



C/2024/5957

4.10.2024

POMOC PAŃSTWA – PAŃSTWO CZŁONKOWSKIE

Pomoc państwa SA.57153 (2020/NN) (ex 2020/N) – Niemcy – COVID-19 – Pomoc dla Lufthansy Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej

(Tekst mający znaczenie dla EOG)

(C/2024/5957)

Pismem z dnia 8 lipca 2024 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Niemcy o swojej decyzji o wszczęciu postępowania określonego w art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej dotyczącego wspomnianego wyżej środka pomocy.

Zainteresowane strony mogą zgłaszać uwagi na temat środka, w odniesieniu do którego Komisja wszczyna postępowanie, w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i towarzyszącego mu pisma na następujący adres lub numer faksu:

European Commission
Directorate-General for Competition
State Aid Greffe
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Otrzymane uwagi zostaną przekazane Niemcom. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie klauzulą poufności ich tożsamości lub fragmentów zgłaszanych uwag.

TEKST STRESZCZENIA

Procedura

12 czerwca 2020 r. Niemcy zgłosiły pomoc w formie dokapitalizowania Deutsche Lufthansa AG („DLH”) („środek”) na podstawie art. 107 ust. 3 lit. b) TFUE w świetle jego wykładni przedstawionej w sekcji 3.11 zmienionych tymczasowych ram środków pomocy państwa w celu wsparcia gospodarki w kontekście trwającej epidemii COVID-19 ⁽¹⁾ („tymczasowe ramy kryzysowe”).

Środek składał się z elementu kapitałowego (306 mln EUR) i dwóch komponentów instrumentu hybrydowego, a mianowicie cichego udziału I (4,7 mld EUR) i cichego udziału II (1 mld EUR). W dniu 25 czerwca 2020 r. Komisja przyjęła decyzję, w której postanowiono nie wnosić zastrzeżeń wobec środka, uznając go za zgodny z rynkiem wewnętrznym na podstawie art. 107 ust. 3 lit. b) TFUE ⁽²⁾.

⁽¹⁾ Komunikat Komisji „Tymczasowe ramy środków pomocy państwa w celu wsparcia gospodarki w kontekście trwającej epidemii COVID-19” z dnia 19 marca 2020 r. (Dz.U. C 91 I z 20.3.2020, s. 1) zmieniony komunikatem Komisji C(2020) 2215 final z dnia 3 kwietnia 2020 r. „Zmiany w tymczasowych ramach środków pomocy państwa w celu wsparcia gospodarki w kontekście trwającej epidemii COVID-19” (Dz.U. C 112 I z 4.4.2020, s. 1) oraz komunikatem Komisji C(2020) 3156 final z dnia 8 maja 2020 r. „Zmiany w tymczasowych ramach środków pomocy państwa w celu wsparcia gospodarki w kontekście trwającej epidemii COVID-19” (Dz.U. C 164 z 13.5.2020, s. 3).

⁽²⁾ Decyzja Komisji C(2020) 4372 final z dnia 25 czerwca 2020 r. w sprawie pomocy państwa SA.57153 (2020/N) – Niemcy – COVID-19 – Pomoc dla Lufthansy (Dz.U. C 397 z 20.11.2020, s. 2).

W wyroku z dnia 10 maja 2023 r. w sprawach połączonych T-34/21 i T-87/21 („wyrok”) ⁽³⁾ Sąd stwierdził nieważność tej decyzji z powodów związanych z:

- kwalifikowalnością beneficjenta do przedmiotowej pomocy na podstawie pkt 49 lit. c) tymczasowych ram środków pomocy;
- brakiem mechanizmu podwyższania wynagrodzenia lub podobnego mechanizmu na podstawie pkt 61, 62, 68 i 70 tymczasowych ram środków pomocy;
- ceną akcji przy przekształcaniu cichego udziału II zgodnie z pkt 67 tymczasowych ram środków pomocy;
- istnieniem znaczącej pozycji rynkowej w sezonie letnim IATA 2019 w odnośnych portach lotniczych innych niż Frankfurt i Monachium, a w każdym razie w portach lotniczych Düsseldorf i Wiedeń; oraz
- niektórymi aspektami zobowiązań strukturalnych nałożonych na DLH, w szczególności:
 - wykluczeniem konkurentów posiadających już bazę w portach lotniczych we Frankfurcie i Monachium z pierwszego etapu odstąpienia przydziałów czasu na start lub lądowanie; oraz
 - wymogiem, by odstąpienie przydziałów czasu na start lub lądowanie miało miejsce za wynagrodzeniem.

Opis środka, w odniesieniu do którego Komisja wszczyna postępowanie

Celem środka było przywrócenie pozycji bilansowej i płynności DLH w wyjątkowej sytuacji spowodowanej pandemią COVID-19.

Działalność DLH w zakresie lotniczych przewozów pasażerskich obejmuje linie lotnicze Lufthansa Passenger Airlines, Swiss International Air Lines Ltd., Brussels Airlines S.A./N.V., Austrian Airlines AG, Air Dolomiti S.p.A., Eurowings GmbH, Germanwings GmbH, Edelweiss Air AG i SunExpress Deutschland GmbH. Linie te obsługują loty do ponad 300 miejsc docelowych w około 100 krajach, a ich łączna flota wynosi ponad 700 samolotów.

Środek składał się z elementu kapitałowego (306 mln EUR) i dwóch komponentów instrumentu hybrydowego, a mianowicie cichego udziału I (4,7 mld EUR) i cichego udziału II (1 mld EUR).

Udział Niemiec w dokapitalizowaniu DLH opierał się na art. 20 ust. 1 zdanie drugie ustawy ustanawiającej fundusz stabilizacji gospodarki („FSG”) ⁽⁴⁾, specjalny fundusz, którego celem było udzielanie krótkoterminowego wsparcia finansowego, aby ustabilizować sytuację niemieckich przedsiębiorstw dotkniętych pandemią COVID-19 oraz wzmocnić ich kapitał ustawowy. Organem przyznającym pomoc był rząd Niemiec. Publicznym podmiotem odpowiedzialnym za zarządzanie środkiem był FSG.

W dniu 29 czerwca 2020 r. udzielono cichego udziału I i cichego udziału II, a zastrzyk kapitałowy przyznano w dniu 2 lipca 2020 r.

Ocena środka

Po przeanalizowaniu dostępnych jej informacji Komisja uważa, że konieczne jest wszczęcie formalnego postępowania wyjaśniającego w celu zbadania zgodności środka z obowiązującymi zasadami pomocy państwa.

Komisja uważa, że środek stanowi pomoc państwa w rozumieniu art. 107 ust. 1 TFUE.

⁽³⁾ Wyrok Sądu z dnia 10 maja 2023 r., Ryanair DAC i Condor Flugdienst GmbH/Komisja, sprawy połączone T-34/21 i T-87/21, EU:T:2023:248.

⁽⁴⁾ Niemiecka ustawa o funduszu stabilizacji gospodarki z dnia 27 marca 2020 r., opublikowana w Federalnym Dzienniku Ustaw – BGBl. 2020 I, s. 543.

Komisja oceniła zgodność tego środka z sekcją 3.11 tymczasowych ram pomocy państwa, w której określono kryteria, na podstawie których państwa członkowskie mogą udzielać wsparcia publicznego w formie instrumentów kapitałowych lub hybrydowych instrumentów kapitałowych przedsiębiorstwom doświadczającym trudności finansowych w związku z pandemią COVID-19.

W następstwie wyroku stwierdzającego nieważność poprzedniej decyzji Komisja ma wątpliwości, czy środek spełnia wszystkie warunki określone w sekcji 3.11 tymczasowych ram środków pomocy. Wątpliwości Komisji mają związek z (i) kwalifikowalnością beneficjenta na podstawie pkt 49 lit. c) tymczasowych ram środków pomocy, (ii) brakiem mechanizmu podwyższania wynagrodzenia lub podobnego mechanizmu na podstawie pkt 61, 62, 68 i 70 tymczasowych ram środków pomocy, (iii) ceną akcji przy przekształcaniu cichego udziału II zgodnie z pkt 67 tymczasowych ram środków pomocy, (iv) istnienia znaczącej pozycji rynkowej w odnośnych portach lotniczych innych niż Frankfurt i Monachium, oraz (v) niektórymi aspektami zobowiązań strukturalnych zaproponowanych przez Niemcy na podstawie pkt 72 tymczasowych ram środków pomocy, w szczególności: wykluczeniem konkurentów posiadających już bazę w portach lotniczych we Frankfurcie i Monachium z pierwszego etapu odstąpienia przydziałów czasu na start lub lądowanie; oraz wymogiem, by odstąpienie przydziałów czasu na start lub lądowanie miało miejsce za wynagrodzeniem.

Zgodnie z art. 16 rozporządzenia Rady (UE) 2015/1589 wszelka niezgodna z prawem pomoc może podlegać odzyskaniu od beneficjenta.

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PISMO

Subject: State Aid SA.57153 (2020/NN) (ex 2020/N) – Germany – COVID-19 - Aid to Lufthansa

Excellency,

The Commission wishes to inform Germany that, in order to comply with the judgment of the General Court of 10 May 2023 in joined Cases T-34/21 and T-87/21 (the „Judgment”),⁽¹⁾ and having examined the information supplied by your authorities on the aid referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union („TFEU”).

1. PROCEDURE

- (1) Following pre-notification contacts,⁽²⁾ by electronic notification of 12 June 2020, Germany notified aid in the form of a recapitalisation of Deutsche Lufthansa AG („DLH”) (the „Measure”). DLH is the parent company within the Lufthansa Group („LH Group”), which comprises, among others, the airlines Brussels Airlines S.A./N.V., Austrian Airlines AG, Swiss International Air Lines Ltd and Edelweiss Air AG⁽³⁾. For the purposes of this decision, „DLH” shall also refer to the companies of the LH Group controlled by DLH,⁽⁴⁾ as they also benefitted from the Measure ultimately.
- (2) Germany notified the Measure under Article 107(3)(b) TFEU, as interpreted by section 3.11 of the *Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*, as amended („the Temporary Framework”)⁽⁵⁾. The Measure aimed at restoring the balance sheet position and liquidity of the companies of LH Group in the exceptional situation caused by the COVID-19 pandemic.

⁽¹⁾ Judgment of the General Court of 10 May 2023, *Ryanair DAC and Condor Flugdienst GmbH v Commission*, Joined Cases T-34/21 and T-87/21, EU:T:2023:248.

⁽²⁾ The German authorities informed the Commission of the planned recapitalisation on 27 April 2020; on 1 May 2020 the German authorities submitted a first draft term sheet. This draft and its further amendments (shared by the German authorities with the Commission services on 6, 24, 25, 27 and 29 May 2020) were discussed between the German authorities and the Commission services in the context of several calls and written exchanges, including requests for information of 28 and 30 April 2020, and 2, 3, 11, 11, 13 and 18 May 2020, to which the German authorities replied on 29 and 30 April 2020, 1, 7, 12, 17 and 20 May 2020, 8, 9 and 11 June 2020. On 2 June 2020, the German authorities sent to the Commission services the final version of the recapitalisation measure agreed between Germany and Deutsche Lufthansa AG and, on 3 June 2020, they pre-notified it. On 4 June 2020, after an initial examination, the Commission services informed the German authorities that the pre-notification documents did not contain all the information necessary to assess the proposed measure. On the same day, the Commission services sent a request for information to the German authorities. On 6 June 2020 the Commission services sent an additional request for information to the German authorities. The German authorities replied in several instalments between 8 and 11 June 2020.

⁽³⁾ LH Group is composed of the segments Passenger Airlines, Logistics and MRO (maintenance, repair and overhaul of aircraft and components). The Passenger Airlines segment comprises Lufthansa German Airlines, Swiss International Air Lines, Austrian Airlines, Brussels Airlines and Eurowings. Edelweiss Air AG is a sister company of Swiss International Air Lines. The equity investment in SunExpress is also part of that segment. The Logistics segment comprises the scheduled airfreight activities of the Lufthansa Cargo group. The MRO segment is represented by the Lufthansa Technik group.

⁽⁴⁾ This included the major group subsidiaries and head companies of DLH's business segments, i.e., Austrian Airlines AG, Swiss International Air Lines Ltd, Eurowings GmbH (incl. Brussels Airlines S.A./N.V.), LSG, Lufthansa Cargo and Lufthansa Technik. According to Germany, that part of LH Group accounts for more than 92 % of LH Group's employees and for almost the entirety of LH Group's annual turnover.

⁽⁵⁾ Communication from the Commission - Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak, 19 March 2020 (OJ C 91I, 20.3.2020, p. 1), as amended by Communication from the Commission C(2020) 2215 final of 3 April 2020 on the Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 112I, 4.4.2020, p. 1) and by Communication from the Commission C(2020) 3156 final of 8 May 2020 on the Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 164, 13.5.2020, p. 3). After the adoption of the Initial Decision, the Temporary Framework was amended by Commission Communication C(2020) 7127 (OJ C 340I, 13.10.2020, p. 1), C(2021) 564 (OJ C 34, 1.2.2021, p. 6), C(2021) 8442 (OJ C 473, 24.11.2021, p. 1) and C(2022) 7902 (OJ C 423, 7.11.2022, p. 9).

- (3) The Measure consisted of aid to DLH in the form of:
- i. a EUR 306,044,326.40 equity participation;
 - ii. a EUR 4,693,955,673.60 silent participation treated as equity under international accounting standards (IFRS) and under the German Generally Accepted Accounting Principles (GAAP), as provided in the German Commercial Code (HGB) ⁽⁶⁾ and not convertible into equity („Silent Participation I”); and
 - iii. a EUR 1.0 billion silent participation with the features of a convertible debt instrument („Silent Participation II”).
- (4) On 25 June 2020, the Commission adopted a decision, by which it decided not to raise objections to the Measure on the ground that it was compatible with the internal market on the basis of Article 107(3)(b) TFEU (the „Initial Decision”) ⁽⁷⁾.
- (5) Ryanair DAC on 22 January 2021 and Condor Flugdienst on 12 February 2021 lodged actions seeking the annulment of the Initial Decision.
- (6) On 14 December 2021, the Commission adopted Decision C(2021) 9606 final, correcting the contested decision (the „Correcting Decision”).
- (7) In the Judgement, the General Court annulled the Initial Decision for several errors and irregularities relating to:
- the eligibility of the beneficiary concerned for the aid at issue under point 49(c) of the Temporary Framework;
 - the absence of a step-up or similar mechanism under points 61, 62, 68 and 70 of the Temporary Framework;
 - the price of the shares at the time of conversion of Silent Participation II, under point 67 of the Temporary Framework;
 - the existence of Significant Market Power („SMP”) at the relevant airports other than Frankfurt and Munich and, in any event, at Düsseldorf and Vienna airports, during the IATA 2019 summer season; and
 - certain aspects of the structural commitments imposed on DLH, in particular:
 - the exclusion of competitors already based at Frankfurt and Munich airports from the first stage of the slot divestiture; and
 - the requirement that the divestiture of the slots should be remunerated.
- (8) Following the annulment of the Initial Decision, the Commission services met with the German authorities on 25 May 2023, 2 June 2023, 12 July 2023 and 7 March 2024 and requested additional information from Germany on 15 March 2024, which Germany provided on 25 April 2024.
- (9) Germany exceptionally agreed to waive its rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation 1/1958 ⁽⁸⁾, and to have this Decision adopted and notified in English.

⁽⁶⁾ The German GAAP is relevant for the accounts of DLH, as investors and business counterparts look at the accounts of DLH to see the amount of equity available for liabilities (this does not appear in LH Group’s consolidated accounts).

⁽⁷⁾ Commission Decision C(2020) 4372 final of 25 June 2020 on State Aid SA.57153 (2020/N) – Germany – COVID-19 - Aid to Lufthansa (OJ C 397, 20.11.2020, p. 2).

⁽⁸⁾ Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385).

2. DESCRIPTION OF THE MEASURE

- (10) In this section, the Measure and its context are described at the time the Measure was granted (i.e., Silent Participation I and Silent Participation II were granted on 29 June 2020, and the capital injection was granted on 2 July 2020). The assessment of the Measure, following the annulment of the Initial Decision, will be based on the facts and elements prevailing at the moment of granting it.
- (11) Therefore, for the purpose of assessing the compatibility of the Measure, the Commission will not take into account the following events, which occurred after the Measure was granted:
- a) As concerns the equity participation, following a capital increase of 5 October 2021, the shareholding of the State was diluted, amounting to 14 % of the increased registered capital of DLH. The State sold to third parties its shareholding, with the last part of the sale finalised on 13 September 2022;
 - b) As concerns Silent Participation I, DLH drew in total EUR 1.5 billion from the EUR 4.7 billion available under that instrument. That amount was redeemed in full on 11 October 2021 following the capital increase of 5 October 2021. On 9 November 2021, DLH terminated the unused portion of Silent Participation I;
 - c) As concerns Silent Participation II, DLH drew the entire EUR 1 billion available to it under that instrument. On 12 November 2021, DLH redeemed the amount drawn and terminated the Silent Participation II.

2.1. Outline of the different components of the larger support package to LH Group

- (12) The Measure formed part of a larger support package for LH Group.
- (13) In addition to the Measure, the support package included:
- (i) an 80 % State guarantee on a EUR 3 billion 3-year loan, which Germany planned to grant to DLH as individual aid under the scheme approved by the Commission decision of 22 March 2020 (the „German loan”);⁽⁹⁾
 - (ii) a 90 % State guarantee on a EUR 300 million 6-year loan that Austria planned to grant to Austrian Airlines AG as individual aid under the scheme approved by the Commission decision of 8 April 2020;⁽¹⁰⁾
 - (iii) EUR 150 million that Austria planned to grant to Austrian Airlines AG as COVID-19 damage compensation under Article 107(2)(b) TFEU;

⁽⁹⁾ Commission decision of 22 March 2020, SA.56714 (2020/N) – Germany – COVID-19 measures (OJ C 112, 3.4.2020, p. 9). That scheme concerns supported measures implemented through the German State-owned promotional bank Kreditanstalt für Wiederaufbau („KfW”), notably: (i) a loan programme covering up to 90 % of the risk for loans (with a maturity of up to 5 years) for companies of all sizes, up to EUR 1 billion per company; and (ii) a loan programme in which the KfW participated together with private banks to provide larger loans as a consortium covering up to 80 % of a specific loan but no more than 50 % of the total debt of a company. According to the German authorities, the loan corresponded to the measure sub (ii) as KfW did not assume more than 80 % of the risk of the loan. In turn, 20 % of the loan would be assumed by the private banking partners in the consortium. Moreover, KfW did not assume more than 50 % of the total debt volume on DLH’s consolidated balance sheet. The total debt volume per 31 December 2019 had been EUR 6.662 billion; the loan did not exceed the specific liquidity needs of DLH for the following 12 months, which had been estimated at a minimum of EUR 9 billion (depending on the operational scenario). Last, the interest rates for KfW’s participation in the loan would be the same as for the other participating banks in the consortium, which would not be below the rates specified in point 27(a) of the Temporary Framework. Margins had been indicated at [...] initially, above EURIBOR ([...]).

