall (the most westerly point) of England which operates a PSO into London Heathrow.

- 1) Cyprus (CY) for example, has only one PSO and this is to another Member State – Belgium flying into Brussels.<sup>45</sup> This would no doubt generate limited but essential travel to what is the de facto capital of the EU, as it hosts a number of principal EU institutions.<sup>46</sup>

**Data/observations on this PSO route:**

- This route was shown to be operated by Ryanair (with its registered operating office being in Eire); and, this is listed as a *peripheral* and *thin route*<sup>47</sup> (Article 16.1). The route is operated across the 12 months but with a (minimum of) twice-weekly (return) service. The minimum annual number of seats per annum is identified as 20,800; however, in 2018 it is identified that 34,446 were achieved, with 37,044 being offered. This means that 2,598 seats went unoccupied, but the number realised exceeded the minimum by 13,646 – thus having a load factor (pax/actual seat %) of 93%. The maximum fare is furthermore identified as €275, while there is no preferential (discounted) fare available for residents. What is not identified is whether the maximum cost takes into account the ‘add-on’s’ that Ryanair, in particular are noted for, which would no doubt increase the profitability of this route to the operator. This is, however, an open route, meaning that it is not just restricted to one operator (noting that the majority of the PSOs operate under a restriction – that is, to one operator, in most cases due to the lower-end viability of running the service). It is identified that there is no compensation (per pax) payable, in 2018, for this route and there would be no direct alternative service by another mode – given the Cyprus is an island lying to the far east in the EU south of Turkey closer to the area of Syria and Lebanon.

- 2) Czech Republic (CZ) routes all are identified as going to cities outside of the Member State, although data for these routes is more limited due to the fact that these are newer routes (which were under tender as of the period when the data was supplied). The destinations shown were to Germany (Munich) and to Austria (Vienna) for what was identified as ‘development and thin routes.’
- 3) France (FR) is the only Member State which operates (and identifies) over 30 routes. The vast majority of which are utilized to link its own (French) regions and territories. This said, there are several that are perhaps somewhat suprising flying out of Strasbourg – comment will be made on two<sup>48</sup>:
  - (i) Strasbourg to Amsterdam (Netherlands)
  - (ii) Strasbourg to Munich (Germany)

Strasbourg is also a key city and centre for the European Union, arguable it is one of the main cities (alongside Brussels and Luxembourg). The European Parliament meets there, across the year, and there are other significant EU organizations there as well – such as the Council of Europe (and European Court of Human Rights).

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<sup>45</sup> The capital of Belgium.

<sup>46</sup> This includes the administrative (legislative), executive (political) and legislative branches (although the judicial branch is located in Luxembourg and noting that the European Parliament also gathers in Strasbourg.

<sup>47</sup> Thinner markets are characterized by a lower demand for air travel and, as a consequence, airlines schedule fewer flights.

<sup>48</sup> There is also a PSO to Madrid – however, comment will not be made on this route, only to say this it is operated by Air Nostrum, which operates as a franchisee of Iberia (a Spanish airline).

A further one is identified Strasbourg to Prague (the capital of the Czech Republic) – noting this was ceased as of April 8, 2019.

**Noting:** Article 16(1) requires that PSO route should always to be defined from one airport to another, and not with reference to two cities or regions. This said, the way that the PSO is listed on the database tends to refer more specifically to the cities. The selection of the airport for the purpose of a PSO should also be properly rationalized, while onward connectivity – i.e. the destinations and frequencies offered by the airports of the destination city – is however another element in this assessment, it cannot be the only justification for the choice of a specific airport over another.

**Data/observations on routes (i) and (ii)**

(i) *Strasbourg to Amsterdam* is approximately 603 km by road<sup>49</sup> (circa 374 miles). This would equate to approximately – 5 hours 45 minutes. The route is also accessible by train and takes between 7 to just over 9 hours, costing approximately €50 (on average). There is also a bus service which is shown to take between 10-15 hours and the cost is identified as anywhere from €24 upwards with an average of €46.

- Flights are shown to be direct and operated by Air France (a national French airline – although, technically, merged with KLM – a Dutch airline) which is the airline awarded this specific and restricted – PSO (whereby, there is a restriction put on this service - in terms of one operator). The direct flight time is just over the hour (1 hour 10 mins on average being shown).<sup>50</sup>

- Under the PSO data: this route is identified as a ‘thin route.’

This is significant, as it has been identified that the lack of competition is especially relevant on thin routes where alternative transportation modes (i.e., bus, train or car) cannot offer an alternative efficient service. However, it is highly questionable whether this is the case noting that there are three alternative modes (train, bus and car).

While, Bilotkach et al.,<sup>51</sup> identify that intermodal competition is only relevant in Europe on routes that are shorter than 400 miles. This route lies just short of this distance – however, it should not be ignored as to the fact that this sees two key significant cities in the region being linked by an airline that has key links to both Member States, which potential is also essential to bear in mind and may cast doubt on a one size fits all approach in terms of referring to a specified distance (and providing a guise to hide subsidies under the premise of a PSO).

The duration of the current PSO on this route is shown as being from April 9, 2019 to April 8, 2022; to be operated across the 12-months with a (return) frequency of between 5-10 flights per week. Under this PSO, the minimum number of seats per annum, required is 44,100. However, data shows that in 2018 the actual number of seats offered was 123,039 with 90,378 PSO seats being occupied. Hence, 32,661 seats were not occupied but the number realised exceeded the minimum by 46,278 – thus having a load factor (pax/actual seat %) of 204.94%. This also means that it sits just outside the 100,000 passengers being carried per year – which the Commission identifies as a potential rationale for defining a thin route (as above); however, it

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<sup>49</sup> Via the A61 – which is said to be the fastest route as of this research (July 2020).  
<https://www.google.com/maps> Strasbourg,+France/Amsterdam,+Netherlands

<sup>50</sup> Alternative travel data being sourced by the author through general internet searches.

<sup>51</sup> Bilotkach, V., Fageda, X., Flores-Fillol, R., 2010, ‘Scheduled service versus personal transportation: the role of distance.’ *Regional Science and Urban Economics*, 40, pp. 60-72



should be noted that there are other reasonably easy options (other transport modes) that can also be utilized; and, as the Commission also identifies this threshold, *‘does not imply, however, that any route with a traffic less than 100, 000 passengers per year is necessarily a thin route. Generally speaking, the higher the number of passengers on a particular route the more difficult it becomes to argue that such route would be eligible for a PSO, i.e. that without a PSO no carrier would assume certain standards as referred to in Article 16(1) solely considering its commercial interest.’*<sup>52</sup>

There was also compensation payable, per passenger (pax) in 2018 at €22.07 and the amount of annual compensation paid therefore is shown to be €1.994.666,67.<sup>53</sup> It should be identified that there was no maximum fare specified.

Looking on web searches across the month of September (2020) the cost of a return flight seemed to be on average in the area of €130 rising to upward of €220 for flights on Air France (or a subsidiary of Air France – *Hop!*<sup>54</sup>).

(ii) *Strasbourg to Munich*: The shortest road journey is identified as approximately 370 km by road<sup>55</sup> (equating to roughly, 230 miles); and, by car, this would take approximately 3 hours and 40 min. In other words, depending upon where you lived, the proximity to the airport, and the time needed to park, clear security etc., this would invariably be seen as the quickest mode to use to travel from Strasbourg to Munich. As, according to Rail Europe: ‘Fast trains from Strasbourg to Munich take around 3 hours and 43 minutes, covering a distance of approximately 287 kilometres.’<sup>56</sup> It is identified that there are frequent services on this route too, with prices shown as varying between €27.63-€78.<sup>57</sup>

Yet, this route does operate a PSO for what is deemed another ‘thin route.’