⁽¹⁰⁾ Commission decision of 8 April 2020, SA.56840 (2020/N) – Austria – COVID-19 Austrian liquidity assistance scheme (OJ C 144, 30.4.2020, p. 1).

- (iv) EUR 250 million that Belgium planned to grant to Brussels Airlines S.A./N.V. in the form of „profit sharing certificates”⁽¹¹⁾ that were considered as equity under Belgian accounting standards (but not under international accounting standards), and a EUR 40 million short term loan that Belgium planned to grant to Brussels Airlines S.A./N.V. under section 3.3. of the Temporary Framework;⁽¹²⁾ and
 - (v) an 85 % State guarantee on a EUR 1.4 billion loan, which Switzerland had granted to Swiss International Air Lines Ltd and Edelweiss Air AG⁽¹³⁾.
- (14) The total support to be received by the companies of LH Group in the context of the COVID-19 pandemic amounted to approximately EUR 11 billion, of which approximately EUR 9 billion were to come from Germany, EUR 0.3 billion from Belgium, EUR 0,45 billion from Austria and EUR 1.4 billion from Switzerland.
- (15) The components of the support package that were granted in addition to the Measure were to be subject of separate Commission decisions if they were granted by Member States⁽¹⁴⁾ and not covered by existing aid schemes⁽¹⁵⁾.

2.2. The impact of the COVID-19 crisis on LH Group

- (16) According to the German authorities, LH Group was severely affected by the COVID-19 crisis.
- (17) The German authorities explained that, before the global outbreak of the crisis, the capital market had a very positive outlook on LH Group, expecting a solid growth of over 2 % on average. In addition, the capital market also believed that the LH Group's operating profitability would continue to improve by a margin on average higher than 7 %⁽¹⁶⁾.
- (18) At the time the Measure was adopted, by contrast, LH Group was facing a significant reduction and/or suspension of its services in comparison to the pre-COVID forecasts, resulting in high operating losses due notably to the travel restrictions and other containment measures taken by the authorities to tackle the COVID-19 pandemic. Those high operating losses were driven by a significant decline in demand. This was, *inter alia*, demonstrated by the decline in the seat load factor since the outbreak of the COVID-19 pandemic. That decline in demand is represented in the following overview:

Figure 1 [redacted figure]

Source: LH Group _ Annex 5 to the notification form submitted by Germany on 12 June 2020.

- (19) The average seat load factor for 2019 was [80-90] % in total (split into continental flights at [70-80] % and intercontinental flights at [80-90] %). Since the outbreak of COVID-19 in February 2020, the seat load factor became highly volatile and dropped to the range of between below 20 % and 70 % for both categories. The lowest figures recorded were [10-20] % for intercontinental and [10-20] % for continental flights, amplifying the significant impact of the COVID-19 pandemic on LH Group's business⁽¹⁷⁾.

⁽¹¹⁾ Hybrid instrument under Belgian Corporate law, which allows an investor to make a contribution in kind to be remunerated by profit shares.

⁽¹²⁾ That measure had been envisaged by the Belgian authorities and presented to DLH in a draft term sheet shared by Belgium with the Commission services on 9 June 2020. At that moment, there was no agreement between Belgium and DLH on the Belgian aid package in favour of Brussels Airlines S.A./N.V. and it was uncertain whether or not any aid would be granted by Belgium to the LH Group.

⁽¹³⁾ Decision of 20 May 2020 of the Swiss Competition Commission (COMCO) concerning the support measures in favour of Swiss International Air Lines and Edelweiss airlines.

⁽¹⁴⁾ Pursuant to Article 14 of the Agreement between the European Community and the Swiss Confederation on Air Transport, agreed by Decision of the Council and of the Commission of 4 April 2002 (2002/309/EC, EURATOM), the Commission had been informed about the decision of 20 May 2020 issued by the Swiss Competition Commission (COMCO) on the support measures for Swiss International Air Lines and Edelweiss airlines.

⁽¹⁵⁾ Notably, the EUR 150 million that Austria planned to grant to Austrian Airlines AG as COVID-19 damage compensation under Article 107(2)(b) TFEU was assessed in case SA.57539(2020/N) – Aid to Austrian Airlines.

⁽¹⁶⁾ Source: Ibies forecast as per 31.12.2019.

⁽¹⁷⁾ Source: Eurocontrol/LG Group. Germany explained that the overview somewhat overstated the seat load factor for DLH since the outbreak of COVID-19 because the figures for Austrian Airlines AG and Brussels Airlines S.A./N.V. were only included [...] respectively.

- (20) The downfall in demand caused by the travel restrictions and other containment measures led to a radical shrinkage in supply, as is demonstrated by the significant reduction of available seat kilometres („ASK”), indicating the capacity in passenger seats per flown kilometres. For LH Group (excluding Eurowings), the operated ASK fell dramatically since the beginning of 2020, from [22-23] billion in January to [700-800] million in May, thus showing the severe impact of the COVID-19 pandemic ⁽¹⁸⁾. In particular, the official travel warning issued by the German Foreign Office on 17 March 2020 and subsequent restrictions had a severe impact on the operations of the companies of the LH Group, since they had to cancel approximately [90-100] % of their scheduled flight programme until 1 June 2020 and ground a large part of its fleet.
- (21) The German authorities also explained that the activity of the companies of LH Group did not cease entirely, because the latter guaranteed the operation of repatriation flights for stranded passengers and of cargo flights (primarily for the transport of protective masks and medical equipment from China to Europe), thus partly compensating for the massive economic damage. From the beginning of 2020, Lufthansa Cargo AG operated approximately [60-70] % of the cargo flight volume of the corresponding period in 2019 ⁽¹⁹⁾.
- (22) The German authorities further submitted that, immediately after the outbreak of the COVID-19 pandemic, LH Group undertook several operational, personnel and financial measures in order to obtain as much liquidity as possible under the given circumstances. Germany explained that LH Group reduced its operating costs, notably by grounding a large part of its fleet; by offering its customers rebooking options including additional vouchers to discourage claims for immediate refund; by optimising maintenance, repair and operations costs; and by suspending marketing or other non-essential activities. As regards personnel, besides interrupting recruitment and reducing management’s allowances by [10-20] %, nearly [80,000-90,000] employees, amounting to the overwhelming part of LH Group’s workforce, were put on short-time work. Other labour-related measures included the reduction of collected overtime and the granting of unpaid leave to certain employees. On the financial side, since the start of the pandemic LH Group reduced its planned investments by approximately EUR [2-3] billion; it was able to obtain an additional EUR [1-2] billion in further external financing in the first quarter of 2020 and to draw additional resources from the suspension of dividend payments for the financial year 2019 (amounting to EUR [0-1] billion) and the termination of leases (amounting to EUR [0-1] billion).
- (23) The impairment of LH Group’s financial situation increased its capital requirements, which according to the German authorities could not be covered on the capital market or by alternative financing options. Against that background, Germany intended to grant aid to DLH to restore the balance sheet position and liquidity and to prevent a likely insolvency, which could have triggered an uncontrolled and disorderly process and could have led to the collapse of LH Group, with far-reaching effects on the entire aviation sector.
- (24) The German authorities explained that, in view of the significant and immediate financial impact of the COVID-19 crisis, Germany set up an Economic Stabilisation Fund („ESF”), that is, a special fund established by law which served to provide financial support on short notice and to stabilise German companies affected by the COVID-19 pandemic and to strengthen their capital base, whilst at the same time cushioning the negative effects on the industry as a whole (including manufacturers, service providers, employees). The Measure represented a first application of such stabilisation strategy.

⁽¹⁸⁾ Source: LH Group.

⁽¹⁹⁾ Lufthansa Cargo AG operated a total of around [4,000 – 5,000] cargo flights, using both freight-only aircraft and belly freight on passenger aircraft. Looking only at freight transport by cargo aircraft, Lufthansa Cargo AG operated [2,000 – 3,000] cargo flights, corresponding to [90-100] % of the originally planned cargo flight volume and [80-90] % of the cargo flight volume of the corresponding period in the previous year. Due to the decline in passenger air transport, freight transport in the belly of passenger aircraft was reduced to [1,000-2,000] flights, equalling [40-50] % of the usual cargo flights of the originally planned cargo flight volume and [50-60] % of the cargo flight volume of the previous year.

2.3. Beneficiary

- (25) The beneficiary of the Measure is DLH, as defined in recital (1) (i.e., including the companies of LH Group controlled by DLH).
- (26) DLH, headquartered in Cologne, Germany, is the holding company within LH Group. DLH's passenger air transport business includes Lufthansa Passenger Airlines, Swiss International Air Lines Ltd., Brussels Airlines S.A./N.V., Austrian Airlines AG, Air Dolomiti S.p.A., Eurowings GmbH, Germanwings GmbH, Edelweiss Air AG and SunExpress Deutschland GmbH. DLH is a member of the global aviation alliance Star Alliance⁽²⁰⁾.
- (27) LH Group is a large aviation group with operations worldwide. LH Group represents Europe's largest airlines by revenue, and the respective LH Group airlines are Germany's, Austria's and Switzerland's largest airlines by both passenger numbers and revenue. Its airlines operate flights to more than 300 destinations in around 100 countries, with a fleet of more than 700 aircraft. LH Group's principal hubs for international operations are Frankfurt (FRA), Munich (MUC), Brussels (BRU), Zurich (ZRH) and Vienna (VIE) airports. It also operates a number of bases⁽²¹⁾ across the world. In 2019, LH Group carried approximately 145 million passengers.
- (28) The Measure aimed to ensure that sufficient equity remained available to the companies of LH Group and that the disruptions caused by the pandemic would not undermine the viability of the companies of the group. It was to be used to enable DLH to maintain the value of the LH Group, and therefore support the liquidity and the equity positions of its subsidiaries, including first and foremost its airline subsidiaries.
- (29) Germany confirmed that neither DLH nor any subsidiaries benefiting from the other components of the support package for LH Group (as outlined in recital (13)) were in difficulty within the meaning of the General Block Exemption Regulation („GBER”) ⁽²²⁾ on 31 December 2019.

2.4. Objective of the Measure and the overall support package in favour of LH Group

- (30) The COVID-19 pandemic severely affected the financial position of DLH. The Measure formed part of an overall support package in favour of LH Group, which aimed to ensure that sufficient equity remained available to the companies of LH Group and that the disruptions caused by the pandemic would not undermine the viability of the companies of the group.
- (31) According to the German authorities, without support, DLH's equity would have become negative and would have fallen to minus EUR [exceeding 2] billion by the end of 2020. Such a fall would have led to a high pressure on DLH's liquidity needs⁽²³⁾ and its solvency in the short term and would have further impeded its ability to raise funds.
- (32) In particular, Germany explained that DLH would not have been able to raise sufficient resources in the debt or equity capital markets within the required timeframe to avoid insolvency for the following reasons.

⁽²⁰⁾ Star Alliance was created by five airlines in 1997 as the first global aviation alliance. At the time of adoption of the Initial Decision, Star Alliance had 28 member airlines, which offered connections across a global network. A project company based in Frankfurt in Germany coordinates Star Alliance's activities, including co-locations at airports, infrastructure, communication initiatives and other services.

⁽²¹⁾ A „base” means that aircraft stays overnight at the airport and can be used to operate several routes from that airport.

⁽²²⁾ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1).

⁽²³⁾ Germany also submitted that DLH's cash position was highly affected by the upcoming maturities stemming from the financings obtained on the markets before the outbreak of the COVID-19 pandemic, totalling EUR [exceeding 2] billion in 2021.

- (33) On the debt side, investors would not have been willing to provide DLH with additional financing without sufficient securities to protect their claims in case of default. In addition, DLH would not have had sufficient collateral for securitised debt instruments over the entire amount at the loan-to-values ratio ⁽²⁴⁾ and market values at that point in time. Furthermore, the total amount of EUR 9 billion that would have been needed to preserve the continuity of LH Group's economic activity during and after the COVID-19 pandemic exceeded the total volumes of debt issued in Europe in previous months. Finally, an all-debt funding would have resulted in an unsustainable capital structure of DLH that would have significantly impaired its ability to refinance itself in the future.
- (34) On the equity side, Germany explained that DLH's ability to issue short-term equity would have been capped by its authorised capital at that time and, based on existing share price levels, DLH would not have technically been able to issue more than approximately EUR [1-2] billion in equity. Any larger equity issuance would have faced several obstacles, first in terms of size: the total funding requirement of EUR 9 billion was approximately twice the size of the market capitalisation of DLH at the time; furthermore, a theoretical new investor would have had to meet the requirements of the Air Traffic Control Act and any new investment would have also been capped at 30 % of the share capital due to the mandatory offer threshold, which corresponded to a value above EUR [1-2] billion at share price level at the time. Second, in terms of timing, the equity issuance would have required an extraordinary shareholder meeting and preparatory documentation, and this could most likely not have been executed before late August 2020, which would have been too late for DLH's short-term funding needs. Finally, Germany pointed out that equity investors would have been deterred by the uncertain outlook of DLH's financial situation and would have required certainty on the going concern of the business before providing additional capital to DLH.
- (35) Germany also submitted that DLH could not have accessed the markets for corporate bonds, hybrid- and equity-linked bonds because of a general high level of uncertainty on its viability ⁽²⁵⁾.
- (36) Finally, as regards accessibility to existing horizontal State aid measures in Germany, the German authorities explained that the German promotional bank KfW as well as the private institutions involved had demanded as a prerequisite for the syndicated loan under the KfW programme 855 ⁽²⁶⁾ that [...].

2.5. Type and form of aid

- (37) The Measure took the form of a recapitalisation for a total amount of EUR 6 billion by means of equity and hybrid capital instruments, as further described in section 2.10.

2.6. Legal basis

- (38) The participation of Germany in the recapitalisation of DLH is based on section 20 (1) sentence 2 of the Act establishing the ESF ⁽²⁷⁾. On that basis, on 3 June 2020, the ESF and DLH signed a Term Sheet (*Rahmenvereinbarung*) detailing the main features of the recapitalisation. The provisions set out in the Term Sheet had to be specified in a separate agreement (*Rahmenvertrag* or „Framework Agreement”), to be signed by the parties after the approval of the Measure by the Commission.

⁽²⁴⁾ The loan-to-value (LTV) ratio is an assessment of lending risk that financial institutions and other lenders examine before approving a loan. It measures the relationship between the loan amount and the market value of the asset securing the loan. Typically, loans with high LTV ratios are considered higher risk loans. Therefore, higher interest rates apply.

⁽²⁵⁾ Germany submitted that even the promissory note market would have been foreclosed: following an issuance attempt in March 2020, all non-binding orders placed by investors had been withdrawn during the marketing phase.

⁽²⁶⁾ Specific aid measure in the form of syndicated loans by the KfW and other private credit institutions.

⁽²⁷⁾ *Wirtschaftsstabilisierungsfondsgesetz („WStFG“)* of 27 March 2020, published in the Federal Law Gazette – BGBl. 2020 I, p. 543.

2.7. Administration of the Measure

- (39) The granting authority was the Government of Germany. ESF was the public organism responsible for administering the Measure.

2.8. Budget and duration of the Measure

- (40) The budget of the Measure was EUR 6 billion. The Measure was financed by the ESF, which could act in its own name, sue, and be sued in legal transactions. Aid could be granted under the Measure as from its approval until no later than 31 December 2021.

2.9. Scope of the Measure

- (41) Germany explained that the aviation industry plays a key role for the German and the EU economy: Germany is the second-largest aviation market in Europe⁽²⁸⁾. At the time of adoption of the Initial Decision, the sector employed 315,000 people in Germany and indirectly supported another 337,000 jobs through the purchase of goods and services from local suppliers. Foreign tourists arriving by air to Germany were estimated to support an additional 299,000 jobs in the national economy. According to IATA's report on the importance of air transport to Germany, in 2016, 1.1 million jobs were supported by air transport in Germany⁽²⁹⁾, and the air transport industry was an enabler of economic activity in Germany, contributing EUR 77.8 billion to the German economy, which is equivalent to 2.5 % of German GDP.
- (42) Against that background, Germany submitted that the Measure was meant to benefit the German economy from several standpoints. First, with 135,353 employees (73,000 alone at the German hubs), DLH generated revenue of EUR 36.4 billion in the financial year 2019. Thus, in 2019 DLH contributed more than EUR 1.5 billion in social security contributions and income tax payments to the German State. Second, Germany submitted that DLH provides to individuals and corporations fast and direct travel options, be it domestically, EU-wide or globally. Third, Germany submitted that DLH contributes to a significant part of the foreign trade volume of air freight in Germany, keeping the German export economy afloat and guaranteeing a steady flow of goods for the entire population (see also recital (21)). Fourth, DLH paid EUR [...] in air transport taxes in Germany in 2019, which is approximately [30-40] % of the total amount of air passenger taxes paid in Germany that year. From 1 April 2020, Germany increased the share of the air passenger taxes earmarked for the financing of the measures under its 2030 climate protection programme⁽³⁰⁾. Finally, approximately [50-60] % of DLH's share capital was held by private shareholders (approximately 480,000 shareholders), the vast majority of which were based in Germany⁽³¹⁾.
- (43) Against that background, Germany submitted that a default of LH Group or a significant downsizing of its activities would have had severe effects on different levels: first on employment, not only in relation to LH Group's employees, but also in relation to other companies connected or dependent on it; second, on connectivity of Germany and Europe for persons and businesses, which could have no longer relied on the dense network of feeder traffic operated by all airlines comprised in LH Group and on its multi-hub approach. Germany also pointed out that the high level of connectivity and services provided by all airlines in LH Group would not have been easily substitutable by competitors or at least not to the same extent, especially during and immediately after the COVID-19 pandemic, once demand for air transport services would have started again to increase.
- (44) Germany therefore concluded that, in the absence of the State intervention in support of DLH, there would have been a severe risk for the German economy as a whole and for its recovery after the COVID-19 pandemic.