It was identified as a ‘new route’ with the PSO running, as before, from April 9, 2019 to April 8, 2022.

It is operated by the German airline, Lufthansa, on what is described as a restricted route that covers all 12-months with a return (minimum) frequency of 5 times per week. The minimum number of seats required under the PSO, per annum, is 20,700. While saying this is a new route, it is however, identified that in 2018, 46,800 seats were offered on this PSO route and that there was compensation is the same year amounting to €1,132.666,67.<sup>58</sup>

No minimum fare is specified.

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<sup>52</sup> Footnote 18 of the Interpretive Commission document:

Commission Information Notice: INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES: Interpretative guidelines on Regulation (EC) No 1008/2008 of the European Parliament and of the Council — Public Service Obligations (PSO). June 17, 2017 O.J. C 194/01

<sup>53</sup> The note added against this identifying that this relates to an average for 3 years 2019-2022.

<sup>54</sup> <https://www.airfranceklm.com/en/hop>

<sup>55</sup> Google Maps identifies 367.7 km - via the A81 and A8 which equates to 4 h 8 min.

Or the fastest route – 3 hours 36 mins via the A8, totalling 372.9 km

<https://www.google.com/maps> Strasbourg,+France/Munich,+Germany

<sup>56</sup> <https://www.raileurope.com/en/destinations/strasbourg-munich-train>

<sup>57</sup> *Id.*

<sup>58</sup> As above: The note added against this identifying this compensation relates to an average for 3 years 2019-2022.

As Bråthen and Eriksen identified, Member States have a high level of flexibility in terms of deciding which routes are ultimately, ‘*essential air services*’ and whether the route should be ‘*deemed vital for the economic and social development of the region*’ (served by the airport identified<sup>59</sup>). This includes starting with whether the Central Government or the Regional Governments should have responsibility for the PSO tender process.<sup>60</sup>

It should be noted, that the vast majority of PSOs result in subsidized services paid by the public authorities. According to the Commission, the amount of subsidies spent yearly to operate them is estimated to be at least EUR 300 million (based on the information at the disposal of the Commission<sup>61</sup>). The Commission has reinforced that PSOs need to respect the ‘principles of transparency, non-discrimination and proportionality’ stressing that they ‘*cannot introduce any discrimination based on the nationality or the identity of the air carriers and they cannot go beyond what is needed to attain the policy objectives.*’<sup>62</sup> Hence, while PSOs could be utilized to lift barriers to the economic and social development of regions or cities, they must not be implemented with the aim, directly or indirectly, to develop a particular airport and neither to promote or support a particular air carrier.

As can be seen though, it is viewed that Member States have a relatively large degree of freedom with respect to when a PSO service should be offered in the first place, and also with respect to the definition of a *thin route*.<sup>63</sup> Consequently, this has invariably led to a certain degree of diversity in PSO practice and operations that inevitably leads to a fine line existing, between supporting areas and providing, a de facto, (State or Regional) aid, in most cases to a national airline, reasoned by presenting a rationale to justify the use of a PSO.

This said, the EU Commission identifies that ‘the number of formal complaints – lodged by airlines and airports – has been very limited.’<sup>64</sup> It also identifies and rationalizes that Article 16(1) of the Regulation does in fact pose ‘*limits to the margin of discretion of the Member States.*’<sup>65</sup> Conversely, the Commission has no power to require a Member State to impose a specific PSO on any route; while it does though, assess the criteria for those proposed in terms of adherence to the necessity and the adequacy provisions (as Article 16.3 above) of the envisaged PSO.

Taking the two PSOs identified above, from Strasbourg to Amsterdam and Strasbourg to Munich, it would have to be questioned whether (i) both adequately fall within the non-specific definition of a thin route and/or (ii) whether a PSO is justified, under the necessity

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<sup>59</sup> Article 16(1) of Regulation No 1008/2008. ‘The airport’ here refers to the airport serving a peripheral or development region in the territory of the Member State.

<sup>60</sup> Svein Bråthen and Knut Sandberg Eriksen. Regional aviation and the PSO system – Level of Service and social efficiency. *Journal of Air Transport Management*. June 2018, Volume 69 Pages 248-256.

<sup>61</sup> This would have been based on data prior to the latest 2019 DG Move records – during the period when there were more PSOs – 179 of which 136 were subsidized.

Commission Information Notice: INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES: Interpretative guidelines on Regulation (EC) No 1008/2008 of the European Parliament and of the Council — Public Service Obligations (PSO). June 17, 2017 O.J. C 194/01.

<sup>62</sup> *Id.*

<sup>63</sup> Svein Bråthen and Knut Sandberg Eriksen. Regional aviation and the PSO system – Level of Service and social efficiency. *Journal of Air Transport Management*. June 2018, Volume 69 Pages 248-256.

<sup>64</sup> Commission Information Notice: INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES: Interpretative guidelines on Regulation (EC) No 1008/2008 of the European Parliament and of the Council — Public Service Obligations (PSO). June 17, 2017 O.J. C 194/01

<sup>65</sup> *Id.*



and adequacy provision relating to access to other alternative transport modes and whether such can (or cannot) adequately meet the transport needs of the region concerned.

The EU Commission refers to the need to take services offered by train, coach and, where necessary and applicable, ferry provisions, into account. Stating that, *‘the adequacy of the services should be assessed, in particular, with regard to their frequency, journey times, departure times and to possible connections to other important destinations, in particular long-haul travel options.’*<sup>66</sup>

The possibilities of individual (car) transport is also another factor that should also be explored, having regard in particular to the journey times by road. As previously said, access to Munich to Strasbourg is reasonably well catered for by both road and rail.

This said, the EU Commission refers to a train journey of less than three hours in particular being taken into account, noting that (from Strasbourg) to Munich it is an extra 43 minutes (on average). However, it is also identified that each assessment should be based on a case-by-case basis.

In many cases, there is little doubting that identified routes are essential and are even deemed life-line services. In some instances, the use of PSOs forms the larger percentage of domestic traffic – for example, in Ireland the share of PSOs in the domestic traffic equates to approximately 70 %.<sup>67</sup>

PSO routes to islands therefore, in most instances, are both necessary and justified. In many cases there are also seasonal justification in terms of fluctuating tourist demands, when, during certain periods, there is not enough traffic to support a commercially viable operation being applied on a year-round basis. Such routes exist for example in Estonia, Ireland, Italy, Greece, Portugal and the UK.

While some Member States, such as Finland and Sweden, are less densely populated and there are cases where distances between regions are particularly long and where no alternative transport tends to exist. Such routes therefore can generally be eligible for the use of PSOs.

As per the introduction to this paper, recognition is clearly accorded to the significance played by air transport services to individual EU citizens and business. The Communication on the ‘Aviation strategy for Europe’<sup>68</sup> identified and acknowledged that access to high quality air transport services is essential to the EU internal market and hence, the very ethos as to why it was created.

#### **4. THE RIGHT TO ..... *Free Movement and Travel***

Technically, the principles enshrined into the European Treaties,<sup>69</sup> that function as the cornerstone of the single market, are based on four freedoms:

The

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> COM(2015) 598 final of December 12, 2015.

<sup>69</sup> Enshrined in the first European Treaty of Rome in 1957 (as discussed at Section 2 of this paper)

- Free movement of goods;
- Free movement of capital;
- Freedom to establish and provide services;
- Free movement of persons.