⁽²⁸⁾ Measured by IATA Connectivity Index 2018, a composite measure of number of transferred passengers weighted by a destination measure in all German airports.

⁽²⁹⁾ „IATA Economics Air Transport Regulatory Competitiveness Indicators”, 2019 Edition, available at <https://www.iata.org/en/about/worldwide/europe/competitiveness/germany/> (as last accessed on 4.6.2024).

⁽³⁰⁾ <https://www.bundesregierung.de/breg-de/themen/klimaschutz/luftverkehrsteuer-1681874> (as last accessed on 4.6.2024)

⁽³¹⁾ Approximately [50-60] % of the share capital of DLH was held by German private shareholders and approximately [0-5] % was held by shareholders domiciled in other Member States. In addition, there were other retail investors holding shares in a range of a low single-digit percentage whose nationality cannot be determined since it was not noted in the registry.

2.10. Basic elements of the Measure

- (45) The EUR 6 billion measure consisted of an equity component (EUR 306 million) and two hybrid instrument components, namely, Silent Participation I (EUR 4.7 billion) and Silent Participation II (EUR 1 billion). It was subject to behavioural and structural commitments (see section 2.10.4).

2.10.1. Equity participation

- (46) The EUR 306 million equity participation consisted of a shareholding of the ESF in DLH in an amount of 119,548,565 new shares to be issued in the course of an ordinary capital increase⁽³²⁾ at an issue price of EUR 2.56. This corresponded to 20 % of the resulting increased registered share capital of DLH.
- (47) ESF's 20 % shareholding in DLH gave ESF veto rights covering the protection of the financial interests of ESF as a minority shareholder that did not acquire control of DLH. According to the Term Sheet agreed between DLH and ESF, ESF had contractual veto rights requiring its approval for important business transactions (e.g. large scale acquisitions or financings), but no voting rights at the general meeting of shareholders, in connection with inter alia the following resolutions: choice of auditors, election of supervisory board members (other than the representatives of ESF), and determination of the annual financial statements (if entrusted to the general shareholders' meeting).
- (48) According to the Term Sheet, ESF undertook, upon request of DLH, to try to dispose⁽³³⁾ of its entire shareholding in DLH by 31 December 2023⁽³⁴⁾. However, no disposal could occur until DLH had repaid Silent Participation I, including all interests (coupons) and any possible additional remuneration (see recital (51)) and Silent Participation II, including all interests (coupons). In any event, the disposal of shares had to be effected at least at the market price or at EUR 2.56 plus 12 % p.a. (calculated for the period between acquisition and sale), whichever was higher⁽³⁵⁾.

2.10.2. Silent Participation I

- (49) The EUR 4.7 billion Silent Participation I was a hybrid instrument with loss participation and without conversion rights. It could be drawn upon by DLH until 31 December 2021 at the latest, in a maximum of six tranches in an amount of at least EUR 250 million each and up to the amount of the nominal value.
- (50) The term of Silent Participation I was unlimited. ESF could have transferred Silent Participation I to third parties if it had not been fully repaid by 31 December 2023.
- (51) The profit participation of ESF was calculated as interest (coupon) at an annually increasing rate on the nominal amount of Silent Participation I (i.e., without taking into account any losses/write-downs). The calculation was performed for each financial year either on the nominal value in the event of a single drawing and without partial redemption, or pro rata on a daily basis on the nominal value provided and not repaid in the event of multiple drawings or partial redemptions.
- (52) According to the Term Sheet, the coupons amounted to 4 % in 2020 and 2021; 5 % in 2022; 6 % in 2023; 7 % in 2024; 8 % in 2025 and 2026; and 9.5 % in 2027 and following years.

⁽³²⁾ The ordinary capital increase, without subscription rights, would be resolved by an extraordinary general meeting of DLH's shareholders on 25 June 2020 in an expected amount of EUR 306 million so as to increase the share capital from EUR 1.224 billion to EUR 1.530 billion.

⁽³³⁾ At ESF's discretion, the disposal could have been carried out in one or more steps by means of an offer of subscription to existing shareholders, a private placement with qualified investors, the issue of call options on the shares or by other means.

⁽³⁴⁾ If ESF had not succeeded in disposing of the shares by 31 December 2023, DLH was entitled, from 1 January 2024, to demand that ESF sell the remaining shares to investors nominated by it. The costs of any such placement were to be borne by DLH to the extent permissible under the Framework Agreement.

⁽³⁵⁾ This minimum sale price was to be adjusted in the event of capital and/or restructuring measures in order to achieve an economically equivalent result.

- (53) The coupons accrued on the nominal amount of Silent Participation I on a yearly basis as long as Silent Participation I was not repaid. However, no coupon could be paid in the financial years in which the unconsolidated financial statements of DLH did not record a sufficient annual net income⁽³⁶⁾. With respect to financial years in which the unconsolidated financial statements of DLH recorded a sufficient annual net income, the coupon could be paid at DLH's discretion in subsequent financial years or upon a total or partial redemption of Silent Participation I. In any event, unpaid coupons had to be paid mandatorily no later than with the total repayment of Silent Participation I.
- (54) According to the Term Sheet, to the extent that coupons had not been paid, the compensation (profit participation) would increase by an additional remuneration corresponding to interest on the unpaid coupons until payment at the then-current rate (so, e.g., interest for 2020 at the rate of 4.0 % as from 1 January 2021). Deferred coupons were not capitalised⁽³⁷⁾.
- (55) A repayment (also partial) of Silent Participation I was possible at any time. However, in the event of a partial or total redemption of Silent Participation I by DLH, ESF had a claim to receive payment of the accrued outstanding coupons including any additional compensation accrued on the total outstanding nominal value. There could have been no total redemption of Silent Participation I by DLH as long as Silent Participation I had been reduced through losses and such losses had not yet been replenished.
- (56) Silent Participation I would participate in balance sheet losses in accordance with German GAAP. Notably, losses recorded in the unconsolidated financial statements would be set off in the following order: profit reserves; capital reserves; Silent Participation I; and, last, subscribed capital.
- (57) The replenishment of Silent Participation I up to its nominal value followed the same order as the write-down but in reverse. In particular, profits recorded in the unconsolidated financial statements in accordance with German GAAP would be set off in the following order: subscribed capital; Silent Participation I; and, last, profit reserves.
- (58) In the event of insolvency, claims arising from Silent Participation I could not be enforced as insolvency claims, they were however to be satisfied preferentially in relation to other providers of capital⁽³⁸⁾.
- (59) Considering the above features, and in particular the fact that DLH had full discretion as to when to repay Silent Participation I and its accrued coupons, Silent Participation I was recognised as an equity instrument under IFRS and the German GAAP.

2.10.3. *Silent Participation II*

- (60) The EUR 1 billion Silent Participation II was a hybrid instrument without loss participation and with a conversion right.
- (61) Silent Participation II had a term of six years. According to the Term Sheet, the term of Silent Participation II would be extended annually, each time for one additional year, to the extent that Silent Participation I (including the accrued coupons and any possible additional compensation) had not been completely repaid. However, ESF could transfer Silent Participation II at any time to third parties.

⁽³⁶⁾ In particular, no interest could be paid if and to the extent the payment of such interest would result in the existence of grounds for insolvency or result in or increase an annual net loss recorded in DLH's unconsolidated financial statements in accordance with German GAAP for the relevant financial year, or if a motion for the commencement of insolvency proceedings had been filed prior to the interest payment. In accordance with German GAAP, the sufficient annual net income had to be considered after any replenishment of elements of equity capital specifically shielded from distribution (nominal capital as well as distribution-blocked Silent Participation I or profit reserves).

⁽³⁷⁾ Capitalised interest is unpaid interest that is added to the total principal balance of a long-term liability or loan. The interest is not recognized as an interest expense. Instead, capitalised interest is added as part of the liability or loan balance, accrues for future interests and is included in the repayment schedule.

⁽³⁸⁾ This is in derogation from § 236 HGB.

- (62) Interest (coupon) was owed at an annually increasing rate amounting to 4 % in 2020 and 2021; 5 % in 2022; 6 % in 2023; 7 % in 2024; 8 % in 2025 and 2026; and 9.5 % in 2027 and following years. The coupon had to be paid annually. Its payment was not at the discretion of DLH.
- (63) Silent Participation II was composed of two tranches („Silent Participation II-A” and „Silent Participation II-B”) depending on the event triggering the conversion into equity.

2.10.3.1. Silent Participation II-A

- (64) Silent Participation II-A was a EUR 102 million hybrid instrument convertible by ESF into 39,849,522 shares at a conversion price of EUR 2.56 ⁽³⁹⁾.
- (65) ESF could convert it only in the event of a takeover offer ⁽⁴⁰⁾ or acquisition of control ⁽⁴¹⁾. That restriction with regard to the conversion would cease to apply in case of a sale of Silent Participation II-A to a third party. In case of transfer to third parties, the conversion right for Silent Participation II-A would have become exercisable for such third party at any time (i.e., not only in case of a takeover scenario).

2.10.3.2. Silent Participation II-B

- (66) Silent Participation II-B was a EUR 898 million hybrid instrument convertible by ESF into shares at a conversion price that varied depending on the event triggering the conversion.
- (67) In the case of exercise of the conversion right for the purpose of protecting ESF from dilution, ⁽⁴²⁾ the conversion price would have been the trading price at the time of conversion minus 10 % ⁽⁴³⁾.
- (68) In the case of exercise of the conversion right triggered by non-payment of the coupon accrued on Silent Participation I, the conversion price would have been the trading price at the time of conversion minus 5.25 % ⁽⁴⁴⁾. In particular, if the coupon accrued on Silent Participation I had not been paid for any of the financial years up to and including 2023, Silent Participation II-B would have been converted into 5 % of the share capital, and if the coupon accrued on Silent Participation I had again not been paid for the 2024 and 2025 financial years, the remaining part of Silent Participation II would have been converted into a further 5 % of the share capital, except to the extent that Silent Participation II-A had been converted.
- (69) According to the Term Sheet, in case of transfer to third parties, the conversion right for Silent Participation II-B would have fallen away.
- (70) An unconverted nominal amount of Silent Participation II remained in existence and had to be repaid on maturity.

⁽³⁹⁾ Germany committed that, in the case that the conversion price exceeded the price that would have been obtained by using the methodology of TERP at the time of conversion minus 5 %, the ESF would have needed the agreement of the Commission on the exercise of the conversion option.

⁽⁴⁰⁾ As defined in section 10 of the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz – „WpÜG”*).

⁽⁴¹⁾ As defined in section 35 in conjunction with section 29 WpÜG.

⁽⁴²⁾ This concerns possible dilution of (i) ESF's shareholding as increased to 25 % plus one share through conversion of Silent Participation II-A, or (ii) ESF's shareholding of 20 % in the event of a capital increase without subscription rights not offered to the ESF. In any event, the ESF could waive its right to avoid dilution.

⁽⁴³⁾ Germany committed that, in the case that the conversion price exceeded the price that would be obtained by using the methodology of TERP at the time of conversion minus 5 %, the ESF would seek the agreement of the Commission on the exercise of the conversion option.

⁽⁴⁴⁾ Germany explained that, in the present case, the trading price at the time of conversion minus 5.25 % corresponded technically to a 5 % discount to TERP.

2.10.4. Commitments by Germany imposed on the beneficiary

- (71) Germany committed that DLH would appoint, subject to Commission's approval, a monitoring trustee in charge of the overall task of monitoring and ensuring, under Commission's instructions, compliance with the behavioural and structural commitments (as outlined in Section 2.10.4.1 and Section 2.10.4.2). For that purpose, Germany would propose to the Commission for approval, no later than one month from the date of the Initial Decision, a list of one or more persons whom it proposed to appoint as monitoring trustee. The monitoring trustee would be appointed by DLH within one week of the Commission's approval in accordance with the mandate approved by the Commission and would report to the Commission on a quarterly basis as to DLH's compliance with the commitments.

2.10.4.1. Behavioural commitments

- (72) DLH was subject to a ban on advertising and an acquisition ban. In particular, according to the Term Sheet concluded between the ESF and DLH, and as confirmed by the German authorities, Germany undertook to implement the following commitments:
- DLH would not use the Measure for commercial advertising purposes;
 - DLH would not acquire an interest of more than 10 % in competitors or other companies in the same business segment, including upstream and downstream business activities, as long as at least 75 % of the total amount of the Measure had not been redeemed. In exceptional circumstances, without prejudice to merger control and subject to the prior approval of the Commission, DLH could acquire a stake of more than 10 % in upstream or downstream companies in its field of business if the acquisition was necessary to maintain the viability of the acquirer.
- (73) As long as at least 75 % of the COVID-19 recapitalisation measures had not been redeemed, Germany committed that (i) the remuneration of the management („Geschäftsleitung“) of DLH ⁽⁴⁵⁾ would not go beyond the fixed part of their remuneration on 31 December 2019; for persons becoming members of the management on or after the date of the recapitalisation, the applicable limit was the lowest fixed remuneration of any of the members of the management on 31 December 2019; and (ii) DLH would refrain from paying bonuses, other variable or comparable remuneration elements. DLH would have to report regularly to the ESF in suitable form on compliance with the requirements regarding the remuneration of the management of DLH. In case of doubt about compliance with the requirements regarding the remuneration of the corporate bodies mentioned above, the ESF, following a duly reasoned opinion of the monitoring trustee, would have to submit the remuneration report to the Commission for approval.
- (74) Until the Measure had been fully repaid, DLH would be subject to the obligation not to make dividend payments, nor non-mandatory coupon payments, nor buy back shares, other than in relation to the State or where there was a legal obligation to do so. In case of doubt as to whether a legal obligation existed, DLH, following a duly reasoned opinion of the monitoring trustee, would have to submit the proposed coupon or dividend payment to the Commission for approval. The dividend ban did not apply to intra-group dividend payments made to DLH by companies (directly or indirectly) fully owned by DLH. Moreover, for companies in which DLH held less than 100 % of the shares, the dividend ban should not apply in case DLH provided financial support to the company following the approval of the COVID-19 recapitalisation measures in favour of DLH, by way of an equity injection or a loan, and all other shareholders provided at least the same support (pari-passu and pro-rated).
- (75) According to the Term Sheet, DLH committed not to cross-subsidise group companies which, on 31 December 2019, had been undertakings in difficulty as defined in the GBER, having recourse, if necessary, to separation of accounts.

⁽⁴⁵⁾ This commitment applied to the management of all companies of which DLH had control that were also part of the management of DLH and the subsidiaries Austrian Airlines AG, Brussels Airlines S.A./N.V., Eurowings GmbH, Lufthansa Cargo AG, Lufthansa Technik, LSG and Swiss International Air Lines Ltd.

2.10.4.2. Structural commitments

- (76) The German recapitalisation package was subject to Germany's commitment that DLH would divest slots and additional assets to the benefit of one air carrier at Frankfurt airport and one air carrier at Munich airport.
- (77) In particular, Germany committed that DLH would divest 24⁽⁴⁶⁾ slots/day⁽⁴⁷⁾ at each of Frankfurt airport and Munich airport (including both winter and summer slots), and additional assets as required by the Slot Coordinator⁽⁴⁸⁾ to allow for a transfer of those slots by way of a partial take-over of an air carrier within the meaning of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L14, 22.1.1993, p.1) (the „Slot Regulation“). This was meant to allow one air carrier to establish a base at Frankfurt airport and one air carrier to establish a base at Munich airport (the „new entrants“). In addition, Germany committed that, upon request of the purchasers, DLH would make available to the purchasers: (i) access to the airport infrastructure or facilities at Frankfurt airport and Munich airport, on the same terms as those granted to DLH by the airport managers; (ii) overnight parking stands for the aircraft to be based at Frankfurt airport and/or Munich airport; and (iii) relevant staff (cabin/cockpit) to operate the bases.
- (78) If, after three IATA seasons from the last IATA season for which Article 8(2), second indent, of the Slot Regulation (the „use-it-or-lose-it rule“) did not apply in full,⁽⁴⁹⁾ the slots had not been divested to one new entrant for the establishment of a base at respectively Frankfurt airport and/or Munich airport, they would be made available for divestment to one new entrant or to one other air carrier for the expansion of its existing base („based carrier“) at respectively Frankfurt airport or Munich airport. In that case, the potential purchaser, that would be a based carrier, would have to commit to operate the total number of aircraft after expansion of its base for at least three IATA seasons. Overall, Germany's commitment that DLH divest the slots and the other assets to the purchasers as mentioned in this section would apply for six full consecutive IATA seasons after the last season for which the „use-it-or-lose-it rule“ would no longer apply in full⁽⁵⁰⁾. In any event, the commitments would no longer apply to Frankfurt airport and Munich airport, once DLH had divested slots to one purchaser at respectively Frankfurt airport and Munich airport.
- (79) To be eligible to obtain the slots and other assets, a potential purchaser had to: (a) be an air carrier holding an operating license issued by an EU/EEA Member State; (b) be independent of and unconnected with DLH; (c) not be subject to measures to preserve effective competition within the meaning of point 72 of the Temporary Framework for having received a COVID-19 recapitalisation instrument of more than EUR 250 million; (d) have the intention to establish a base of at least four aircraft for a new entrant or expand its base for a based carrier at Frankfurt airport and/or Munich airport; and (e) commit to comply with the applicable Union and national labour laws.

⁽⁴⁶⁾ A potential acquirer might wish to acquire a business package containing less than 24 slots.

⁽⁴⁷⁾ To ensure the viability of DLH's hub-and-spoke network at each of Frankfurt airport and Munich airport, DLH would not be obliged to divest more than three departure slots and three arrival slots in any one of the three one-hour periods at each of Frankfurt airport and Munich airport. In the event that a request was made for the divestment of more than three departure slots or three arrival slots in any one of these three one-hour periods, DLH would offer the purchasers the next closest slot to the time requested.

⁽⁴⁸⁾ The Slot Coordinator is the person responsible for the allocation of slots (Article 4(5) of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, OJ L14, 22.1.1993, p.1). According to its Article 8a(2), „[t]he transfers or exchanges referred to in paragraph 1 shall be notified to the coordinator and shall not take effect prior to the express confirmation by the coordinator“.