These freedoms have largely been guaranteed since the mid-1980's which is also when significant advancement was made in terms of liberalization of the internal aviation market.<sup>70</sup> De facto, aviation became the first mode of transport — '*and to a large extent still the only one — to benefit from a fully integrated single market.*'<sup>71</sup>

The original concept of free movement was to enable the European 'working population' to freely travel and settle in any EU State. In the mid 1980's, cooperation between individual governments also led to the signing, in Schengen (Luxembourg), of the Agreement on the gradual abolition of checks at common borders,<sup>72</sup> followed by the signing in 1990 of the Convention implementing that Agreement.<sup>73</sup>

Since the 1990's there has also been a drive to enforce the concept of European citizenship<sup>74</sup> and a sense of belonging to the European Union or, phrased another way, a Union of United Nations (States). In this way, it also serves as a mechanism to ensure unity, removing barriers (and borders) and, many other discriminatory/protectionist practices – creating equality regardless of race, or a perceived affiliation to (or ownership) by to a member state (through birth or a passport). This is, in essence, the same ethos as applied to a European or Community (aviation) carrier – which led to the realization of stand-alone cabotage across a united network of States/countries.<sup>75</sup>

The free movement of persons therefore is a fundamental right guaranteed by the EU to its 'citizens.' It enables every EU citizen to travel, work and live in any EU country with relative ease. In many ways the EU has taken the concept of Article 13 of the Universal Declaration of Human Right (UDHR<sup>76</sup>) one step further; this stating that:

- “(1) *Everyone has the right to freedom of movement and residence within the borders of each state.*  
(2) *Everyone has the right to leave any country, including his own, and to return to his country.*”<sup>77</sup>

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<sup>70</sup> As per discussions within Section 2 (2.1) of this paper.

<sup>71</sup> <https://www.europarl.europa.eu/factsheets/en/sheet/131/air-transport-market-rules>

<sup>72</sup> The implementation of the Schengen Agreements started in 1995, initially involving seven EU States.

<sup>73</sup> Today, the Schengen Area encompasses most EU States, with the exception of Bulgaria, Croatia, Cyprus, Ireland and Romania. However, Bulgaria, Croatia and Romania are currently in the process of joining the Schengen Area. Of non-EU States, Iceland, Norway, Switzerland and Liechtenstein have joined the Schengen Area.

Noting: the UK (even before its departure from the EU) was never part of the wider Schengen Agreement and related Protocols).

<sup>74</sup> The Treaty on European Union introduced for the first time a systematic concept of citizenship in the Community scope: Treaty on European Union 1992; (In Part Two of the EC Treaty; Articles 17 – 22 EC - renumbered after the Treaty of Amsterdam). Since the Lisbon Treaty: Part Two - NON-DISCRIMINATION AND CITIZENSHIP (Articles 18 – 25).

<sup>75</sup> See EU (External) Aviation Policy Briefing – May 2016.

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/582021/EPRS\\_BRI%282016%29582021\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/582021/EPRS_BRI%282016%29582021_EN.pdf)

<sup>76</sup> The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948.

<sup>77</sup> See linked discussions within: Sarah Jane Fox (2017) “Mobility and Movement Are ‘Our’ Fundamental Rights”. . . Safety & Security – Risk, Choice & Conflict! *Issues in Aviation Law and Policy*. Volume 17 No. 1. Autumn, 2017, pp 7-43.

Schengen cooperation therefore enhances this freedom by enabling citizens to cross internal borders without being subjected to regular/systematic border checks. There is a common set of Schengen rules applied (the so-called "Schengen acquis") that cover, controls of land, sea and air borders (airports), as well as the issuing of visas, police cooperation and protection of personal data.

The border-free Schengen Area guarantees free movement to more than 400 million EU citizens (as well as to many non-EU nationals, businessmen, tourists or other persons legally present on the EU territory). This unfettered ability to move freely across sovereign states borders ultimately recognizes the importance of transport in our daily lives. Mankind has both a physiology and a psychological need for physical mobility.<sup>78</sup>

The movement of people, goods and services invariably remains the lifeline of civilization.<sup>79</sup> As the United Nations (UN) Secretary-General Ban Ki-moon, acknowledged, “[t]ransport is *vital* for everyone.”<sup>80</sup>

Noting, the word ‘vital’ is also used to provide rationale for the use of a PSO – reinforcing the concept of transport (in this context, air services) as an enabler of economic, social and cultural survival. The importance was also mentioned in the opening paragraphs of this paper in terms of the fact that *mobility is vital to the ..... quality of life of citizens as they enjoy their freedom to travel....*<sup>81</sup>

#### **4.1. Covid-19: 2020 – The world is turned upside down!**

In 2020: Covid-19 turned the ‘*the world upside down.*’<sup>82</sup> It has been described as an unprecedented global crisis, with countries worldwide facing agonizing health and social emergencies.<sup>83</sup>

Cases of Covid-19 technically started to emerge in late 2019, when the virus was first reported in Wuhan, the Hubei province of China.

Since this time, the “coronavirus” has spread across the world and, on February 11, 2020, the World Health Organization (WHO) stated the official name would be COVID-19, a shortened version of the coronavirus disease - 2019. The more formal name (as referred to by

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<sup>78</sup> *Id.* Discussing Clifford R. Bragdon, Transportation Security. Butterworth-Heinemann Homeland Security Series (2008).

<sup>79</sup> As discussed within a previous edition of this journal Sarah Jane Fox (2017) “Mobility and Movement Are ‘Our’ Fundamental Rights”. . . Safety & Security – Risk, Choice & Conflict! *Issues in Aviation Law and Policy*. Volume 17 No. 1. Autumn, 2017, pp 7-43

<sup>80</sup> Emphasis added to the word ‘vital.’

UN Press release. ‘*New UN group seeks solutions for harnessing rising investments in transport while reducing harmful pollutants for sustainable future.*’ New York, 18 November 2014.

<sup>81</sup> Emphasis added. COM (2011) 144 (final) ‘Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system.’ Brussels, 28.3.2011.

<sup>82</sup> <https://unstats.un.org/unsd/ccsa/documents/covid19-report-ccsa.pdf>

<sup>83</sup> <https://www.statista.com/statistics/1103040/cumulative-coronavirus-covid19-cases-number-worldwide-by-day/> (August 7, 2020).

the International Committee on Taxonomy of Viruses) is SARS-CoV-2 “severe acute respiratory syndrome coronavirus 2.”<sup>84</sup>

As of March 11, 2020, the World Health Organization (WHO) declared COVID-19 as a pandemic<sup>85</sup> - causing pandemonium globally.

To date, the disease has impacted around 210 countries and territories, with the United States confirming circa one-quarter of all global cases.<sup>86</sup>

**August 2020** - since 31, December 2019 (and as of August 6, 2020) 18 793 522 cases of COVID-19<sup>87</sup> have been reported, including 707 715 deaths worldwide.<sup>88</sup>

**Noting** number supplied by WHO differ (as of August 8, 2020): they were reporting 13 146 596 cases with 441 178 confirmed deaths.<sup>89</sup>

This difference serves not only to demonstrate the consequence of this disease, but actually to highlight the sheer unknowns in terms of the actual magnitude – which will doubtless never be anywhere near fully accurately recorded.

**Europe** – has seen 3 000 274 cases; with, 206 131 deaths.

- The five countries reporting most cases are Russia (867 343), United Kingdom (307 184), Spain (305 767), Italy (248 803) and Germany (213 067).
- The five countries reporting most deaths are United Kingdom (46 364), Italy (35 181), France (30 305), Spain (28 499) and Russia (14 532).<sup>90</sup>

Many health systems have been overwhelmed worldwide, with the disease affecting the richest and poorest areas of society. With the steep rise in the number of global coronavirus cases countries have had to resort to drastic measures to try to lower the number of cases to minimize (and ideally prevent) the spread of the virus. In many countries national and regional ‘lockdowns’ have occurred, whereby citizens have been confined to their homes with a restriction to their movements to set times or events – including within the EU.