⁽⁴⁹⁾ Under Article 8(2) of the Slot Regulation, the general principle regarding slot allocation is that an air carrier having operated its particular slots for at least 80 % during the summer or winter scheduling period is entitled to the same slots in the equivalent scheduling period of the following year (the „grandfather rights“). Consequently, slots which are not sufficiently used by air carriers are returned to the slot pool and reallocated.

⁽⁵⁰⁾ The Commission could, upon a substantiated request from Germany, review the commitments should the „use-it-or-lose-it“ rule be amended following a review of the Slot Regulation.

- (80) To obtain the slots, an eligible potential purchaser had to demonstrate that it had exhausted all reasonable efforts⁽⁵¹⁾ to obtain the necessary slots to operate the base concerned through the normal workings of the general slot allocation procedure⁽⁵²⁾. To that end, the selection of the remedy takers and the allocation of slots would observe the following procedure:
- The monitoring trustee appointed by DLH⁽⁵³⁾ would publish the number of available slots/bases in advance of the start of the general slot allocation procedure;
 - Potential purchasers would indicate their interest in slots/bases in advance of the start of the general slot allocation procedure;
 - By the IATA slot request submission deadline, potential purchasers would apply for slots through the general slot allocation procedure and would submit a formal bid for DLH slots (at the same time as those requested through the general slot allocation procedure);
 - The potential purchasers had to offer a price for the divested slots and assets. The bidding price would be taken into account in tied bids⁽⁵⁴⁾. For the avoidance of doubt, the divestment should have been at no minimum price;
 - The bids would be evaluated by the Commission, advised by the monitoring trustee. The Commission could reject the bids if they were not credible from an economic or operational point of view.
- (81) Shortly after the IATA Scheduling Conference, the interested purchasers would have to confirm whether or not they obtained the slots through the general slot allocation procedure and whether or not they intended to establish a base or expand their base using DLH's slots. Following such confirmation, DLH and the potential purchasers would have to conclude an asset purchase agreement, to be reviewed by the monitoring trustee and approved by the Commission.

2.11. Cumulation

- (82) The aid granted under the Measure could be cumulated with aid under de minimis Regulations⁽⁵⁵⁾ or the GBER, provided the provisions and cumulation rules of those Regulations were respected.

⁽⁵¹⁾ The eligible potential purchaser would be deemed not to have exhausted all reasonable efforts to obtain necessary slots if slots at Frankfurt airport or Munich airport, respectively, were available through the general slot allocation procedure within +/- 20 minutes for short-haul flights and within +/- 60 minutes for long-haul flights of the times requested but such slots were not accepted by the eligible potential purchaser. If the eligible potential purchaser were deemed to have exhausted all reasonable efforts to obtain necessary slots, Germany committed that DLH would make available the slots within the above-mentioned time windows. In the event that DLH did not have slots within the relevant time window, DLH would offer to release the slots closest in time to the purchaser's request. DLH did not have to offer slots if the slots which the eligible potential purchaser could have obtained through the general slot allocation procedure were closer in time to the purchaser's request than the slots that DLH had available. The arrival and departure slot times would be such as to allow for reasonable aircraft rotation to the extent possible, taking into account the eligible potential purchaser's business model and aircraft utilisation constraints.

⁽⁵²⁾ Under Article 10(6) of the Slot Regulation, the general slot allocation procedure is based on the setting up of „pools“ containing newly-created time slots, unused slots and slots which have been given up by a carrier or have otherwise become available. 50 % of the slots from the slot pool shall first be offered to new entrants. The other 50 % of the slots from the slot pool will be placed at the disposal of other applicant airlines (incumbent airlines). If applications by new entrants amount to less than 50 % of the capacity made available through slots from the pool, this remaining capacity will also be placed at the other applicants' disposal.

⁽⁵³⁾ The appointment, mandate and termination of mandate of the monitoring trustee would follow the Best Practice Guidelines on divestiture commitments in merger control cases of the European Commission. Following those guidelines, DLH and Germany would propose an initial list of candidates as monitoring trustee for the Commission's consideration. After the selection process, DLH would agree on a suitable fee structure with the monitoring trustee and would appoint it.

⁽⁵⁴⁾ Tied bids are bids that are given the same evaluation by the Commission.

⁽⁵⁵⁾ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (OJ L 352, 24.12.2013, p. 1), Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8).

- (83) The aid granted under the Measure could be cumulated with aid granted under other measures approved by the Commission under other sections of the Temporary Framework provided the provisions in those specific sections were respected. According to the Term Sheet agreed between the ESF and DLH, the support of other countries for companies of LH Group had to be reflected in a corresponding reduction of the Silent Participations (I or II) or of the complementary loans, subject to the agreement of the ESF.

2.12. Monitoring and reporting

- (84) The German authorities confirmed that they would respect the monitoring and reporting obligations laid down in section 4 of the Temporary Framework (including the obligation to publish relevant information on the recapitalisation granted to DLH on the comprehensive State aid website or Commission's IT tool within three months from the moment of granting) ⁽⁵⁶⁾.
- (85) Germany also confirmed that it would ensure that:
- DLH would submit reports to Germany based on the schedule laid out in point 82 of the Temporary Framework on the progress in the implementation of the repayment schedule and the compliance with the conditions of section 3.11.6 of the Temporary Framework;
 - DLH as beneficiary of the Measure would publish, within 12 months from the date of the recapitalisation and thereafter periodically every 12 months, for a period of three years, information on the use of the aid received. In particular, this includes information on how DLH's use of the aid received supports its activities in line with Union objectives and national obligations linked to the digital transformation and how DLH is contributing to the Union's economy-wide objective of climate neutrality by 2050, including through this aid and in its public advocacy activities; ⁽⁵⁷⁾
 - Germany would provide annual reports to the Commission on the implementation of the repayment schedule and compliance with the conditions in section 3.11.6 and point 54 of the Temporary Framework;
 - Germany would notify a restructuring plan if Germany's intervention had not been reduced below 15 % of DLH's equity within six years after the recapitalisation.

3. ASSESSMENT

3.1. Existence of State aid

- (86) For a measure to be categorised as aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. First, the measure must be imputable to the State and financed through State resources. Second, it must confer an advantage on its recipients. Third, that advantage must be selective in nature. Fourth, the measure must distort or threaten to distort competition and affect trade between Member States.
- (87) The Measure is imputable to the State, since it was administered by the ESF, i.e., an entity created and organised by law. The Measure was financed through State resources, since it was financed by public funds.
- (88) The Measure confers an advantage on its beneficiary, DLH, in the form of a recapitalisation. The Measure thus relieved DLH of costs that it would have had to bear under normal market conditions.

⁽⁵⁶⁾ Referring to information required in Annex III to Commission Regulation (EU) No 651/2014.

⁽⁵⁷⁾ Under the EU emissions trading system, the net reduction in aviation related emissions between 2013-2020 was estimated to be 193.4 Mt of CO₂ emissions (European aviation environmental report 2019, available at: <https://www.eurocontrol.int/publication/european-aviation-environmental-report-2019>, as last accessed on 10.6.2024).

- (89) The advantage granted by the measure is selective, since it is awarded only to one specific undertaking, i.e., DLH, while other undertakings in a comparable legal and factual situation within that sector or other sectors (considering that all economic operators should in principle cover their own costs), are not eligible for aid and thus did not receive the same advantage.
- (90) The Measure is liable to distort competition, since it strengthened the competitive position of DLH. It also affects trade between Member States, since DLH is active in sectors in which there is intra-Union trade.
- (91) In view of the above, the Commission concludes that the Measure constitutes aid within the meaning of Article 107(1) TFEU. The German authorities do not contest that conclusion.

3.2. Lawfulness of the measures

- (92) By notifying the Measure before putting it into effect, the German authorities respected their obligations under Article 108(3) TFEU.
- (93) Nevertheless, following the annulment of the Initial Decision by the General Court, the Measure has become unlawful since the moment it was granted, as it is no longer approved by a Commission decision.

3.3. Compatibility

- (94) Since the Measure involves aid within the meaning of Article 107(1) TFEU, it is necessary to consider whether or not the Measure is compatible with the internal market.
- (95) Pursuant to Article 107(3)(b) TFEU the Commission may declare compatible with the internal market aid „to remedy a serious disturbance in the economy of a Member State”.
- (96) By adopting the Temporary Framework on 19 March 2020, the Commission acknowledged (in section 2) that, „the COVID-19 outbreak affects all Member States and that the containment measures taken by Member States impact undertakings”. The Commission concluded that „State aid is justified and can be declared compatible with the internal market on the basis of Article 107(3)(b) TFEU, for a limited period, to remedy the liquidity shortage faced by undertakings and ensure that the disruptions caused by the COVID-19 outbreak do not undermine their viability”.
- (97) Section 3.11 of the Temporary Framework deals with recapitalisation measures. It sets out the criteria under which Member States may provide public support in the form of equity and/or hybrid capital instruments to undertakings facing financial difficulties due to the COVID-19 pandemic, aiming to ensure that the disruption of the economy does not result in the unnecessary exit from the market of undertakings that were viable before that pandemic.

3.3.1. Applicability

- (98) Point 46 of the Temporary Framework states that „the following conditions shall apply to recapitalisation schemes and individual recapitalisation measures of Member States for non-financial undertakings (collectively referred to as »COVID-19 recapitalisation« measures) under this Communication, which are not covered by section 3.1 of this Communication. They apply to COVID-19 recapitalisation measures for large undertakings and SMEs”.
- (99) The Measure aimed at strengthening the equity of DLH and its access to liquidity at a time when the normal functioning of credit markets was severely disturbed by the COVID-19 pandemic, which was affecting the wider economy and leading to severe disturbances of the real economy of Member States. The Commission observes that the Measure concerns the recapitalisation of a large non-financial undertaking facing financial difficulties as a result of the COVID-19 pandemic. Hence, the Measure can be qualified as a COVID-19 recapitalisation to remedy a serious disturbance in the economy of the Member State.

(100) Point 48 of the Temporary Framework states that COVID-19 recapitalisation measures may not be granted later than 30 June 2021. Germany committed to grant the Measure no later than 30 June 2021. Silent Participation I and Silent Participation II were granted on 29 June 2020, i.e., the date of conclusion of the Framework Agreement between the ESF and DLH, whereas the capital injection was granted on 2 July 2020, i.e., the date ESF acquired the 20 % shareholding in DLH.

(101) In the following sections, the Commission will assess the compatibility of the Measure under section 3.11 of the Temporary Framework, taking into account, when considering the proportionality of the Measure, the cumulative effects arising from the other elements of the overall support package in favour of companies of LH Group (as detailed in recitals (12) to (15)).

3.3.2. Eligibility and entry conditions

(102) According to point 49 of the Temporary Framework, a COVID-19 recapitalisation measure must fulfil the following conditions:

- a) without the State intervention the beneficiary would go out of business or would face serious difficulties to maintain its operations. Such difficulties may be shown by the deterioration of, in particular, the beneficiary's debt to equity ratio or similar indicators;
- b) it is in the common interest to intervene. This may relate to avoiding social hardship and market failure due to significant loss of employment, the exit of an innovative company, the exit of a systemically important company, the risk of disruption to an important service, or similar situations duly substantiated by the Member State concerned;
- c) the beneficiary is not able to find financing on the markets at affordable terms and the horizontal measures existing in the Member State concerned to cover liquidity needs are insufficient to ensure its viability; and
- d) the beneficiary is not an undertaking that was already in difficulty on 31 December 2019 (within the meaning of the General Block Exemption Regulation) ⁽⁵⁸⁾.

(103) As explained in recital (31), DLH's impaired equity position severely affected the liquidity of the company and threatened its solvency in the short-term. The German authorities provided the Commission with financial projections for the years 2020 to 2026. Based on those projections, the equity of DLH would have been reduced significantly by the end of 2020, ⁽⁵⁹⁾ as compared to end 2019, and would have been negative. Germany further submitted that, based on DLH's assumptions during that time, DLH would have faced technical illiquidity by the end of calendar week [...] of 2020, despite the actions it had implemented immediately after the outbreak of the COVID-19 pandemic to obtain further liquidity (see recital (22)).

(104) The Commission has also requested and analysed internal documents to assess this matter. Those internal documents show that DLH expected facing illiquidity without the recapitalisation measures ⁽⁶⁰⁾.

(105) It follows that the Measure aimed at maintaining a capital structure and liquidity profile that prevented an insolvency scenario. The Commission therefore considers that, in absence of the capital increase, DLH would have faced serious difficulties to maintain its operations, and therefore that point 49(a) of the Temporary Framework is fulfilled. This finding was upheld by the General Court in the Judgment, ⁽⁶¹⁾ which was not appealed before the Court of Justice on that point.

⁽⁵⁸⁾ As defined in Article 2(18) of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26.6.2014, p. 1).

⁽⁵⁹⁾ The negative results in 2020 would have consumed DLH's equity in total and led to a negative equity of approximately EUR [exceeding 2] billion by the end of 2020, compared to a book equity value of more than EUR 10 billion at the end of 2019.

⁽⁶⁰⁾ See, for example, the following internal documents submitted to the Commission on 11 June 2020: [...].

⁽⁶¹⁾ Judgment, paragraphs 95 ad 98.

- (106) As explained in recitals (41) to (44), Germany submitted evidence of the systemic importance of DLH for the German economy from several standpoints, highlighting the severe risks that a default of LH Group or a significant downsizing of its activities would entail for German employment, connectivity and foreign trade volumes. The Commission therefore considers that it was in the common interest to intervene, and therefore that point 49(b) of the Temporary Framework is fulfilled. This finding was upheld by the General Court in its Judgment, ⁽⁶²⁾ which was not appealed before the Court of Justice on that point.
- (107) In the Initial Decision, the Commission found that, as explained in recitals (32) to (35), the German authorities had set out sufficient reasons why DLH had not been able to find financing on debt or equity capital markets at affordable terms and in the timeframe needed to avoid triggering insolvency proceedings. Moreover, according to the Initial Decision, Germany had also demonstrated that the existing horizontal measures in Germany to cover liquidity needs were not available to DLH in the absence of a prior recapitalisation (see recital (36)).
- (108) However, the General Court concluded in the Judgment that the Commission had not taken account of all the relevant evidence that must be taken into consideration in order to assess the compliance of the Measure with point 49(c) of the Temporary Framework ⁽⁶³⁾.
- (109) First, according to the General Court, the Commission did not assess the possible availability of collateral, such as DLH's unencumbered aircraft, their value and the terms for any loans that it may have been possible to obtain on the financial markets against such collateral ⁽⁶⁴⁾. According to the General Court, that is an important aspect of the condition laid down in point 49(c) of the Temporary Framework. An evaluation of an undertaking's inability to obtain financing on the markets at affordable terms implies determining, in particular, whether that undertaking could offer collateral allowing it to have access to such financing ⁽⁶⁵⁾.
- (110) Second, according to the General Court, the Commission's assertion that the „collateral” would not be sufficient to cover the „entire amount” of the funds necessary was based on the false premiss that the financing that can be obtained on the markets must necessarily cover the entirety of the beneficiary's needs ⁽⁶⁶⁾.
- (111) Considering the above, the Commission has doubts that the Measure can be considered in compliance with point 49(c) of the Temporary Framework. That issue will be assessed in the framework of the formal investigation procedure. The Commission invites Germany as well as the interested parties to submit their comments in this respect, in particular, on whether the rating of DLH at that time would have allowed the company to raise market financing at affordable terms against collateral and whether the type and amount of that financing would have likely been sufficient to ensure DLH's viability.
- (112) Third, based on the evidence submitted by Germany, the Commission observes that DLH and the subsidiaries benefiting from the other components of the support package for LH Group (as outlined in recital (13)) are not undertakings that were already in difficulty on 31 December 2019 within the meaning of the GBER (see recital (29)). Therefore, the Commission preliminarily considers that point 49(d) of the Temporary Framework is fulfilled. That finding was not contested before the General Court.
- (113) Fourth, pursuant to point 50 of the Temporary Framework, when Member States notify COVID-19 individual recapitalisation measures, they must provide evidence of a written request for such aid by the prospective beneficiary undertaking as part of the notification to the Commission. The Commission takes note that the German notification included such a written request in the form of a letter dated 27 March 2020 sent by DLH to the German Ministries of Finance and of Economic Affairs and Energy. The Commission therefore preliminarily considers that point 50 of the Temporary Framework is fulfilled. That finding was not contested before the General Court.

⁽⁶²⁾ Judgment, paragraph 111.

⁽⁶³⁾ Judgment, paragraph 132.

⁽⁶⁴⁾ Judgment, paragraph 123.

⁽⁶⁵⁾ Judgment, paragraph 124.

⁽⁶⁶⁾ Judgment, paragraph 125.

3.3.3. Types of recapitalisation measures

- (114) According to point 52 of the Temporary Framework, „Member States can provide COVID-19 recapitalisation measures using two distinct sets of recapitalisation instruments: (a) equity instruments, in particular, the issuance of new common or preferred shares; and/or (b) instruments with an equity component (referred to as »hybrid capital instruments«),⁽⁶⁷⁾ in particular profit participation rights, silent participations and convertible secured or unsecured bonds”. Point 53 of the Temporary Framework states that „[t]he State intervention can take the form of any variation of the above instruments, or a combination of equity and hybrid capital instruments”. In any event, „[t]he Member State must ensure that the selected recapitalisation instruments and the conditions attached thereto are appropriate to address the beneficiary’s recapitalisation needs, while at the same time being the least distortive to competition”.
- (115) As already mentioned (recitals (37) and (45)), the Measure was a combination of an equity instrument and hybrid capital instruments.
- (116) The equity instrument consisted of EUR 306 million equity paid by ESF to DLH against the issuance by DLH of new common shares leading to a 20 % shareholding of ESF in the resulting increased registered share capital of DLH.
- (117) The hybrid capital instruments took the form of two silent participations, which were flexible instruments for the parties as regards the participation of the silent partner in the profit/losses of the company or in the company’s decision-making. Due to that flexibility, silent participations do not necessarily qualify as equity under accounting standards. The features that are necessary for them to be considered as equity vary, depending on the accounting standard taken as reference and on the specific design of the whole partnership agreement⁽⁶⁸⁾. Silent Participation I (approximately EUR 4.7 billion) qualified as equity under accounting standards, whereas Silent Participation II (approximately EUR 1 billion) qualified as debt convertible into equity.
- (118) As explained by Germany, neither the ESF nor DLH had an interest in an equity participation of ESF in DLH higher than 20 %. Nevertheless, it was very important for both ESF and DLH to have a certain amount of silent participation recognised as equity under accounting standards in order to restore the capital structure of DLH and allow DLH to return as soon as possible to capital markets. For those reasons, Germany decided to grant the greater part of the recapitalisation in the form of Silent Participation I, while leaving to the equity instrument the amounts necessary to obtain a 20 % participation in DLH. ESF’s participation in DLH could have increased, rising to 30 %, through the conversion of the Silent Participation II into equity, if DLH failed to pay the coupons accrued on the Silent Participation I according to the terms agreed by the parties.
- (119) The Commission therefore considers that points 52 and 53 of the Temporary Framework are fulfilled. This finding was upheld by the General Court in its Judgment,⁽⁶⁹⁾ which was not appealed before the Court of Justice on that point.

3.3.4. Amount of the recapitalisation

- (120) According to point 54 of the Temporary Framework, „[i]n order to ensure proportionality of the aid, the amount of the COVID-19 recapitalisation must not exceed the minimum needed to ensure the viability of the beneficiary, and should not go beyond restoring the capital structure of the beneficiary to the one predating the COVID-19 outbreak, i.e. the situation on 31 December 2019. In assessing the proportionality of the aid, State aid received or planned in the context of the COVID-19 outbreak shall be taken into account”.

⁽⁶⁷⁾ Hybrid capital instruments are instruments that have characteristics of debt as well as of equity. For instance, convertible bonds are remunerated like bonds until they are converted into equity. The assessment of the overall remuneration of hybrid capital instruments thus depends on the one hand on their remuneration while they are debt-like instruments and on the other hand on the conditions for conversion into equity-like instruments.

⁽⁶⁸⁾ A silent participation can be considered as equity under IFRS, but not under German GAAP and vice versa.

⁽⁶⁹⁾ Judgment, paragraph 149.

- (121) The proportionality test set out in point 54 has two cumulative conditions. On the one hand, the COVID-19 recapitalisation must not exceed the minimum needed to ensure the viability of the beneficiary, that is, it cannot go beyond the minimum amount of recapitalisation aid needed to restore the company's access to the capital markets (and be in a position to get debt and/or equity financing at affordable rates from those markets). On the other hand, the COVID-19 recapitalisation cannot go beyond restoring the capital structure of the beneficiary to the one predating the COVID-19 pandemic.
- (122) Moreover, in this case, the Commission notes that, in addition to the Measure, Austria, Belgium, Germany and Switzerland had granted or planned to grant further State aid in the context of the COVID-19 pandemic to DLH or companies of LH Group (see recitals (13) and (14)). Those measures were all interrelated and were, in conjunction, necessary to allow DLH and its subsidiaries to face the liquidity shortage affecting LH Group due to the COVID-19 pandemic. Therefore, the Commission will take that further public support into account in assessing the proportionality of the Measure.
- (123) First, in order to assess whether the aid corresponded to the minimum needed to restore the capital structure of the beneficiary to the one before the COVID-19 pandemic, in recitals (126) to (133) the Commission will take into account the financial projections concerning (i) the equity position of the beneficiary and (ii) the net debt-to-equity ratio of the beneficiary after the COVID-19 recapitalisation at the end of 2020 and 2021. The Commission will compare the value of those indicators with those predating the COVID-19 pandemic, i.e., the situation on 31 December 2019.
- (124) Second, in order to assess whether the aid corresponded to the minimum needed to ensure the viability of the beneficiary, in recitals (134) to (140) the Commission will consider what was the minimum amount of recapitalisation aid needed to restore the company's access to the capital markets (debt and/or equity). To that end, the Commission will analyse the liquidity situation of the beneficiary and the (forecasted) net debt-to-equity ratio, typically considered by rating agencies when assessing the creditworthiness of companies. In particular, the Commission will compare the net debt-to-equity ratio of the beneficiary after the COVID-19 recapitalisation with a benchmark net debt-to-equity ratio of other European airlines predating the COVID-19 pandemic, i.e., the situation on 31 December 2019. The Commission considers the net debt-to-equity ratio of the third quartile of comparable companies as a useful and appropriate benchmark.
- (125) Last, in recitals (141) and (142), the Commission will also assess the proportionality of the recapitalisation measures in favour of DLH under a sensitivity analysis with an alternative loss forecast.

3.3.4.1. Whether the public support is limited to the minimum needed to restore the capital structure of LH Group

- (126) Table 1 illustrates the relationship between the recapitalisation measures provided by Germany, Austria, Belgium and Switzerland and the capital structure of LH Group predating the COVID-19 pandemic, i.e., the situation on 31 December 2019.
- (127) According to the term sheet between ESF and DLH, the financing contribution from other countries would in principle lead to a reduction in Silent Participation I or of the complementary German loan. The envisaged loan to be guaranteed by Austria of up to EUR 300 million had to be deducted from the German loan. Depending on the form of COVID-19 damage compensation element under the Austrian measure, the amount of EUR 150 million was to be deducted from either the Silent Participation I of ESF or from the German loan⁽⁷⁰⁾. The envisaged loan guaranteed by Switzerland of up to EUR 1.4 billion had to be deducted from the German loan. Since the form of potential aid measures contributed by Belgium had not yet been determined at that point in time, it was unclear whether or not any funds eventually provided would be deducted from the German loan or from ESF's Silent Participation I⁽⁷¹⁾.

⁽⁷⁰⁾ In the balance sheet forecasts for LH Group submitted by Germany, the Austrian COVID-19 damage compensation was deducted from the German loan. The Commission followed this approach in its proportionality assessment and noted that the conclusion on proportionality would not be different, if the Austrian COVID-19 damage compensation had been deducted from Silent Participation I.

⁽⁷¹⁾ Source: [...], submitted on 17 June 2020.

- (128) Therefore, the following capital measures could have reduced the German loan of EUR 3 billion accordingly and would not have increased any further the net debt of LH Group: (i) the planned Austrian measures of EUR 450 million; (ii) the Swiss measure of EUR 1.4 billion; and (iii) the planned Belgian measures of EUR 290 million ⁽⁷²⁾.
- (129) In recitals (130) to (133), the Commission will assess the proportionality of the recapitalisation measures in the scenario where the EUR 3 billion German loan would be reduced by the contributions from other Member States, as described in recital (128). In addition, the Commission will consider the COVID-19 damage compensation from Austria as a measure strengthening the equity position of LH Group, not as debt. As a result, the total debt measures provided to LH Group by Germany, Austria, Belgium and Switzerland would amount to EUR 2.85 billion instead of EUR 3 billion. The Commission considers that that is a conservative approach, as it implies that LH Group had less debt and more equity than in the baseline scenario with the EUR 3 billion German loan.

Table 1

Proportionality indicators ⁽⁷³⁾

(EUR million)

Measures	LH Group
COVID-19 recapitalisation	6,000
COVID-19 damage compensation	150
<i>Equity position without recapitalisation by end 2020</i>	- [2,000-3,000]
<i>A. Equity position (31.12.2019)</i>	10,256
<i>B. Equity position after recap (31.12.2020)</i>	[3,000-4,000]
Proportionality indicator I: $B - A \leq 0$	[...] ≤ 0
<i>C. Net Debt/Equity Ratio (31.12.2019)</i>	0,65
<i>D. Net Debt/Equity Ratio after recap (31.12.2020)</i>	[3-4]
Proportionality indicator II: $C - D \leq 0$	[...] ≤ 0

- (130) Table 1 shows that the equity position of LH Group after the recapitalisation (on 31 December 2020) would be of EUR [3-4] billion. That amount of equity factored in the following recapitalisation measures provided by Germany: (i) Silent Participation I of EUR 4.7 billion; (ii) Silent Participation II of EUR 1.0 billion; (iii) equity participation of EUR 306 million, and (iv), Austrian COVID-19 damage compensation to be granted under Article 107(2)(b) TFEU, which would strengthen the equity position of LH Group by EUR 150 million.
- (131) According to the beneficiary's financial projections, the losses for LH Group attributable to the COVID-19 pandemic would amount to EUR [11-12] billion in 2020 (and EUR [1-2] in 2021). As such, the recapitalisation of LH Group (EUR 6 billion), taken together with the Austrian damage compensation, would not lead to a higher equity level than that predating the COVID-19 pandemic, i.e., the situation on 31 December 2019.

⁽⁷²⁾ Calculations were based on the assumption that the EUR 290 million support from Belgium would be in form of debt, but the conclusions on proportionality would not have been materially different if that support had been counted as equity (see recital (142) for an alternative assumption).

⁽⁷³⁾ Source: [...], submitted on 17 June 2020. The equity position in 2020 without support was calculated as the difference between the equity position with support and the amount of the recapitalisation package.

- (132) The Commission observes that the recapitalisation of LH Group would not go beyond restoring the capital structure of the beneficiary to that predating the COVID-19 pandemic, for the following reason: the net debt-to-equity ratio of LH Group was expected to be [3-4] on 31 December 2020 and [4-5] on 31 December 2021, while it was 0.65 on 31 December 2019. Based on the forecasts submitted by Germany, the 2019 net debt-to-equity ratio of LH Group was not expected to be restored in the time horizon considered in the business plan, i.e., [...].
- (133) The Commission also requested and analysed internal documents to assess whether that limb of the proportionality test was met. Those internal documents confirm that DLH expected a level of losses corresponding to what had been submitted to the Commission by Germany ⁽⁷⁴⁾.

3.3.4.2. Whether the public support is limited to the minimum needed to ensure the viability of LH Group

- (134) According to DLH's financial projections, ⁽⁷⁵⁾ LH Group would have faced technical illiquidity, without fresh liquidity available, by the end of calendar week [...] of 2020. LH Group had a positive cash position of EUR [2-3] billion on 31 December 2019 and, due to the pandemic, forecasted a negative cash position of EUR [8-9] billion on 31 December 2020. The cash position after the recapitalisation was expected to be EUR [1-2] billion on 31 December 2020.
- (135) The Commission also requested and analysed internal documents to assess whether that limb of the proportionality test was met. Those internal documents confirm that DLH expected facing illiquidity without the recapitalisation measures ⁽⁷⁶⁾.
- (136) To assess the viability condition of point 54 of the Temporary Framework, the Commission has considered how the recapitalisation measures would affect LH Group's forecasted net debt-to-equity ratio, in comparison with that of a sample of peer airlines on 31 December 2019. That sample consists of ten European airlines, ⁽⁷⁷⁾ of which four had a credit rating ranging between B+ and BBB ⁽⁷⁸⁾.
- (137) The Commission considers that it is a conservative approach to compare LH Group's forecasted net debt-to-equity ratio to that of its peers. The reason is that the rated peers had a rating either below or very close to the investment grade threshold (i.e., BBB), which is normally considered as the minimum rating allowing a company to get access to market financing at affordable terms. In addition, the Commission has used the third quartile of LH Group's peer net debt-to-equity ratio distribution as a benchmark. This is also a conservative assumption, because the higher the net debt-to-equity ratio, the lower a company's creditworthiness and hence rating.
- (138) The Commission notes that, taking into account the recapitalisation measures, the expected net debt-to-equity ratio of LH Group on 31 December 2020 was still well above the third quartile of the peers' distribution of the same ratio predating the COVID-19 pandemic, i.e., the situation on 31 December 2019. The capital structure of LH Group was not expected to sufficiently improve in 2021, i.e., the net debt-to-equity ratio of LH Group on 31 December 2021 would still be worse than the [20-30] % highest net debt-to-equity ratios of peer airlines predating the COVID-19 pandemic, i.e., the situation on 31 December 2019 ⁽⁷⁹⁾. In addition, the Commission notes that the expected net debt-to-equity ratio of LH Group on 31 December 2020 was also higher than the maximum ratio among the rated peers.

⁽⁷⁴⁾ See, for example, in the following internal documents submitted to the Commission on 11 June 2020: [...].

⁽⁷⁵⁾ Source: [...], submitted on 8 June 2020.

⁽⁷⁶⁾ See, for example, in the following internal documents submitted to the Commission on 11 June 2020: [...].

⁽⁷⁷⁾ The sample comprised of Ryanair, IAG, Air France-KLM, easyJet, Wizz Air, Norwegian Air Shuttle, SAS, Aegean Airlines, Finnair and Jet2.com Limited. Among these airlines, the net debt-to-equity ratio was 0.30 and the third quartile was 1.00 on 31 December 2019.

⁽⁷⁸⁾ The rated peers were Ryanair, IAG, easyJet and SAS (Source: Capital IQ, 22 June 2020). Their net debt-to-equity ratio on 31 December 2019 was between 0.09 and 1.11.

⁽⁷⁹⁾ The Commission notes that a higher net debt/equity ratio implies a more leveraged financial structure.

- (139) LH Group's expectations on the time horizon to return to an investment grade rating provided further evidence of the proportionality of the recapitalisation measures. The net debt-to-equity ratio is one of the indicators that rating agencies consider in their assessment of a company's creditworthiness. LH Group expected to return to an investment grade, after the recapitalisation, only in [...] ⁽⁸⁰⁾. That suggests that the recapitalisation measures would not have led to a complete and immediate restoration of the beneficiary's capital structure. By contrast, it indicates that the recapitalisation measures would allow LH Group to face the negative effects of the COVID-19 crisis in the years [...] and [...]. At the same time, those measures would enable LH Group to restore its access to private capital markets and thus facilitate its return to normality in [...].
- (140) The argument that LH Group would return to an investment grade rating in [...] is also supported by the evolution of the dynamic gearing ratio, ⁽⁸¹⁾ i.e., the ratio between net financial liabilities and EBITDA. Based on standing practices in debt capital markets for companies with investment grade ratings, the dynamic gearing ratio should not exceed 3.0 or 3.5 (although it is further dependent on the type of industry the company is active in and its investor base). Values higher than that threshold are considered as a signal of poor creditworthiness, which makes it difficult for a company to raise debt. According to DLH's financial projections, the dynamic gearing ratio of LH Group was expected to be [1-2] ⁽⁸²⁾ on [...] and [16-17] on [...]. Based on that forecast, the dynamic gearing ratio of LH Group was only expected to be below 3.0 in [...], where a dynamic gearing ratio of [1-2] was expected. That provides further evidence that the recapitalisation measures would allow LH Group to face the negative effects of the COVID-19 crisis in the years [...] and [...] and would also enable LH Group to restore its access to private capital markets in [...].

3.3.4.3. Sensitivity analysis

- (141) The Commission also assessed the proportionality of the recapitalisation measures in favour of LH Group under a sensitivity analysis with an alternative loss forecast. Germany submitted that LH Group expected losses of EUR [11-12] billion in 2020, of which EUR [2-3] billion consisted of one-off items. Those items referred to extraordinary losses, which LH Group expected to incur due to the COVID-19 crisis in addition to the losses from its ordinary business activities. Among those one-off items, the most significant was the loss of value of the aircraft that LH Group had grounded or expected to dispose of due to its reduced activity. Germany provided a sensitivity analysis showing LH Group's equity position and net debt-to-equity ratio in a scenario with EUR [2-3] billion lower losses in 2020 and EUR [0-1] billion lower losses in 2021, which was even greater than the entire amount of one-off items. The results of that analysis showed that LH Group's equity position would have been EUR [6-7] billion in 2020 and EUR [6-7] billion in 2021, which was below the EUR 10.256 billion equity position in 2019. In addition, the net debt-to-equity ratio would have been [1-2] both in 2020 and in 2021. Those net debt-to-equity ratios were still higher than those of LH Group on 31 December 2019 (i.e., 0.65), as well as the third quartile of its distribution over a sample of European airlines on 31 December 2019 (i.e., 1.00). Those results indicate that both limbs of the proportionality assessment of the recapitalisation package in favour of LH Group were robust to the assumption of lower losses, inter alia by excluding one-off items.

⁽⁸⁰⁾ LH Group's claim on its rating in [...] was in line with an estimate using the [...]. That estimate was based on LH Group's forecasted financial data in [...]. However, the [...], in addition to company-specific financial information, used other data measured at that point in time. Hence, that estimate is not a proper forecast of LH Group's rating, as not all the inputs necessary for the estimate referred to expectations in [...]. It is rather the rating that LH Group would have had at that point in time if its financial data were to be those forecasted for [...].

⁽⁸¹⁾ The dynamic gearing ratio was intended to be used as a viability indicator in the German recapitalisation scheme (ESF scheme, SA.56814 (2020/N)) to ensure that the amount of the recapitalisation would be set at the minimum necessary to enable the company to finance itself independently on the credit markets once the effects of the COVID-19 crisis no longer existed.

⁽⁸²⁾ LH Group expected negative EBITDA in 2020 and for that reason, the dynamic gearing ratio became negative and was not a meaningful indicator for that year.

(142) Finally, the Commission has verified the proportionality of the recapitalisation measures in favour of LH Group in the scenario where the support from Belgium to Brussels Airlines S.A./N.V. (EUR 290 million) would take the form of an equity instrument instead of debt. In that scenario, the equity position of LH Group would have been EUR [3-4], while its net debt-to-equity ratio would have been [3-4] in 2020 and [4-5] in 2021. As LH Group's equity position would have been lower than in 2019, and its net debt-to-equity ratio would have been higher than the 2019 value and the value of the third quartile of LH Group's peers, the Commission considers that the recapitalisation package would also be proportionate in the scenario where the support from Belgium would take the form of equity instead of debt.

3.3.4.4. Conclusion

(143) In light of the above, the Commission considers that the Measure (having factored in the contributions from other Member States) does not exceed the minimum to ensure the viability of LH Group and does not go beyond restoring its capital structure on 31 December 2019. While some assumptions of the business plan were likely to be on the conservative side, that does not appear to have significant impact on the overall losses that DLH was expecting. Therefore, the Commission considers that the above analysis provides sufficient evidence that the Measure is proportionate, and therefore that point 54 of the Temporary Framework is fulfilled. This finding was upheld by the General Court in its Judgment, ⁽⁸³⁾ which was not appealed before the Court of Justice on that point.

3.3.5. Remuneration and exit of the State

(144) According to the general principles of the remuneration and exit of the State outlined in points 55-59 of the Temporary Framework, the Member State must receive appropriate remuneration for the investment and must put a mechanism in place that gradually incentivises redemption.