This extraordinary measure goes against the concept of free movement and the right to travel.<sup>91</sup> Yet, the severity of the disease has led to such unprecedented measures being taken –

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<sup>84</sup> “The International Committee on Taxonomy of Viruses and the World Health Organization announced official names for both the virus and the disease it causes: SARS-CoV-2 and COVID-19, respectively.” <https://www.statista.com/statistics/1043366/novel-coronavirus-2019ncov-cases-worldwide-by-country/> (The SARS-CoV-2 virus causes the disease COVID-19).

<sup>85</sup> WHO Director-General's opening remarks at the media briefing on COVID-19 March 11, 2020. <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>

<sup>86</sup> August 7, 2020 – data from: <https://www.statista.com/statistics/1043366/novel-coronavirus-2019ncov-cases-worldwide-by-country/>

<sup>87</sup> Data: In accordance with the applied case definitions and testing strategies in the affected countries.

<sup>88</sup> Data from European Centre for Disease Prevention and Control - An agency of the European Union <https://www.ecdc.europa.eu/en/geographical-distribution-2019-ncov-cases> (August 7, 2020).

**United States:** (August 7, 2020)

*Reported cases* - 4 823 891

*Deaths* - 158 256

<sup>89</sup> *Number of Coronavirus (COVID-19) Cases Worldwide as of August 6, 2020, by Country*, Statista.com <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

<sup>90</sup> Data from European Centre for Disease Prevention and Control - An agency of the European Union <https://www.ecdc.europa.eu/en/geographical-distribution-2019-ncov-cases> (August 7, 2020).

<sup>91</sup> Noting that measures are able to be taken and limitations imposed, based on considerations of public security, public policy and hence, *public health grounds*.

whereby, the priority is to keep people safe, healthy and ultimately alive. This has resulted in reduced transport services for land, sea and air modes – including those operated under PSOs.

The Schengen Borders Code allows Member States to impose a temporary provision, which allows the reintroduction of border control measures at the internal borders in the event that a serious threat to public policy or internal security has been established.<sup>92</sup> It is ultimately a decision that rests with that Member State, while the Commission may issue an opinion with regard to the necessity of the measure and its proportionality, it is unable to veto such a decision.

The reintroduction of border controls must remain an exception and must respect the principle of proportionality. The scope and duration of such a ‘temporary’ reintroduction is imposed for a limited time and should be restricted to the bare minimum needed to respond to the threat in question. Ultimately, reintroducing border control at the internal border is used as a measure of last resort and hence this shows the severity of Covid-19 in 2020 when a number of States applied various forms of limitations of citizens movements within the EU.<sup>93</sup> This was particularly noticeable across the months of March and April, when, in March, EU Member States agreed on coordinated action at the external borders based on the recommendations by the Commission to restrict non-essential travel for a specific period which has since been extended a number of times.<sup>94</sup>

By mid-April the EU Commission published a Roadmap aimed at reducing the measures imposed.<sup>95</sup> In May this was reinforced with a publication addressing tourism and transport challenges in 2020 and beyond,<sup>96</sup> and by June, 30 the EU Council adopted a Recommendation on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction.<sup>97</sup>

## 5. COVID-19: *Effects to aviation*<sup>98</sup>

This said, ‘transport’ has also been viewed as a key service - essential to keep moving, to ensure the supply of medical and other essential goods and is ultimately, a vital component to

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For example, the Free Movement Directive (2004/38/EC) provides the general principles applicable to restrictions and the grounds that may be used to justify such measures; these grounds are public policy, public security or public health.

<sup>92</sup> Public health is not explicitly mentioned in the legitimate grounds to reintroduce border checks:

- Article 28 only refers to public policy and internal security. However, and even though EU law usually distinguishes public health from public policy, the latter can be broadly interpreted to cover the current circumstances and justify the measures taken.

<sup>93</sup> This link: provides an indicator of measures as of July, 13 2020: pursuant to Article 25 and 28 *et seq.* of the Schengen Borders Code:

[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms\\_notifications\\_-\\_reintroduction\\_of\\_border\\_control\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf)

<sup>94</sup> COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL.

COVID-19: Temporary Restriction on Non-Essential Travel to the EU. Brussels, March, 16, 2020 COM(2020) 115 final.

<sup>95</sup> Joint European Roadmap towards lifting COVID-19 containment measures, OJ C 126, April 17, 2020

<sup>96</sup> Brussels, May 13, 2020 COM(2020) 550 final.

<sup>97</sup> Institutional File Reference No: 2020/0134

<sup>98</sup> Also see discussions by the author (currently in press):

Sarah Jane Fox & Luis Martín Domingo, *EU Air Passengers’ Rights Past, Present, and Future: In an Uncertain World (Regulation (EC) 261/2004: Evaluation and Case Study)*, 85 J. Air L. & Com. (September 2020).

our economy. While extraordinary measures at borders have been; and, are still being taken – from an EU perspective - guidelines were also provided for border management measures to protect health and ensure the availability of goods and essential services.<sup>99</sup> This guidance document reiterated the need to recognize the concept of free movement (albeit, with limitations) to EU citizens and the obligations imposed on all States to, ‘*admit their own citizens and residents, and facilitate transit of other EU citizens and residents that are returning home.*’

The guidelines also referred to the need to ensure ‘*green lanes*’ to facilitate the movement of freight, while a separate document was issued specifically relating to ensuring continuous air cargo.<sup>100</sup> Within this, it was highlighted that restrictions on flights and/or limitations on the movement of passengers had been imposed, with a view to containing the pandemic, but it stressed the need for continued air cargo operations – identifying the importance of air freight, particularly for time-sensitive cargo during this crisis and in the direct fight against Covid-19. Mention was also made (referring to March consequences) that, air traffic movements were down over 80%, and nearly all passenger flights had been cancelled. Passenger services remain key to air freight movements, given that half of all air cargo is carried in the hold of passenger aircraft.<sup>101</sup> This was largely due to the containment measures, such as travel restrictions and flight bans, imposed by States, as well as a significant drop in demand for travel.

From a U.S. perspective; on March 17, 2020, the USA announced the decision of the Secretary of Homeland Security (DHS) to direct all flights to the United States carrying persons who have recently traveled from, (or were otherwise present within) the Schengen Area to arrive at one of the number of designated United States airports, where the was focusing public health resources.<sup>102</sup>

As was commented upon in the introduction Covid-19 has led to the “*deepest crisis ever in the history of aviation,*”<sup>103</sup> surpassing the tragedies’ of 9/11 and the predecessor of the

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<sup>99</sup> Brussels, March 16, 2020 C(2020) 1753 final.

<sup>100</sup> Brussels, March 26, 2020 C(2020) 2010 final

<sup>101</sup> *Id.*

<sup>102</sup> Federal Register: Vol. 85, No. 52 - Tuesday, March 17, 2020 - Rules and Regulations (15059).

DEPARTMENT OF HOMELAND SECURITY. U.S. Customs and Border Protection 19 CFR Chapter I Transportation Security Administration 49 CFR Chapter XII

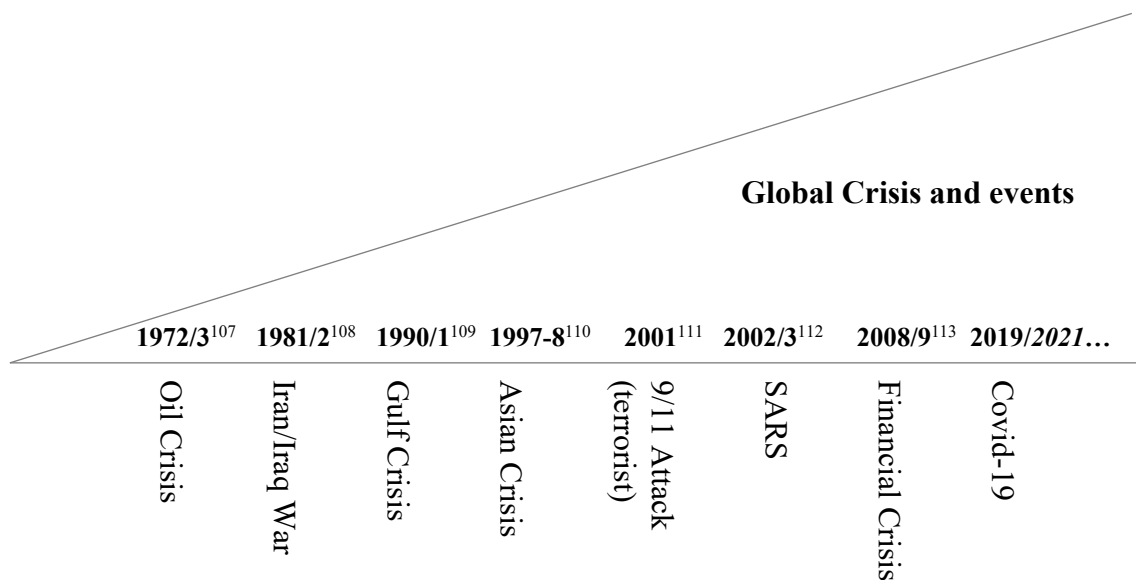
Notification of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the Countries of the Schengen Area.

Pursuant to 19 U.S.C. 1433(c), 19 CFR 122.32, 49 U.S.C. 114, and 49 CFR 1544.305 and 1546.105, DHS has the authority to limit the locations where all flights entering the U.S. from abroad may land.

(Noting: flights carrying cargo only were excluded from this. And, observing two days later, the same limitations were applied in respect to the UK and the Republic of Ireland).

<sup>103</sup> <https://unstats.un.org/unsd/ccsa/documents/covid19-report-ccsa.pdf>

Coronavirus/Covid-19<sup>104</sup> – Sars-Cov (in 2002/3)<sup>105</sup> with it being reported that the “depth of COVID19 impact far exceeds previous crises RPKs 20% fall after 9-11 and 12% after SARS vs 95% fall in April 2020.”<sup>106</sup> This is consistent across the globe – it is a truly *global crisis* on a scale never previously experienced and, appreciating aviation has certainly had its fair share of crisis (Chart 1: key events that have shaken and challenged aviation).



**Chart 1:** Global events challenging aviation (1972-2020 and beyond)

<sup>104</sup> Both COVID-19 and SARS are caused by coronaviruses:

- SARS-CoV, the virus that caused [SARS](https://www.who.int/ith/diseases/sars/en/), which first came to light in late 2002 being identified in 2003 <https://www.biospace.com/article/comparison-2003-sars-pandemic-vs-2020-covid-19-pandemic/>
- MERS-CoV, the virus that caused Middle East respiratory syndrome (MERS), which was first identified in 2012.
- SARS-CoV-2, the virus that causes [COVID-19](https://www.healthline.com/health/coronavirus-vs-sars#sars), which was first identified in 2019.

<https://www.healthline.com/health/coronavirus-vs-sars#sars>

[https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(20\)30129-8/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30129-8/fulltext)

<sup>105</sup> Wall Street Journal - “*Global Airlines Brace for Coronavirus Impact*” – Early predictions said that ‘Epidemic might cost sector as much as \$100 billion’ but this may well be underestimated.

<https://www.wsj.com/articles/germanys-lufthansa-makes-cuts-as-it-braces-for-coronavirus-impact-11582712819>

<sup>106</sup> <https://www.iata.org/contentassets/4820c05b19f148e2855db91f2a579369/nw20-slot-waiver---a-matter-of-urgency-.pdf>

<sup>107</sup> The oil crisis spanned much of the 1970’s (<https://www.history.com/topics/1970s/energy-crisis>)

<sup>108</sup> Technically the war is recorded from 1980-1988 (<https://www.globalsecurity.org/military/world/war/iran-iraq.htm>)

<sup>109</sup> Recorded as of Aug 2, 1990 – Feb 28, 1991 (<https://www.history.com/topics/middle-east/persian-gulf-war>)

<sup>110</sup> Again, spanning a period of years – normally accepted to be 1996-1998 (with 97/98 the peak of the crisis) [https://unctad.org/en/Docs/ux\\_hi\\_akyuz.en.pdf](https://unctad.org/en/Docs/ux_hi_akyuz.en.pdf)

<sup>111</sup> 9/11 refers to a series of four coordinated terrorist attacks by the Islamic terrorist group al-Qaeda against the United States on September 11, 2001 – although the effects were felt for a number of years and there were residual consequences (particularly to aviation security as a result of this specific day).

<sup>112</sup> Technically identified as spanning from 2002-2004 with a peak in 2003

SARS coronavirus (SARS-CoV) a virus first identified in 2003, first infecting humans in the Guangdong province of southern China in 2002. <https://www.who.int/ith/diseases/sars/en/>

<sup>113</sup> The financial crises spanned a number of years (approx. five) across the mid to late 2000’s having a peak around 2007/2009

<https://www.theguardian.com/business/2012/aug/07/credit-crunch-boom-bust-timeline>



On March 13, British Airways Chief Executive, Alex Cruz, stated, “It is a crisis of global proportions like no other we have known,” and will ultimately lead to the grounding of airlines on a scale never previously seen. In the video message sent to staff, he advised them, not to ‘underestimate the seriousness of this for our company;’ identifying that jobs would be lost. The headlined message said it all, ‘*the survival of British Airways.*’<sup>115</sup>

As of mid-June, 2020, it was stated that airlines around the world, were predicted to lose a record \$84 billion in 2020, more than three times the loss made during in the Global Financial Crisis.<sup>116</sup> It was identified that the loss would continue into at least 2021, with an anticipated loss of circa \$16 billion in 2021; that prediction being made with the assumption that there would not be a second wave of COVID-19 infections in the autumn and winter.<sup>117</sup>

ICAO – reporting as of August 5, 2020 painted an even more negative picture, with the following estimates:<sup>118</sup>

First Quarter 2020 – January-March

- *Overall reduction ranging from 18% to 37% of seats offered by airlines*
- *Overall reduction of 290 to 562 million passengers*
- *Approximately USD 44 to 80 billion potential loss of gross passenger operating revenues of airlines*

Full year 2020 (January-December)

- *Overall reduction ranging from 44% to 50% of seats offered by airlines*
- *Overall reduction of 2,538 to 2,843 million passengers*
- *Approximately USD 343 to 383 billion potential loss of gross passenger operating revenues of airlines.*<sup>119</sup>

ICAO clearly acknowledged the following (meaning it could actually be worse than anticipated and forecast):

*“The actual impacts will depend on duration and magnitude of the outbreak and containment measures, the degree of consumer confidence for air travel, and economic conditions, etc.”*<sup>120</sup>

The July 2020 Moody’s report (by the Investor Service) – stated:

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<sup>114</sup> International Civil Aviation Organization (ICAO) data:

[https://www.icao.int/sustainability/Documents/COVID-19/ICAO\\_Coronavirus\\_Econ\\_Impact.pdf](https://www.icao.int/sustainability/Documents/COVID-19/ICAO_Coronavirus_Econ_Impact.pdf)

Dates refer to peak effects to aviation during the crises – accepting that there would also be some regional variations.