(145) According to point 57 of the Temporary Framework, *„[t]he remuneration of the COVID-19 recapitalisation measure should be increased in order to converge with market prices to provide an incentive to the beneficiary and to the other shareholders to redeem the State recapitalisation measure and to minimise the risk of distortions of competition”*. Point 58 of the Temporary Framework clarifies that the purpose of point 57 is that the recapitalisation measures *„contain appropriate incentives for undertakings to redeem the recapitalisation and look for alternative capital when market conditions permit, by requiring a sufficiently high remuneration for the recapitalisation”*.

(146) With particular regard to the remuneration, point 59 of the Temporary Framework allows Member States to *„notify schemes or individual measures where the remuneration methodology is adapted in accordance with the features and seniority of the capital instrument provided they overall lead to a similar outcome with regard to the incentive effects on the exit of the State and a similar overall impact on the State's remuneration”*.

(147) In recitals (148) to (198), the Commission will assess compliance of the Measure with those general principles, taking into account the specific rules set out by the Temporary Framework depending on the type of recapitalisation instrument (notably points 60-64 of the Temporary Framework as regards the equity instrument and points 65-70 of the Temporary Framework as regards the hybrid capital instruments).

3.3.5.1. Remuneration of the equity instrument and exit of the State

(148) With regard to the equity instrument, the Commission notes that, according to point 60 of the Temporary Framework, a capital injection by the State must be conducted at a price that does not exceed the average share price of the beneficiary over the 15 days preceding the request for the capital injection (*„the Maximum Share Price”*). As DLH's written request for the capital injection is dated 27 March 2020, the Maximum Share Price is therefore calculated at EUR 9.12 per share.

⁽⁸³⁾ Judgment, paragraphs 162, 177, 183, 190, 193, 207-211, 216 and 217.

- (149) The Commission observes that the price for the new shares in the capital increase was EUR 2.56 per share, which constitutes a 71.9 % discount on the Maximum Share Price.
- (150) In order to increase the remuneration for the State and to incentivise the beneficiary to buy back the State capital injection, point 61 of the Temporary Framework requires a step-up mechanism in two rounds at years four and six after the COVID-19 equity injection. According to point 62 of the Temporary Framework, the Commission may accept alternative mechanisms, provided they overall lead to a similar outcome with regard to the incentive effects on the exit of the State and a similar overall impact on the State's remuneration.
- (151) As regards the remuneration for the State, if Germany had subscribed new shares at the Maximum Share Price, the State's shareholding at entry would have been 6.56 %, which would have increased up to 7.87 % after the two step-ups in year six after the recapitalisation. The transaction envisaged at the time of adopting the Initial Decision conferred on Germany a significantly higher ownership at entry than the level of ownership that Germany would have had at the Maximum Share Price even after the implementation of the two step-ups. The Commission therefore preliminarily considers that the discount over the Maximum Share Price provides sufficient remuneration for the State at entry. This finding was not specifically contested before the General Court.
- (152) As regards the incentive effects on the exit of the State, the Commission observes that the different components of the Measure, namely the equity participation, Silent Participation I and Silent Participation II, are tightly interconnected, and therefore their combined effects regarding exit incentives should be taken into account. In this respect, it should be noted that the equity instrument represents a mere 5 % of the total recapitalisation in favour of LH Group.
- (153) The Initial Decision found that, firstly, the mere presence of the State in DLH's shareholding represented an undesirable situation for DLH, as the latter had openly and repeatedly stated. Under the Term Sheet, DLH could request Germany to sell its entire shareholding, but the disposal could occur only if (i) DLH had repaid Silent Participation I (including any pending interests) and Silent Participation II (including any pending interests) and (ii) the sale of the shares could be executed at a price at least equal to the higher of the market price or EUR 2.56 plus 12 % p.a. calculated for the period between acquisition and sale (see recital (48)). Secondly, the Commission noted that Silent Participations I and II had increasing coupons (see recitals (52) and (62)), and that the likelihood of conversion of Silent Participation II-B into shares would increase with time (which would cause dilution of previous shareholders' ownership in favour of the State). Finally, the Commission observed that some behavioural commitments (see section 2.10.4.1) would be in force until the Measure, including all instruments, would be fully redeemed. Particularly, for a traded company such as DLH, the dividend ban represented a significant hurdle in terms of reputation and access to private capital markets. All those elements meant that the longer the State's participation remained in DLH, (i) the more difficult it would be for the beneficiary to buy back the State's capital injection (increase in the minimum sale price of EUR 2.56 at 12 % p.a.), (ii) the higher would be the likelihood of further dilution of previous shareholders' ownership (potential conversion of Silent Participation II-B into additional shares for the State), and (iii) the more burdensome would the costs be for that the company to bear (quickly increasing interest rates on Silent Participations I and II). The Commission thus concluded, in the Initial Decision, that the overall structure of the Measure included sufficiently strong exit incentives for the State's shareholding.
- (154) For those reasons, the Commission concluded in the Initial Decision that the overall structure of the Measure, in line with point 62 of the Temporary Framework, constituted an alternative mechanism to the one envisaged in points 60 to 61 of the Temporary Framework regarding the State's remuneration and the beneficiary's incentives to buy back the State's capital injection. Thus, the remuneration for the State as well as the exit incentives provided for under the Measure would be in line with points 60 to 62 of the Temporary Framework.
- (155) Finally, the Commission observed that DLH, upon its request to ESF (see recital (48)), would always be able to buy back the State participation at least at the market price or EUR 2.56 plus 12 % p.a. (calculated for the period between acquisition and sale), whichever would be higher, thus ensuring an appropriate remuneration for the State's investment. Alternatively, the State might also sell at any time its equity stake at market prices to purchasers other than DLH. Therefore, the Commission concluded in the Initial Decision that the conditions set out in points 63 and 64 of the Temporary Framework were met.

- (156) The General Court concluded in the Judgment that the equity participation was not accompanied by any step-up mechanism, that none of the grounds put forward in the Initial Decision demonstrated that the equity participation was accompanied by an „alternative mechanism” to that of a step-up, and that the Temporary Framework in the version applicable *ratione temporis*, did not provide for any derogation from the obligation to require either a step-up mechanism or an alternative mechanism ⁽⁸⁴⁾.
- (157) According to the General Court, first, the price of the shares acquired by Germany on its entry into DLH's equity does not have a sufficiently close connection with the subject matter and purpose of the step-up mechanism or one that is an alternative to it and does not lead overall to a similar outcome with regard to the incentive effect on the exit of the State as required in point 62 of the Temporary Framework ⁽⁸⁵⁾.
- (158) Second, according to the General Court, the fact that the State's shareholding in DLH is „undesirable” is irrelevant since such an assertion is subjective and lacks any legal force ⁽⁸⁶⁾.
- (159) The General Court also referred to the assertion, made in paragraph 141 of the Initial Decision, that DLH could ask the State to sell its entire shareholding on condition, first, that DLH had repaid Silent Participations I and II, including any interest, and, second, that the price of the shares at the time of sale would be equal to the higher of either the market price or EUR 2.56 per share plus 12 % per annum, calculated for the period between the acquisition and the sale: the General Court noted, as regards the fact that DLH could only request that the State sell its entire shareholding after it had repaid, *inter alia*, Silent Participation II, including any interest, that that possibility necessarily concerned the possible repayment of that participation before its conversion into equity. However, the requirement to provide for a step-up or alternative mechanism with respect to hybrid capital instruments applied after their conversion into equity, as would be apparent from point 68 of the Temporary Framework. Consequently, according to the General Court, that possibility had no relation to DLH's situation after the eventual conversion of Silent Participation II into equity, when the inclusion of such a mechanism, as a rule, had to be provided for ⁽⁸⁷⁾. In addition, as regards the price of the shares at the time they would be sold back by the State, that price was governed by point 63 of the Temporary Framework, which lays down a separate requirement that is additional to, but does not replace, the requirement relating to the inclusion of a step-up or similar mechanism ⁽⁸⁸⁾.
- (160) Third, the General Court held that the fact that the interest rate providing remuneration for Silent Participations I and II increased over time was, under the Temporary Framework, a separate requirement for hybrid capital instruments until their conversion into equity-like instruments, set out in its point 66, which does indeed provide for increasing interest rates over time ⁽⁸⁹⁾. The General Court found that that requirement has an entirely different field of application to that of the requirement, flowing from points 61 and 62 of the Temporary Framework, to provide for a step-up or similar mechanism ⁽⁹⁰⁾.
- (161) According to the General Court, the increase over time of the likelihood that part of Silent Participation II would be converted into equity does not serve to waive the obligation to include a step-up or alternative mechanism ⁽⁹¹⁾. On the contrary, in accordance with point 68 of the Temporary Framework, it would be precisely after such a conversion that a mechanism of that kind must be included with respect to hybrid capital instruments, such as Silent Participation II. In other words, that conversion would trigger the obligation to make provision for such a mechanism and could, therefore, under no circumstances serve to justify the absence of that mechanism ⁽⁹²⁾.

⁽⁸⁴⁾ Judgment, paragraphs 251 and 252.

⁽⁸⁵⁾ Judgment, paragraph 254.

⁽⁸⁶⁾ Judgment, paragraph 258.

⁽⁸⁷⁾ Judgment, paragraph 259.

⁽⁸⁸⁾ Judgment, paragraph 259.

⁽⁸⁹⁾ Judgment, paragraph 260.

⁽⁹⁰⁾ Judgment, paragraph 260.

⁽⁹¹⁾ Judgment, paragraph 261.

⁽⁹²⁾ Judgment, paragraph 261.

- (162) Fourth, the fact that DLH would be subject to the behavioural commitments set out in section 3.11.6 of the Temporary Framework, such as, in particular, a ban on paying dividends, likewise did not replace the obligation to establish a step-up or an alternative mechanism within the meaning of point 62 of the Temporary Framework, since that too was a matter of separate requirements, which are additional to, but are not a substitute for, the requirement set out in points 61 and 62 of the Temporary Framework ⁽⁹³⁾.
- (163) The General Court in the Judgment concluded that the Commission had not demonstrated to the requisite legal standard that the overall structure of the Measure, and in particular the combined effects of its three interconnected components, led overall to incentive effects on the exit of the State from the beneficiary's capital that were comparable to those generated by a step-up or a similar mechanism, within the meaning of point 62 of the Temporary Framework ⁽⁹⁴⁾.
- (164) Considering the above, the Commission has doubts that the Measure can be considered in compliance with points 61 and 62 of the Temporary Framework. That issue will be assessed in the framework of the formal investigation procedure. In that context, the Commission will also assess whether the retroactive introduction in the Measure – which in the meantime has been redeemed – of a step-up mechanism or alternative mechanism to incentivise the exit of the State (e.g., by amending the Framework Agreement between the ESF and DLH) could be deemed necessary and appropriate to ensure compliance of the equity instrument with the Temporary Framework and, ultimately, for the compatibility of the Measure with the internal market pursuant to Article 107(3)(b) TFEU. The Commission invites Germany as well as the interested parties to submit their comments in this respect.

3.3.5.2. Remuneration of the hybrid capital instruments and exit of the State

(a) Silent Participation I

- (165) In accordance with point 65 of the Temporary Framework, the Commission assesses the overall remuneration of Silent Participation I by factoring in the characteristics of the instrument (recitals (170) and (171)), its built-in incentives for exit (recital (172)) and an appropriate benchmark interest rate (recital (169)).
- (166) According to point 66 of the Temporary Framework, hybrid capital instruments, until they are converted into equity-like instruments, must bear a minimum remuneration at least equal to the base rate (1 year IBOR or equivalent as published by the Commission) plus the premium as set out in Table 2:

Table 2

Remuneration of hybrid capital instruments: 1-year IBOR +

Type of recipient	1 st year	2 nd year	3 rd year	4 th year	5 th year	6 th year	7 th year	8 th year and after
Large enterprises	250 bps	350 bps	350 bps	500 bps	500 bps	700 bps	700 bps	950 bps

⁽⁹³⁾ Judgment, paragraph 262.

⁽⁹⁴⁾ Judgment, paragraph 263.

(167) According to recital (52), the remuneration of Silent Participation I will be, at least, ⁽⁹⁵⁾ the following one set out in Table 3 in fixed rates:

Table 3

Remuneration of Silent Participation I (fixed rates)

Remun. SP-I	1 st year	2 nd year	3 rd year	4 th year	5 th year	6 th year	7 th year	8 th year and after
<i>(fixed rates)</i>	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

(168) In order to compare the remuneration of Silent Participation I (fixed rates) to the minimum remuneration set out in the Temporary Framework (variable rates), it is necessary to convert fixed rates into market equivalent variable rates ⁽⁹⁶⁾ taking into account market implicit swap rates on the date of the written request for the capital injection, i.e., on 27 March 2020. The resulting market equivalent variable rates of Silent Participation I would be at least those set out in Table 4:

Table 4

Remuneration of Silent Participation I (market equivalent variable rates) and its margin difference with minimum rates set out in the Temporary Framework

Remun. SP-I	1 st year	2 nd year	3 rd year	4 th year	5 th year	6 th year	7 th year	8 th year
<i>(variable rates. 1-year IBOR +)</i>	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
<i>Difference with minimum TF margins</i>	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

(169) From Table 4, the Commission notes that the remuneration of Silent Participation I was, as an annual average, ⁽⁹⁷⁾ [...] higher than the minimum required under the Temporary Framework.

(170) The Commission also notes that this hybrid instrument is treated as equity under IFRS rules (recital (59)), and it has many features of equity-like instruments, which makes the instrument riskier for the investor ⁽⁹⁸⁾. Therefore, its high remuneration above the minimum required under point 66 of the Temporary Framework took into consideration the additional risk borne by the State as investor due to the fact that that hybrid instrument was very close to equity in terms of seniority, ⁽⁹⁹⁾ was not convertible into shares, bore coupons only payable at DLH's discretion (recital (53)) ⁽¹⁰⁰⁾, and had a potentially unlimited maturity (recital (50)).

⁽⁹⁵⁾ The Temporary Framework foresees yearly remuneration rates starting on the date of the capital injection, while Silent Participation I sets its remuneration in calendar years. Therefore, depending on the exact date of the capital increase, the comparable yearly remuneration of Silent Participation I might slightly deviate. For the purpose of comparison, the remuneration of Silent Participation I assumed that the capital injection would be executed on 23 June 2020, and the actual remuneration would be higher in case of a later execution date.

⁽⁹⁶⁾ DLH, if willing to do so, could convert the fixed rates of Silent Participation I into variable rates via interest rate swap contracts.

⁽⁹⁷⁾ The average was calculated over the first 8 years after the capital injection.

⁽⁹⁸⁾ For example, Silent Participation I could be perpetual, the payment of its coupons could be deferred unilaterally by DLH, and it was a loss/profit participating instrument that could be written-down and replenished.

⁽⁹⁹⁾ In case of loss participation, Silent Participation I was junior to subscribed capital but senior to capital reserves, whereas in case of insolvency, Silent Participation I was senior to subscribed capital and to capital reserves.

⁽¹⁰⁰⁾ Two risk-mitigating factors were (i) the fact that unpaid coupons would accrue compound interests as explained in recital (54), and (ii) the conversion into shares of Silent Participation II-B in case of unpaid coupons (recital (68)).

- (171) To ensure that the coupons were ultimately paid, especially given that DLH had the option not to do so, there were several incentivising mechanisms: (i) interest on unpaid (deferred) coupons was compounded; (ii) even in cases where Silent Participation I was written down, coupons accrued to the initial nominal amount of Silent Participation I; (iii) conversion into shares of Silent Participation II also provided additional incentives to pay the coupons of Silent Participation I; and (iv) the behavioural requirements would apply until the nominal amount of Silent Participation I and its claims would have been fully repaid by the company irrespective of a potential sale of claims.
- (172) As regards the exit incentives for the State's participation, recital (152) is relevant for this assessment. Firstly, Silent Participation I included a yearly increasing interest rate (together with compound interests in case of unpaid coupons), which made it an increasingly costly source of funding for the company. Moreover, before the State's shares could be sold, DLH had to repay in full Silent Participation I. Finally, in accordance with the Temporary Framework, that hybrid instrument needed to be redeemed in order for the behavioural commitments imposed on DLH and its subsidiaries under the Initial Decision to end. All those elements created strong incentives for DLH to repay or to refinance Silent Participation I as soon as possible.
- (173) For those reasons, the Commission considers that, for Silent Participation I, the remuneration for the State and the exit incentives respect the principles set out in points 65 to 70 of the Temporary Framework. This finding was upheld by the General Court in its Judgment, ⁽¹⁰¹⁾ which was not appealed before the Court of Justice on that point.

(b) Silent Participation II

- (174) In accordance with point 65 of the Temporary Framework, the Commission assesses the overall remuneration of Silent Participation II by factoring in the characteristics of the instrument (recital (176)), its built-in incentives for exit (recital (177)) and an appropriate benchmark interest rate (recital (175)).
- (175) As regards the remuneration for the State, according to recital (62), the interest rates of Silent Participation II would be the same as those of Silent Participation I. In terms of interest remuneration, the analysis performed in recitals (165) to (169) applies thus, *mutatis mutandis*, to Silent Participation II. The Commission therefore notes that the remuneration of Silent Participation II was, at least, on annual average [...] above the minimum required under the Temporary Framework.
- (176) The Commission also notes that that hybrid instrument was treated as debt under IFRS rules, and has many features of debt-like instruments ⁽¹⁰²⁾. In light of its risk characteristics, the Commission notes that the minimum remuneration required under point 66 of the Temporary Framework could be considered as sufficient for this type of hybrid instruments, taking into account its subordination status with respect to more senior debt and its particular features ⁽¹⁰³⁾. Therefore, the Commission considers that this instrument was remunerated at coupon rates that were higher than the minimum necessary under the Temporary Framework.
- (177) As regards the exit incentives for the State's participation, recital (152) is relevant for this assessment. The Initial Decision concluded that firstly, Silent Participation II included a yearly increasing interest rate, which made it an increasingly costly source of funding for DLH. Secondly, as long as Silent Participation II-B was not paid back, the potential conversion into equity could be triggered, which could mean further dilution of previous shareholders' ownership of DLH. Thirdly, before the State's shares could be sold, DLH would have to repay in full Silent Participation II. Finally, in accordance with the Temporary Framework, that hybrid instrument had to be fully redeemed in order for all the behavioural commitments imposed on DLH and its subsidiaries to end. All these elements, taken together, according to the Initial Decision, created strong incentives for DLH to repay or to refinance Silent Participation II as soon as possible.