<sup>115</sup> As reported via Sky News (online)

<https://news.sky.com/story/coronavirus-more-serious-for-airline-industry-than-9-11-ba-boss-11957065>

<sup>116</sup> The International Air Transport Association (IATA)

<https://www.iata.org/en/iata-repository/publications/economic-reports/record-loss-in-2020-extending-to-2021-but-at-a-lower-level/>

<sup>117</sup> World Economic Forum (referring to IATA date)

<https://www.weforum.org/agenda/2020/06/4-charts-airline-crisis-covid-way-ahead/>

<sup>118</sup> ICAO: Effects of Novel Coronavirus (COVID-19) on Civil Aviation: Economic Impact Analysis  
Montréal, Canada. August 5, 2020

[https://www.icao.int/sustainability/Documents/COVID-19/ICAO\\_Coronavirus\\_Econ\\_Impact.pdf](https://www.icao.int/sustainability/Documents/COVID-19/ICAO_Coronavirus_Econ_Impact.pdf)

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*



“The global airline industry has been disproportionately affected by the coronavirus pandemic, and the strain on its once flourishing fundamentals will affect a broad swath of the world economy well into 2022 and beyond, given the importance of passenger airlines to global economic activity.”<sup>121</sup>

In the same report, it was identified that the industry would not recovery to the 2019 demands until, at the earliest, 2023, however even in this regard there was caution since the infection rates rise and dip and then rise again.<sup>122</sup> IATA, only a few weeks later, stated Global passenger traffic (revenue passenger kilometers or RPKs) would not return to pre-COVID-19 levels until 2024, that is a year later than previously projected.<sup>123</sup> Ultimately, Covid-19 has dramatic consequences to individual airlines (as well as airports and all players involved in the aviation industry) – including of course, passengers and the overall economies of nations. Hence, the recovery of the industry remains unknown and is subject to many factors, not just the containment of the virus but passenger confidence and the ability to be able purchase flights and holidays (i.e. public spending). Many individuals have inevitably lost their jobs, as other industries also struggle to survive, which creates a circle in terms of less corporate demand for travel.

From a European perspective, as of August 17, 2020, ICAO estimates that Europe’s lost revenue is approximately USD \$57,934,897,437.<sup>124</sup> IATA’s June data reveals that European carriers saw demand topple 96.7% in that month versus a year earlier, compared to a 98.7% decline in May. Capacity dropped 94.4% and load factor shrank 35.7 percentage points to 52.0 %.<sup>125</sup>

### **5.1. Bailouts and support: A risk to liberalization and competition?**

The future for the aviation industry looks bleak, as viewed in 2020, and for some time to come. This affects not only the airlines but ‘would-be’ passengers as well.

The opening statement of this paper – said:

*‘transport drives development, links people, connects local communities to the world, builds markets and facilitates trade.’*<sup>126</sup> It is key to our very survival. It is arguably a fundamental right to be able do so.

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<sup>121</sup> Research Announcement:

Moody's – Coronavirus-related disruptions to airline industry affect broad swath of global economy  
July 16, 2020. Accessible via:

[https://www.moody's.com/research/Moodys-Coronavirus-related-disruptions-to-airline-industry-affect-broad-swath--PBC\\_1237929](https://www.moody's.com/research/Moodys-Coronavirus-related-disruptions-to-airline-industry-affect-broad-swath--PBC_1237929)

<sup>122</sup> *Id.*

<sup>123</sup> IATA Press Release No: 63. Dated: July 28, 2020

Recovery Delayed as International Travel Remains Locked Down

<https://www.iata.org/en/pressroom/pr/2020-07-28-02/>

<sup>124</sup> Int'l Civil Aviation Org., *Revenue/Pax/Seat Losses*, <https://data.icao.int/coVID-19/economic.htm> (last visited Aug. 17, 2020).

<sup>125</sup> Press Release, Int'l Air Transp. Ass'n, Recovery Delayed as International Travel Remains Locked Down (July 28, 2020), <https://www.iata.org/en/pressroom/pr/2020-07-28-02/>.

<sup>126</sup> MOBILIZING for DEVELOPMENT: Analysis and Policy Recommendations from the United Nations Secretary-General's High-Level Advisory Group on Sustainable Transport. New York City, October 2016.  
<https://sustainabledevelopment.un.org/content/documents/2375Mobilizing%20Sustainable%20Transport.pdf>

As a consequence, PSOs exist in order to ensure that commercial transport services, including aviation, are available to citizens. In rural and peripheral regions, these are essential and vital services, normally applied so as to connect communities within one State and provide citizens with *freedom and quality of life*. That said, it has also been argued<sup>127</sup> that on some occasions, across borders, the utilization of PSOs is being applied in a questionable manner – with routes being designated as “thin” (or “development”) when arguably they are not and/or there is means to utilize other transport modes.

Today, airlines are identifying the risk to their businesses in terms of being able to survive and provide any services at all in the future.

Italy’s former flag carrier – Alitalia, even before Covid-19, was struggling for survival. Last year, the carrier was reported as losing more than €450 million and in the first quarter of this year another €218 million.<sup>128</sup> Airline bosses are crying out for support from their respective governments and hence what amounts to State aid.

In March, at the start of the Covid-19 crisis, the chairman Peter Norris the majority shareholder of the Virgin Group<sup>129</sup> (supported by Shai Weiss, the Virgin Atlantic’s chief executive) is understood to have written to the prime minister to warn that the UK sector would need, at that time, immediate financial aid of between £5bn and £7.5bn.<sup>130</sup> This said, in July 2020, Virgin Atlantic was forced to seek support from the Virgin Group through the injection of £200m, with additional funds provided by investors and creditors. This included brokering a deal that included funding from US hedge fund Davidson Kempner Capital Management, plus, the postponement of about £450m in payments to creditors.<sup>131</sup> In total it was recorded as a 1.2 billion pounds-deal. Even then, it is being questioned, if this will be enough to keep the airline going. Initially the airline had hoped that the UK government would bail them out with £500 million in loans, however, it was reported that ministers had made it clear, that taxpayers’ money (State aid) would only be considered once all other options had been exhausted.<sup>132</sup> The potential is that this may yet occur.

At the start of the crisis in March, 2020, – the UK regional carrier ‘Flybe<sup>133</sup>’ - the largest in Europe, lost its battle for survival, when it entered into administration. It had already received a State aid bail-out from the government in January of that year, which was heavily criticised by Willie Walsh, the then Chief Executive Officer (CEO) of IAG.<sup>134</sup> Reportedly, Walsh had written to the transport secretary arguing that Flybe should not be bailed out by public purse-strings, asserting that the airline's owners, which ironically included Virgin Atlantic/Delta should be digging deeper.

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<sup>127</sup> See *supra* sec. 3.2.1 (case studies discussion).

<sup>128</sup> Euronews report:

<https://www.euronews.com/2020/05/22/analysis-can-the-aviation-industry-survive-the-coronavirus-crisis>

<sup>129</sup> Virgin Group owns 51% of the airline, with the rest held by US carrier Delta Air Lines.

<sup>130</sup> Guardian news report: UK airlines call for multibillion bailout to survive Covid-19 crisis

<https://www.theguardian.com/world/2020/mar/15/uk-airlines-call-for-multibillion-bailout-to-survive-covid-19-crisis>

<sup>131</sup> BBC Report July 14, 2020: Coronavirus: Virgin Atlantic finalises £1.2bn rescue deal (online)

<https://www.bbc.com/news/business-53406604>

<sup>132</sup> *Id.*

<sup>133</sup> Flybe was the biggest operator of UK domestic flights, carrying around eight million passengers annually and flying from 43 airports across Europe and 28 in Britain.

<https://news.cgtn.com/news/2020-03-05/UK-airline-Flybe-collapses-as-virus-hits-flights-worldwide-OBJuJUAidi/index.html>

<sup>134</sup> International Airlines Group.

Walsh is supposedly have written in his letter:

*“Prior to the acquisition of Flybe by the consortium, which includes Virgin/Delta, Flybe argued for taxpayers to fund its operations by subsidizing regional routes. Virgin/Delta now want the taxpayer to pick up the tab for their mismanagement of the airline. This is a blatant misuse of public funds.”*<sup>135</sup>

It is stated that Flybe’s deal provided the airline with three months to pay off around \$130 million worth of duty. The deal is also thought to have included also a plan to review this duty which is te £13 (\$16) air passenger duty (APD) on domestic flights – often criticized by the airlines, particularly on internal flights within the same country.<sup>136</sup>

This said, the government support package was also criticized by Caroline Lucas (a Green Party MP) who tweeted, “Domestic flights need to be reduced, not made cheaper.”<sup>137</sup> A comment which offers more support to the environment than potentially recognizing the value and importance of regional connectivity (the ethos – enshrined within the PSO mechanism) to the community and hence, passengers. It is questionable whether any of the Flybe routes could have been considered and deemed by the UK government as a public obligation service (PSO). Flybe already having one PSO route from Newquay (Cornwall) into London Heathrow scheduled to operate from October 26, 2018 until October 25, 2022.<sup>138</sup>

As the consequences of Covid-19 continue to be felt globally, many airlines (including European carriers) faced with an uncertain future, also continue, to look to their governments for support; with it being reported, for example: that Alitalia, now stands to be relaunched with a massive €3 billion injection of government subsidies.<sup>139</sup> While the German airline ‘Condor’ is also reported to receive a second round of public aid. The bail out to Condor having already come under scrutiny from the EU Commission who assessed the measure under Article 107(2)(b) of the Treaty on the Functioning of the European Union (TFEU) finding that:

*“This State-guaranteed €550 million loan will allow Germany to compensate Condor, operating in the particularly hard hit aviation sector, for part of the damage suffered due to the coronavirus outbreak. We cooperate with Member States to find workable solutions.”*<sup>140</sup>

In other words, the Commission found it compatible to provide State aid to compensate specific companies or specific sectors (in the form of schemes within the meaning of Article 107(2)(b)) for damage(s) directly caused by exceptional occurrences – which, Covid-19 must be recognized by all to be.

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<sup>135</sup> UK’s Flybe bailout a ‘misuse of public funds’ says British Airways CEO (reported Jan. 15, 2020) <https://newseu.cgtn.com/news/2020-01-15/UK-s-Flybe-bailout-a-misuse-of-public-funds-says-British-Airways-CEO-NhnTuGftBK/index.html>

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> EU Commission State aid data.

<sup>139</sup> Euronews report:

<https://www.euronews.com/2020/05/22/analysis-can-the-aviation-industry-survive-the-coronavirus-crisis>

<sup>140</sup> Emphasis added: EU Commission: State Aid Press Release: State aid: Commission approves €550 million German State-guaranteed loan to compensate airline Condor for damage caused by coronavirus outbreak Reported - April 27, 2020

The non-confidential version of the decision will be/is available under the case number SA.56867 is available in the State Aid register.

This said, Ryanair's CEO, Michael O'Leary has condemned the move and readiness to allocate State aid; with airlines being accused of being '*State aid junkies*.'<sup>141</sup>

O'Leary rationalized,

*"What's clearly happening is we have the French and the Germans creating a huge fund - billions in state aid - that will allow them to either low-cost sell against the likes of Ryanair during the recovery period or allow them to engage in mergers and acquisitions and buy up all their weaker competitors when this is over."*<sup>142</sup>

There is little doubt that this will be the case, whereby there will be inequality across the EU (and UK/Ireland) in terms of which governments will support their States airlines and to what amount. This said, the EU Commission has shown that (as above) it is eager to *cooperate with Member States to find workable solutions*.<sup>143</sup> Latvia's airBaltic, which reportedly lost €8.2 million in 2019, was also identified to receive 'a large infusion of government funds.'<sup>144</sup> This also having now been reviewed by the EU Commission and considered not to breach State aid<sup>145</sup>; or, more, specifically be compatible *under the new State aid temporary framework* – which looks at allowing more State intervention, or more precisely State aid measures to support the economy in the current COVID-19 outbreak.<sup>146</sup>

As was said by Executive Vice-President Margrethe Vestager, in charge of the competition policy, justified:

*"AirBaltic plays a key role for the Latvian economy. It contributes to foreign trade and to ensuring Latvia's domestic and international connectivity. The crisis has hit this airline, as many other companies in the aviation sector, particularly hard. The €250 million Latvian recapitalisation measure will help airBaltic weather the crisis. At the same time, the measure ensures that the State is sufficiently remunerated for the risk taxpayers assume, and that the support comes with strings attached, including a dividend ban as well as further measures to **limit distortions of competition**....."*<sup>147</sup>

AirBaltic is the largest airline in Latvia. Its main shareholder is the Latvian State, which currently holds a share of around 80%. After the recapitalisation, carried out in July 2020, the participation of the State will increase to above 96%.<sup>148</sup>

### 5.1.1. Implications to PSOs

There is arguably a fine line between supporting communities – more specifically, defining communities that need support and providing funding to airlines to deliver subsidized

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<sup>141</sup> As stated within the Euronews report

<https://www.euronews.com/2020/05/22/analysis-can-the-aviation-industry-survive-the-coronavirus-crisis>

<sup>142</sup> *Id.*

<sup>143</sup> EU Commission: State Aid Press Release: State aid: Commission approves €550 million German State-guaranteed loan to compensate airline Condor for damage caused by coronavirus outbreak  
Reported - April 27, 2020

The non-confidential version of the decision will be/is available under the case number SA.56867 is available in the (EU) State Aid register.

<sup>144</sup> Euronews report:

<https://www.euronews.com/2020/05/22/analysis-can-the-aviation-industry-survive-the-coronavirus-crisis>:

<sup>145</sup> EU State Aid Register - case number SA.56943.

<sup>146</sup> COMMUNICATION FROM THE COMMISSION Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak.  
C/2020/1863. OJ C 91I, March 20, 2020, p. 1–9

<sup>147</sup> Emphasis added: EU State Aid Register - case number SA.56943

<sup>148</sup> *Id.*

transport services for such communities/locations, under the auspices of a PSO route (i.e. that do not breach State aid requirements). The use of the terms ‘*peripheral*’ and ‘*development*’ regions and a ‘*thin route*’ have certainly not been precisely defined. Technically, public service compensation granted to airlines, under 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.

There can be no denying that in a Covid-19 environment (and post Covid-19 world) many regions and States will experience a lower GDP per capita and a higher unemployment rate as a result of the pandemic, and, will, invariably, need to be supported by subsidized services; while, airlines will also need to receive financial aid to stay in business and, hence be positioned to service the need of all passengers that wish to fly, including those routes being operated under a PSO.