⁽¹⁰¹⁾ Judgment, paragraphs 235 and 241.

⁽¹⁰²⁾ For example, Silent Participation II had a fixed maturity date, its coupons were payable yearly with no option to defer and it was not a loss-taking instrument.

⁽¹⁰³⁾ See Section 2.10.3.

- (178) Compliance of Silent Participation II with the principles set out in point 65 of the Temporary Framework was not contested before the General Court. In turn, the General Court upheld the Commission's finding that, for Silent Participation II, the principles set out in point 66 of the Temporary Framework had been respected,⁽¹⁰⁴⁾ and the Judgment was not appealed before the Court of Justice on that point. By contrast, as mentioned in recitals (156)-(163), the General Court held in the Judgment that those elements did not show to the requisite legal standard that the overall structure of the Measure, and in particular the combined effects of its three interconnected components, led overall to incentive effects on the exit of the State from the beneficiary's capital that were comparable to the incentive effects generated by a step-up or a similar mechanism, within the meaning of point 62 of the Temporary Framework⁽¹⁰⁵⁾.
- (179) Considering the above, the Commission considers that, for Silent Participation II, the Measure respected the principles set out in point 66 of the Temporary Framework.
- (i) Conversion of Silent Participation II into shares
- (180) Point 67 of the Temporary Framework states that *„The conversion of hybrid capital instruments into equity shall be conducted at 5 percent or more below TERP (Theoretical Ex-Rights Price) at the time of the conversion”*.
- (181) Silent Participation II-A could be converted into shares at a fixed price of EUR 2.56 per share (section 2.10.3.1). For Silent Participation II-B, the conversion rate would be the trading share price at the time of conversion minus 10 % or 5.25 %, depending on the triggering event (section 2.10.3.2). According to the Initial Decision, all those conversion prices could be expected to be in line with the requirement laid down in point 67 of the Temporary Framework, although there might exist a market share price below which point 67 of the Temporary Framework would not be met. Germany committed that ESF would need the agreement of the Commission on the exercise of the conversion option, in case the maximum conversion price calculated using the methodology of TERP at the time of conversion minus 5 % would be below the conversion prices set out for Silent Participation II (tranches A or B) at the time of conversion (see section 2.10.3).
- (182) In that regard, the General Court found in the Judgment that the price of the shares at the time of the conversion of Silent Participation II into equity, as approved in the Initial Decision, was not determined on the basis of the TERP, contrary to what was required by point 67 of the Temporary Framework⁽¹⁰⁶⁾.
- (183) According to the General Court, as far as Silent Participation II-A is concerned, that price, set at EUR 2.56 per share, had no connection at all with the methodology required by point 67 of the Temporary Framework⁽¹⁰⁷⁾.
- (184) In addition, as regards Silent Participation II-B, the price was based on the trading price at the time of conversion, minus 10 % or 5.25 %, depending on the triggering event. However, the TERP did not correspond to the actual trading price of the shares at the time of conversion. The General Court concluded that, despite that, the Commission provided no explanation in the Initial Decision as regards the connection, as it saw it, between the requirement for a price „5 percent or more below TERP”, set out in point 67 of the Temporary Framework, and the trading price at the time of conversion, minus respectively 10 % or 5.25 %, as prescribed for Silent Participation II-B⁽¹⁰⁸⁾.
- (185) It follows for the General Court that the Commission neither explained the reasons why it considered justified to set or calculate the price of the shares at the time of the conversion of Silent Participation II into equity without following the methodology laid down in point 67 of the Temporary Framework, nor did it put forward any exceptional circumstance capable of explaining the non-compliance with that methodology⁽¹⁰⁹⁾.

⁽¹⁰⁴⁾ Judgment, paragraph 235.

⁽¹⁰⁵⁾ Judgment, paragraph 263.

⁽¹⁰⁶⁾ Judgment, paragraph 276.

⁽¹⁰⁷⁾ Judgment, paragraph 277.

⁽¹⁰⁸⁾ Judgment, paragraph 278.

⁽¹⁰⁹⁾ Judgment, paragraph 279.

- (186) Second, the General Court found that the Commission acknowledged in recital 158 of the Initial Decision that the price as accepted might not comply with point 67 of the Temporary Framework. Nonetheless the Commission found that the measure at issue satisfied the requirements set out in that point on the ground that Germany had undertaken to seek its authorisation if the price calculated in accordance with point 67 would be below that set out in the measure at issue ⁽¹¹⁰⁾.
- (187) The General Court considered that the Commission could not be permitted to depart from the rules laid down in the Temporary Framework on the ground that the Member State concerned undertook to seek its authorisation *ex post*. An aid measure must be declared compatible with the internal market *ex ante*, before it may be implemented. The Commission could therefore not postpone its decision on the compatibility of an aid measure with the internal market if it found, as in the present case, that an aspect of that measure was liable to infringe the rules applicable in that area ⁽¹¹¹⁾.
- (188) Moreover, the General Court found, that the undertaking given by the Member State concerned was not capable of guaranteeing that the rule set out in point 67 of the Temporary Framework would be complied with. The General Court considered that Germany did not commit itself, in substantive terms, to ensure, at the appropriate time, that the price of the shares of Silent Partnership II, at its conversion into equity, would comply with the requirements of point 67, for example by undertaking to adjust that price to the level laid down in the aforementioned point of the Temporary Framework, but only, as a matter of procedure, to seek the Commission's authorisation before exercising its right to conversion ⁽¹¹²⁾.
- (189) According to the General Court, the Commission in fact merely postponed its decision in that regard, even though it was aware of the fact that the price of the shares at the time of the conversion of Silent Participation II into equity could prove to be incompatible with point 67 of the Temporary Framework ⁽¹¹³⁾.
- (190) The General Court therefore found that the Commission had infringed point 67 of the Temporary Framework ⁽¹¹⁴⁾.
- (191) Considering the above, the Commission has doubts that the criteria for conversion of Silent Participation II into shares can be considered in compliance with point 67 of the Temporary Framework. That issue will be assessed in the framework of the formal investigation procedure. In that context, the Commission will also assess whether the retroactive introduction in the Measure – which in the meantime has been redeemed – of a revised methodology of the conversion of Silent Participation II into shares could be deemed necessary and appropriate to ensure its compliance with the Temporary Framework, and, ultimately, for its compatibility with the internal market under point 107(3)(b) TFEU. The Commission invites Germany as well as the interested parties to submit their comments in this respect.
- (ii) Step-up mechanism after conversion of Silent Participation II into shares
- (192) Point 68 of the Temporary Framework states, for hybrid instruments, that „*After conversion into equity, a step-up mechanism must be included to increase the remuneration of the State, to incentivise the beneficiaries to buy back the State capital injections.[...]*”. The Commission observes that none of the tranches of Silent Participation II includes such a step-up mechanism after conversion into equity.
- (193) However, point 68 of the Temporary Framework allows the Commission to accept „*alternative step-up mechanisms provided they have the same incentive effect and a similar overall impact on the State's remuneration*”, and point 70 of the Temporary Framework recalls that hybrid instrument remuneration shall in any event reflect the risk of the particular instruments.

⁽¹¹⁰⁾ Judgment, paragraph 280.

⁽¹¹¹⁾ Judgment, paragraph 283.

⁽¹¹²⁾ Judgment, paragraph 284.

⁽¹¹³⁾ Judgment, paragraph 285.

⁽¹¹⁴⁾ Judgment, paragraph 286.

- (194) The Commission noted (see recital 153 of the Initial Decision) that the interest remuneration of Silent Participation II was, at least, on average [...] higher than the minimum required by the Temporary Framework. The Commission also noted (see recitals (148) and (149)) in the Initial Decision that the State subscribed DLH's new shares at a steep discount to the market price and to the Maximum Share Price⁽¹¹⁵⁾. Indeed, according to the Initial Decision those two elements together more than compensated at entry for the loss of shares caused by the absence of step-up mechanisms both in the equity participation and in Silent Participation II after conversion⁽¹¹⁶⁾. The total final discount for the State, after compensation for all potential step-ups and adjusted for over-remuneration of interests on Silent Participation II (that is, the higher remuneration than the minimum required in the Temporary Framework), was estimated to be at a level of at least [60-70] % to Maximum Share Price. Finally, the overall built-in exit incentives in the whole Measure (see recitals (152), (153), (172) and (177)) were deemed sufficient to compensate for the lack of a step-up in terms of exit incentive for the State's intervention.
- (195) The General Court in the Judgment held that for the same reasons as set out in recitals (156) to (163), those considerations were not sufficient to justify the absence of a step-up mechanism or another mechanism that satisfied the conditions under point 68 of the Temporary Framework⁽¹¹⁷⁾.
- (196) Finally, as regards point 70 of the Temporary Framework, referred to in recital 160 of the Initial Decision, the General Court noted that „*since the nature of hybrid instruments varies significantly, the Commission does not provide guidance for all types of instruments*“. The General Court found that the Commission did not provide any explanation of the specific features of the nature of Silent Participation II that would distinguish it from other types of hybrid capital instruments such that point 70 would have any relevance to the present case. In any case, according to the General Court, that point provides that, „*hybrid instruments shall in any event follow the principles* [referred to in the preceding paragraphs of the Temporary Framework]“. Consequently, according to the General Court, point 70 of the Temporary Framework did not relieve the Commission of the obligation to verify that the hybrid capital instrument at issue conformed to the principles set out in that section of the Temporary Framework, including the one that relates to the need to ensure that the hybrid capital instrument concerned is accompanied by a mechanism likely to lead to incentive effects on the exit of the State from the capital of the beneficiary concerned that are similar to those that are integral to the step-up mechanism⁽¹¹⁸⁾.
- (197) Considering the above, the Commission has doubts that the absence of a specific step-up mechanism after conversion of Silent Participation II into shares can be considered in compliance with point 68 of the Temporary Framework. That issue will be assessed in the framework of the formal investigation procedure. In that context, the Commission will also assess whether the retroactive introduction in the Measure – which in the meantime has been redeemed – of a step-up mechanism or alternative mechanism to incentivise the exit of the State could be deemed necessary and appropriate to ensure compliance of Silent Participation II with the Temporary Framework, and ultimately for the compatibility of the Measure with the internal market pursuant to Article 107(3)(b) TFEU. The Commission invites Germany as well as the interested parties to submit their comments in this respect.

⁽¹¹⁵⁾ The State paid around EUR 306 million for an equity stake of 20 % worth more than EUR 933 million at the time of the written request for the capital injection, constituting a discount of more than 72 % to Maximum Share Price.

⁽¹¹⁶⁾ The potential loss of the State due to the lack of a step-up mechanism in the equity participation was estimated at EUR [60-70] million, and the loss due to the lack of a step-up in the Silent Participation II at around EUR [90-100] million. On the flip side, the profits due to the deep entry discount were estimated at more than EUR [600-700] million, and the additional interest remuneration of the Silent Participation II during [...] years was estimated at EUR [100-200] million. Those profits were deemed enough to compensate for previously mentioned losses, and still allowing for EUR [500-600] million in profits resulting from a significant final discount at entry.

⁽¹¹⁷⁾ Judgment, paragraph 261.

⁽¹¹⁸⁾ Judgment, paragraph 266.

(iii) Conclusion on Silent Participation II

(198) For those reasons, the Commission has doubts that, for Silent Participation II, the terms of conversion into equity and the exit incentives after conversion of Silent Participation II into equity respect the principles set out in points 67 and 68 of the Temporary Framework. That issue will be assessed in the framework of the formal investigation procedure. It will also be assessed if a retroactive amendment of Silent Participation II (e.g., by amending the Framework Agreement between the ESF and DLH) could be deemed necessary and appropriate to ensure compliance with the Temporary Framework, and ultimately for the compatibility of the Measure with the internal market pursuant to Article 107(3)(b) TFEU. The Commission invites Germany as well as the interested parties to submit their comments in this respect.

3.3.6. Governance and prevention of undue distortions of competition

(199) According to point 71 of the Temporary Framework, the beneficiary of a COVID-19 recapitalisation should not engage in aggressive commercial expansion and excessive risk taking. The business plan of DLH showed that DLH was preparing a prudent and progressive return to its standard volume of activity. In addition, DLH would respect the conditions referred to in section 3.11.6 of the Temporary Framework („Governance and prevention of undue distortions of competition”).

(200) According to point 72 of the Temporary Framework, if the beneficiary of a COVID-19 recapitalisation measure above EUR 250 million is an undertaking with SMP on at least one of the relevant markets in which it operates, Member States must propose additional measures to preserve effective competition in those markets. The Measure concerns a EUR 6 billion recapitalisation in favour of LH Group. Therefore, in the present decision the Commission will assess whether DLH had SMP for the purposes of point 72 of the Temporary Framework.

3.3.6.1. Identification of the relevant markets

(201) In its prior decisional practice related to mergers in the air transport sector, the Commission has defined the relevant markets for scheduled passenger air transport services on the basis of two approaches: (i) the „point of origin/point of destination” („O&D”) city-pair approach, where the target was an active air carrier; ⁽¹¹⁹⁾ and (ii) the „airport-by-airport” approach, when the target included an important slot portfolio ⁽¹²⁰⁾.

(202) Under the O&D approach, every combination of an airport or city of origin to an airport or city of destination is defined as a distinct market. That market definition reflects the demand-side perspective, whereby passengers consider all possible alternatives of travelling from a city of origin to a city of destination, which they do not consider substitutable for a different city pair.

(203) While the Commission has generally given pre-eminence to demand-side substitution, it has also acknowledged that, from the supply-side perspective, competition between air carriers also takes place on a network level, as network carriers build their network and decide to fly essentially on routes connecting to their hubs ⁽¹²¹⁾. Some low-cost carriers have also claimed that, with the growth of point-to-point airlines, supply-side substitution is an increasingly important aspect of the market definition ⁽¹²²⁾.

⁽¹¹⁹⁾ See e.g. Cases M.8869 – *Ryanair/LaudaMotion*, paragraphs 96-97; M.7541 – *IAG/Aer Lingus*, paragraph 14; M.7333 – *Alitalia/Etihad*, paragraph 63; M.6447 – *IAG/bmi*, paragraph 31.

⁽¹²⁰⁾ See e.g. Cases M.8869 – *Ryanair/LaudaMotion*, paragraph 116; M.8672 – *easyJet/Certain Air Berlin Assets*, paragraph 41; M.8633 – *Lufthansa/Certain Air Berlin Assets*, paragraph 58; M.6447 – *IAG/bmi*, paragraph 483. For Cases M.8672 – *easyJet/Certain Air Berlin Assets* and M.8633 – *Lufthansa/Certain Air Berlin Assets*, the Commission only carried out an airport-by-airport assessment, since the target assets were not used on any route at the time of the transaction (Air Berlin had definitively ceased its flight operations on all routes due to its insolvency).

⁽¹²¹⁾ See e.g. Cases M.7541 – *IAG/Aer Lingus*, paragraphs 17-18; M.6607 – *US Airways/American Airlines*, paragraph 10; M.6447 – *IAG/bmi*, paragraph 31.

⁽¹²²⁾ See e.g. Case M.6663 – *Ryanair/Aer Lingus III*, paragraph 57.

- (204) Under the airport-by-airport approach, every airport (or substitutable airports) is defined as a distinct market. That market definition enables the Commission to assess the effects of a transaction on the operation of passenger air transport services at a given airport on the basis notably of the slot portfolio held by a carrier at the airport, without distinguishing between the specific routes served to or from that airport.
- (205) The airport-by-airport approach has been adopted, in particular, to assess the effects of the strengthening of an airline's position at certain airports and the risks to effective competition entailed by the concentration of slots at certain airports in the hands of a single undertaking⁽¹²³⁾. The Commission has aggregated all routes originating or terminating in an airport for the purpose of defining the relevant situation absent the transaction, in particular, in the case of an air carrier that would have entered into insolvency proceedings⁽¹²⁴⁾.
- (206) For those reasons, the Commission considers that the markets in which the beneficiary operates that are relevant for the purposes of assessing the distortive effects of the Measure on competition are the markets for the provision of passenger air transport services to and from the airports served by the beneficiary. That conclusion is confirmed by the fact that the Measure aimed at preserving the overall ability of the beneficiary to operate air transport services, notably ensuring the preservation of its assets and its rights to operate in the medium/long term. Those assets and rights are not assigned, in principle, to any particular route. This is particularly true for slots at a coordinated airport,⁽¹²⁵⁾ which may be highly valuable and may be used on any route to and from the airport⁽¹²⁶⁾. That conclusion is also supported by the Commission Notice on the definition of relevant market,⁽¹²⁷⁾ which stated, in its footnote 1, that the focus of assessment in State aid cases is the recipient of the aid at issue and the industry or sector concerned rather than the identification of the competitive constraints faced by that recipient.
- (207) The Measure supported the operations of the DLH overall and may have therefore potentially affected competition on all routes originating and arriving at an airport at which it held slots, regardless of the specific competitive position of DLH on any of those specific routes. Considering that the Measure did not lead to a strengthening of DLH's position on certain O&Ds as opposed to others but produced effects on the overall situation of DLH, it is not appropriate to analyse the impact of the Measure on each of those routes separately. Instead, for the purposes of applying point 72 of the Temporary Framework, it is appropriate to follow the „airport-by-airport” approach and define as relevant markets the airports at which DLH supplied passenger air transport services. The beneficiary's power on such relevant markets will be assessed *inter alia* on the basis of the shares of supply (frequencies and seat capacity) by DLH, the level of congestion of the airports and the beneficiary's shares of airport infrastructure capacity that it has the permission to use for its operations (i.e., shares of slots)⁽¹²⁸⁾.

3.3.6.2. Overview of the relevant airports

- (208) For the reasons explained below, the Commission considers that only the coordinated airports in the EU at which DLH had a base before the COVID-19 outbreak are relevant for the purpose of applying point 72 of the Temporary Framework, for the following reasons:

⁽¹²³⁾ See e.g. Case Case M.8869 – Ryanair/LaudaMotion.

⁽¹²⁴⁾ See Case M.6447 – IAG/bmi, paragraphs 136-157.