On May 14, 2020, the European Commission published a working paper on the interpretation of State aid and public service obligations in the aviation sector in the context of the Covid-19 crisis.<sup>149</sup> It was clearly acknowledged, within, that the aim remains to ‘*safeguard and restore the connectivity underpinning the free movement of people and goods*’ per se, while being mindful of the need to maintain a ‘*competitive internal market*’.... which was described as the ‘*best asset to bounce back strongly,*’ after the crisis.<sup>150</sup>

It is unknown as to the full consequences to the routes served by PSOs in terms of ensuring the continuous supply of the designated services (as contracted) but it highly likely that disruptions have occurred during this pandemic. The ASR explicitly provides for a special procedure in case of a sudden interruption of a service by an air carrier previously selected; however, this has limitations and it is almost certain that the drafters would never had envisaged a crisis as presented by Covid-19.<sup>151</sup> So much so that, the exceptional circumstances arising out of the pandemic has led to new interpretive guidance being given as to how the four Altmark criteria could be fulfilled.<sup>152</sup>

The emphasis evidently remains on protecting and restoring connectivity for all European citizens and businesses. While, it is clearly acknowledged that intervention will be needed,

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<sup>149</sup> EU Working Paper:

[https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/air\\_transport\\_overview\\_sa\\_rules\\_during\\_coronavirus.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/air_transport_overview_sa_rules_during_coronavirus.pdf)

This document had a disclaimer acknowledging that it was published

‘..... without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.’ The Working Paper saw two services, (i) Directorate-General for Competition (DG COMP) and (ii) the Directorate-General for Transport and Mobility (DG MOVE) working closely together so as to provide further guidance.

<sup>150</sup> *Id.* (Emphasis added.)

<sup>151</sup> In accordance with Article 17 of that Regulation, and as applied on a specific PSO route.

Article 16(12) of Regulation 1008/2008 entitles the Member State, in case of an emergency, to select by mutual agreement a *different* air carrier to operate that PSO route, for a temporary period of up to seven months – however this is not renewable.

<sup>152</sup> As explained within:

EU Working Paper:

[https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/air\\_transport\\_overview\\_sa\\_rules\\_during\\_coronavirus.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/air_transport_overview_sa_rules_during_coronavirus.pdf)

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.

See also the Communication from the Commission Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis 2020/C 108 I/01C/2020/2078. OJ C 108I, 1.4.2020, p. 1–5.



caution is given to methods which will or may lead to ‘*undue* distortions’ of competition, both during and after the crisis.<sup>153</sup> The use of the word *undue* implies (much in the same way as *limit* is used<sup>154</sup>) that it is inevitable that distortions will occur but it is said that mechanisms that cause this should not be excessive, and/or be used in a discriminatory way. Clearly there remains a need to preserve an ‘efficient transport ecosystems.’<sup>155</sup> However, in many ways, under a PSO route, services operated, arguably, cause a modicum of market distortion - as such routes cannot be run competitively and they are not, unsurprisingly, the most efficient of services. Their purpose is to be an enabler of growth and to ensure that citizens have the freedom of movement as provided by the particular mode of transport employed. In a post Covid-19 world this will be more crucial than ever and is likely to be needed by more citizens and regions.

Member States are evidently encouraged to design their intervention measures on a non-discriminatory basis and in a way which ‘*preserves the pre-crisis market structures.*’<sup>156</sup> However, this may prove a difficult task to achieve. It is acknowledged that any measures should pave the way for a ‘speedy economic recovery;’<sup>157</sup> but, it is also conversely recognized, that any reduction in the number of economic actors in the internal market, post-crisis, potentially would also negatively impact the market. Hence a reduction of players in the air transport sector could result in negative risk and consequences in terms of connectivity, quality of service and prices – whilst any aid could also cause a market distortion.

## 6. CONCLUSION

The historic developments of aviation and the alignment to the principle of creating one internal market within Europe was discussed earlier in this paper.<sup>158</sup> It was identified, that individual governments, for a number of years, had continued to apply a legacy approach to protecting their own airlines handing out State aid which went against the policy direction for one internal, single market, causing higher fares, and hence, market distortion.<sup>159</sup> It was invariably a practice that the EU was forced to intervene in.

The consequences of Covid-19, certainly, in the short term at least, will create a similar environment – which does not necessarily see survival of the fittest airline - more like survival of those that are bailed out (in most cases) by their own State (or, States affiliated to the airline group). But arguably, this time, it will be a permissible measure to be taken – sanctioned in part, albeit temporarily, by the EU through the relaxation of State aid rule and the *new (temporary) framework*.

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<sup>153</sup> EU Working Paper:

[https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/air\\_transport\\_overview\\_sa\\_rules\\_during\\_coronavirus.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/air_transport_overview_sa_rules_during_coronavirus.pdf)

<sup>154</sup> As above, in respect to the comments by Executive Vice-President Margrethe Vestager discussing AirBaltic (EU State Aid Register - case number SA.56943)

<sup>155</sup> EU Working Paper:

[https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/air\\_transport\\_overview\\_sa\\_rules\\_during\\_coronavirus.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/air_transport_overview_sa_rules_during_coronavirus.pdf)

<sup>156</sup> *Id.* (Emphasis added.)

<sup>157</sup> *Id.*

<sup>158</sup> As at 2.1.1. *Historic Challenges – affects to aviation: The internal dimension*

<sup>159</sup> *Id.*

This said, airlines are in trouble and with this comes the risk to economies and the risk to our freedoms – whereby, we have less opportunity to travel (certainly by air) internationally, regionally and nationally. If airlines are not supported – our freedoms are ultimately compromised. Many airlines providing PSOs are also at risk however – in the same way as Flybe once was. Alitalia, for example, plays a vital role in terms of operating a large number of the Italian PSO routes, over half of the eleven routes.

PSOs are recognized as playing a significant positive role in terms of not only connectivity but productivity – with studies showing that connectivity is vital for EU regions: ‘a 10 % increase of connectivity, as measured in those studies, stimulates the GDP (per capita) by an additional 0,5 %, the GDP growth rate by 1% and leads to an overall increase of labour productivity.’<sup>160</sup> In other words, connectivity is key for growth, jobs and social cohesion.

The EU’s *cooperative approach to working with Member States* (as evidenced through the *Temporary Framework for State Aid Measures*) shows more leniency to support not just the airlines, but State economies. This is arguably an essential move – one that is unprecedented and shows the enormity of the Covid-19 crisis and the consequences to the entire European Union. However, debatably, there will develop an even finer line in terms of the compatibility of PSOs and State aid support. There is a potential risk to the liberalized and competitive system that now exists, which will need to be carefully monitored, so as not to return to State protectionism leading to market distortion (and restarting the circular journey that began at section 1.1 of this paper). In the short term, though, connectivity is more essential.

Connectivity remains *vital* and, in this respect, there is an obligation for States to provide transport links to its citizens, including by air. Internally (within a State), remote and peripheral areas will, more than ever, need support from a social and commercial perspective. However, looking ahead, there potentially will be a need for more PSOs – on what were once buoyant commercial routes. This could invariably result in “thin and development” routes being *legitimately* recognized and established – not only within a State but across borders.<sup>161</sup> States may need to establish (or choose) PSOs in order to give this needed connectivity and boost to economies in the wake and aftermath of Covid-19.

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<sup>160</sup> InterVISTAS (2015) Economic Impact of European Airports – A Critical Catalyst to Economic Growth; PwC, 2013, Econometric analysis to develop evidence on the links between aviation and the economy; IATA (2007) Aviation Economic Benefits - Measuring the economic rate of return on investment in the aviation industry.

(As referred to in the Commission Information Notice: INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES: Interpretative guidelines on Regulation (EC) No 1008/2008 of the European Parliament and of the Council — Public Service Obligations (PSO). June 17, 2017 O.J. C 194/01).

<sup>161</sup> See *supra* sec. 3.2.1 (case studies section) (Note particularly the French PSOs – Strasbourg to Amsterdam and Strasbourg to Munich – for which the author raises some “*legitimacy*” questions in terms of their being fully compatible with the aims/objectives of a PSO route.).