⁽¹²⁵⁾ According to Article 2 of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L14, 22.1.1993, p. 1) (the „Slot Regulation”), a „coordinated airport” means „an airport where a coordinator has been appointed to facilitate the operations of air carriers operating or intending to operate at that airport”.

⁽¹²⁶⁾ See presentation by DLH „SA.57153 –Deutsche Lufthansa Revised Proposal and its Effects” dated 26 May 2020, page 4: „Slots can be utilized flexibly through a large slot portfolio and ensure feeder traffic to hub, enabling DLH to be competitive on long-haul routes. Flexibility will be even more important for hub systems in the next years as hygiene standards and control mechanisms will impact connectivity, e.g., by factoring in significantly longer minimum connecting time, and therefore require nimble adaptations of flight schedules.”

⁽¹²⁷⁾ Version at the time when the Measure was granted (Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5)).

⁽¹²⁸⁾ See examples by analogy: Case M.8633 – Lufthansa/Certain Air Berlin Assets; Case M.8672 – easyJet/Certain Air Berlin Assets.

- (209) First, in the context of that assessment, DLH is highly unlikely to have SMP at airports at which it has no base. The fact that an air carrier has a base at a given airport indicates that it is established at that airport on a long-term basis, which enables it to exert a more sustained level of competitive pressure on its competitors operating at the same airport. Furthermore, according to the case-law⁽¹²⁹⁾, the possession of a base confers certain advantages, such as the flexibility to switch between routes, the redeployment of aircraft, the minimising of disruption costs, the exchange of crews, customer care and brand awareness. In addition, the establishment of a base at a particular airport generally implies that some of the carrier's staff are assigned to that base and the aircraft stationed at that base may be deployed on any of the O&Ds departing from it. It follows that a carrier that possesses a base at a particular airport is more likely to establish a stable and long-term presence than a carrier operating at that airport with no base there.
- (210) Second, DLH is unlikely to have significant market power at airports that do not qualify as coordinated under the Slot Regulation. At those airports, the demand for infrastructure, in particular slots, significantly exceeds the capacity, while the expansion of infrastructure to meet demand is not possible in the short term. Conversely, at non-coordinated airports, the capacity generally exceeds demand from airlines and there are sufficient available slots to enable the entry or expansion of a competitor on such a scale as to deter any attempt by DLH to increase prices on O&Ds to and from the airport.
- (211) Third, the rules on State aid apply only within the EU territory. The Commission has no jurisdiction to examine whether the beneficiary holds SMP at an airport located in a non-EU country.
- (212) In that context, on 4 June 2020, the Commission requested information from Germany regarding data about DLH's position during the Summer 2019 IATA Season and Winter 2019/2020 IATA Season at the airports in the EU at which it had a base.
- (213) In its reply of 7 June 2020, Germany explained that DLH operated a base at 15 airports in the EU during the Summer 2019 IATA Season or Winter 2019/2020 IATA Season⁽¹³⁰⁾. Of those 15 airports, ten⁽¹³¹⁾ were coordinated airports⁽¹³²⁾. For the purpose of assessing DLH's position at those coordinated airports, it is necessary to consider whether they were substitutable with other airports in view of their overlapping catchment areas and, therefore, whether they belong to the same relevant market as these other airports.
- (214) Out of the ten coordinated airports in the EU where DLH operated a base, seven airports served cities or regions that were also served by at least one other airport⁽¹³³⁾. The Commission found in the Initial Decision, that it was not necessary to conclude on the substitutability of Berlin Tegel, Stuttgart and Brussels airports with other airports,⁽¹³⁴⁾ as DLH was unlikely to have SMP even under the narrowest geographic market definition (limited to the airport at which DLH was based).

⁽¹²⁹⁾ See judgment of 6 July 2010, *Ryanair v Commission*, T 342/07, EU:T:2010:280, paragraph 269.

⁽¹³⁰⁾ They are: Berlin Tegel airport, Bologna airport, Brussels airport, Cologne-Bonn airport, Dortmund airport, Düsseldorf airport, Frankfurt airport, Hamburg airport, Hannover airport, Munich airport, Palma de Mallorca airport, Salzburg airport, Stuttgart airport, Verona airport, and Vienna airport.

⁽¹³¹⁾ In the Initial Decision, the Commission had stated that nine airports were coordinated airports. In the Correcting Decision, the Commission found that Hannover airport was also a coordinated airport. Hannover airport has therefore also been included in the analysis of coordinated airports in this Decision.

⁽¹³²⁾ They are: Berlin Tegel airport, Brussels airport, Düsseldorf airport, Frankfurt airport, Hamburg airport, Hannover Airport, Munich airport, Palma de Mallorca airport, Stuttgart airport, and Vienna airport.

⁽¹³³⁾ They are: Berlin Tegel airport, which may be substitutable with Berlin Schönefeld airport; Brussels airport, which may be substitutable with Charleroi airport; Düsseldorf airport, which may be substitutable with Cologne-Bonn, Dortmund, and Weeze Niederrhein airports; Frankfurt airport, which may be substitutable with Frankfurt-Hahn airport; Munich airport, which may be substitutable with Memmingen airport; Stuttgart airport, which may be substitutable with Karlsruhe/Baden-Baden airport; and Vienna airport, which may be substitutable with Bratislava airport.

⁽¹³⁴⁾ See Sections 3.3.6.4.5, 3.3.6.4.6 and 3.3.6.4.

- (215) With regard to Frankfurt and Vienna airports, the Commission has concluded in a prior merger decision that the geographic market relevant for assessing an air carrier's power for the provision of passenger air transport services to/from the airport ⁽¹³⁵⁾ was limited to, respectively, Frankfurt and Vienna airports ⁽¹³⁶⁾.
- (216) With regard to Düsseldorf and Munich airports, the Commission has concluded in two prior merger decisions that the geographic market relevant for assessing an air carrier's power for the provision of passenger air transport services to/from the airport was limited to, respectively, Düsseldorf and Munich airports ⁽¹³⁷⁾.

3.3.6.3. Assessment of DLH's market power at the relevant airports

3.3.6.3.1. Conditions for SMP at the relevant airports

- (217) For the purpose of the assessment of SMP in this case, the Commission will take into account the competitive structure of the market, and in particular (i) constraints imposed by the existing suppliers from, and the position on the market of the beneficiary and its actual competitors, and (ii) constraints imposed by the credible threat of future expansion by those actual competitors or entry by potential competitors.
- (218) Market shares expressed by reference to the number of flights offered (frequencies) or deployed seats at a relevant airport provide a useful first indication of the market position of an airline and of the actual competitive constraints to which it is subject. However, they do not reflect the constraints derived from potential competition.
- (219) For that purpose, the Commission considers that the barriers to expansion or entry faced by other air carriers than the beneficiary should be principally taken into account in the assessment. To be able to provide passenger air transport, an air carrier needs access to airport infrastructure. At coordinated airports, an air carrier must hold slots to operate routes from or to those airports. In fact, in accordance with the case-law ⁽¹³⁸⁾, the main barrier to entry in the Union air transport sector is the lack of available slots at large airports. In that context, a high level of airport congestion reflects the airport capacity limitations faced by an air carrier, which affects the ability of that air carrier to effectively constrain the conduct of the beneficiary.
- (220) In light of the above, an air carrier's slot holding at an airport, together with the congestion rate at that airport, provide the most accurate measure of the air carrier's ability to compete on the passenger air transport market to or from that airport. They therefore provide the most accurate indication of the market structure and of the relative importance of the beneficiary and its competitors at an airport.

3.3.6.3.2. Methodology

- (221) A share of flights (or frequencies) is defined as the ratio between the number of flights (or frequencies) operated by an air carrier at an airport and the total number of flights (or frequencies) operated by all air carriers at the airport. It corresponds to the ratio between the number of slots used by an air carrier at an airport and the total number of slots used by all air carriers at the airport. It also corresponds to the ratio between the number of slots allocated to an air carrier at an airport and the total number of slots allocated to all air carriers at the airport.

⁽¹³⁵⁾ Such an assessment under the airport-by-airport approach requires assessing substitutability of airports from the point of view of air carriers, acting as customers of airport infrastructure services. Air carriers' choice of airports depends not only on passengers' demand, but also on other criteria, such as the costs of operating from a particular airport, capacity constraints for slots and facilities, passenger volumes or the positioning of the airport. Therefore, the geographic market definition under the airport-by-airport approach may deviate from the geographic market definition under the O&D approach.

⁽¹³⁶⁾ See Case M.8869 – *Ryanair/LaudaMotion* (2018), paragraphs 213 and 264 for Frankfurt airport, and paragraphs 229 and 243 for Vienna airport.

⁽¹³⁷⁾ See Cases M.8633 – *Lufthansa/Certain Air Berlin assets* (2017), paragraphs 83 and 130 for Düsseldorf airport, and paragraphs 91 and 134 for Munich airport; M.8869 – *Ryanair/LaudaMotion* (2018), paragraphs 206 and 258 for Düsseldorf airport, and paragraphs 226 and 270 for Munich airport.

⁽¹³⁸⁾ See judgment of 4 July 2006, *easyJet v Commission*, T-177/04, EU:T:2006:187, paragraph 166.

- (222) A share of seats is defined as the ratio between the number of seats deployed by an air carrier at an airport and the total number of seats deployed by all air carriers at the airport. It is therefore an indicator of the percentage of capacity offered by an air carrier out of the overall capacity offered at the airport.
- (223) The Commission considers that an air carrier having a share of flights and a share of seats below 40 % at an airport is unlikely to have significant market power at that airport.
- (224) In turn, a slot holding is defined as the ratio between the number of slots held by an air carrier (or the air carriers that are part of the same group) ⁽¹³⁹⁾ at an airport and the total available slots at that airport (i.e., the airport capacity corresponding to the sum of slots allocated to all air carriers and the number of slots not allocated, which could be used for the expansion or entry of air carriers at the airport).
- (225) The Commission uses the qualification as a coordinated airport under the Slot Regulation as a first proxy of a high congestion level of an airport.
- (226) For coordinated airports, the actual congestion rate is calculated by dividing the number of slots allocated to all airlines at the airport in the relevant IATA season by the total capacity of the airport (in terms of slots) in that IATA season. An average congestion rate during the operating hours of less than 60 % would not be *prima facie* problematic ⁽¹⁴⁰⁾.
- (227) Germany has provided data on DLH's share of frequencies, share of seats and slot holding at the relevant airports and on the congestion rates at those airports. For DLH's competitors, Germany has provided the number of slots allocated to them at Frankfurt and Munich airports, as well as an estimation of the number of aircraft they base at the relevant airports. The Commission has checked the overall accuracy of the data submitted by Germany based, *inter alia*, on statistical data collected by the Online Coordination System.
- (228) Based on those data, out of the ten relevant airports, DLH's share of operated weekly frequencies and share of deployed seats were below 40 % during Summer 2019 IATA Season and Winter 2019/2020 IATA Season at two of those coordinated airports: Berlin Tegel airport (below [30-40] %) and Palma de Mallorca airport (below [10-20] %). Therefore, DLH was unlikely to have SMP at those airports.
- (229) The eight coordinated airports in the EU where DLH's share of operated weekly frequencies or of deployed seats exceeded 40 % during Summer 2019 IATA Season or Winter 2019/2020 IATA Season are: Brussels airport, Düsseldorf airport, Frankfurt airport, Hamburg airport, Hannover airport, Munich airport, Stuttgart airport, and Vienna airport. For those airports, it is not possible to exclude, on the basis of DLH's market shares in terms of frequencies and seats offered, that DLH had significant market power pursuant to point 72 of the Temporary Framework.
- (230) In light of the above and of the analytical framework applied by the Commission in prior merger decisions, ⁽¹⁴¹⁾ the Commission will thus further assess DLH's market power at those eight airports, by taking account of the following additional indicators together: (i) DLH's slot holding at the airport, in particular, at peak times; ⁽¹⁴²⁾ and (ii) the level of congestion at the airport.

⁽¹³⁹⁾ In this case, DLH's slot holding is calculated on the basis of slots held by Lufthansa Passenger Airlines, Swiss International Air Lines, Brussels Airlines, Austrian Airlines, Air Dolomiti, Eurowings, Edelweiss Air and SunExpress.

⁽¹⁴⁰⁾ The conditions of operation at the relevant airports may differ due to, notably, different opening hours, night-flight bans and movement restrictions. For the sake of comparability, the Commission has considered DLH's slot holding and airport congestion rate between 6:00 and 21:59 local time (i.e. between 4:00 and 19:59 UTC during IATA Summer Season and between 5:00 and 20:59 UTC during IATA Winter Season).

⁽¹⁴¹⁾ See notably Case M.8633 – *Lufthansa/Certain Air Berlin assets* (2017), paragraphs 165-184.

⁽¹⁴²⁾ The Commission qualifies as „peak times“ the hour bands for which the congestion rate at a given airport is very high, and therefore very limited, or no capacity for entry or expansion is left.

3.3.6.4. Assessment of DLH's market power at Brussels airport, Düsseldorf airport, Frankfurt airport, Hamburg airport, Hannover airport, Munich airport, Stuttgart airport, and Vienna airport

3.3.6.4.1. Frankfurt airport

DLH's shares of frequencies and seats

- (231) At Frankfurt airport, DLH's market shares exceeded 40 % based on weekly frequencies and deployed seats (Summer 2019 IATA Season: [60-70] % based on weekly frequencies and [60-70] % based on deployed seats; Winter 2019/2020 IATA Season: [70-80] % based on weekly frequencies and [60-70] % based on deployed seats).

DLH's slot holding and airport's congestion

IATA Season	DLH's average slot holding	DLH's three highest slot holdings	Airport's average congestion rate	Airport's three highest congestion rates
Summer 2019	[50-60] %	[75-85] % (hour band: 14:00-14:59 UTC) [70-80] % (hour band: 18:00-18:59 UTC) [70-80] % (hour band: 7:00-7:59 UTC)	[80-90] %	[>100] % (hour band: 7:00-7:59 UTC) [>100] % (hour band: 14:00-14:59 UTC) [90-100] % (hour band: 10:00-10:59 UTC)
Winter 2019/2020	[40-50] %	[60-70] % (hour band: 15:00-15:59 UTC) [55-65] % (hour band: 19:00-19:59 UTC) [55-65] % (hour band: 8:00-8:59 UTC)	[60-70] %	[80-90] % (hour band: 8:00-8:59 UTC) [80-90] % (hour band: 11:00-11:59 UTC) [80-90] % (hour band: 15:00-15:59 UTC)

- (232) In Summer 2019 IATA Season and Winter 2019/2020 IATA Season, Germany estimated that DLH's share in slot holding at Frankfurt airport was respectively [50-60] % and [40-50] %. Consequently, DLH's operations represented a significant share of the airport capacity during that airport's opening hours.

- (233) In addition, in Summer 2019 IATA Season, DLH's highest share during any specific hour band at Frankfurt airport reached [75-85] %. That hour band corresponded to the second-most congested hour band at Frankfurt airport (above 100 %). In Winter 2019/2020 IATA Season, DLH's highest share during any specific hour band at Frankfurt airport reached [60-70] %. That hour band corresponded to the third-most congested hour band at Frankfurt airport ([80- 90] %). At peak times, the DLH's slot holding at Frankfurt airport would thus represent most of the available capacity at that airport.

- (234) In Summer 2019 IATA Season and Winter 2019/2020 IATA Season, Germany estimated that the average congestion rate during the relevant opening hours of Frankfurt airport amounted to respectively [80-90] % and [60-70] %.
- (235) In Summer IATA Season, as reflected by the actual level of congestion, Frankfurt airport is a coordinated airport with limited available capacity (below 14 % on average), especially at peak times where the airport capacity is fully used. In Winter IATA Season, although Frankfurt airport is coordinated, the actual level of congestion indicates that there are still available slots for entry or expansion at the airport. As an exception, there is limited capacity available at peak times (below 20 %).

DLH’s competitors’ slot holdings

- (236) In Summer 2019 IATA Season, the second- and third-largest slot holders at Frankfurt airport were respectively Condor and Ryanair, with a share in slot holding of approximately 4 % each. In Winter 2019/2020 IATA Season, the second- and third-largest slot holders at Frankfurt airport were respectively Ryanair (with a share in slot holding of approximately 3 %) and Condor (with a share in slot holding of approximately 2 %).
- (237) In addition, DLH deployed by far the largest fleet at the airport with [200-300] aircraft in July 2019. According to DLH’s estimates, the second-largest carrier operating a base at Frankfurt airport was Ryanair with 10 aircraft, followed by TUIfly (5 aircraft) and Condor (3 aircraft).

Conclusion on DLH’s market power

- (238) Given (i) DLH’s high shares of weekly frequencies and deployed seats at Frankfurt airport in both IATA Seasons (above [60-70] %); (ii) DLH’s significant share of Frankfurt airport capacity (above [50-60] % on average in Summer IATA Season and up to [75-85] % at peak times; above [40-50] % in Winter IATA Season and up to [60-70] % at peak times), (iii) the limited airport capacity available at Frankfurt airport, and (iv) the fragmentation of the capacity allocated to other carriers (the second largest based carrier operating 10 aircraft, compared to [200-300] aircraft for DLH), the Commission preliminarily finds that, for the purposes of this Decision, DLH appears to have SMP on the market for the provision of passenger air transport services to and from Frankfurt airport.

3.3.6.4.2. Munich airport

DLH’s shares of frequencies and seats

- (239) At Munich airport, DLH’s market shares exceeded 40 % based on weekly frequencies and deployed seats (Summer 2019 IATA Season: [65-75] % based on weekly frequencies and [60-70] % based on deployed seats; Winter 2019/2020 IATA Season: [65-75] % based on weekly frequencies and [70-80] % based on deployed seats).

DLH’s slot holding and airport’s congestion

IATA Season	DLH’s average slot holding	DLH’s three highest slot holdings	Airport’s average congestion rate	Airport’s three highest congestion rates
Summer 2019	[45-55] %	[75-85] % (hour band: 12:00-12:59 UTC) [65-75] % (hour band: 9:00-9:59 UTC) [65-75] % (hour band: 13:00-13:59 UTC)	[75-85] %	[90-100] % (hour band: 12:00-12:59 UTC) [90-100] % (hour band: 9:00-9:59 UTC) [90-100] % (hour band: 8:00-8:59 UTC)

IATA Season	DLH's average slot holding	DLH's three highest slot holdings	Airport's average congestion rate	Airport's three highest congestion rates
Winter 2019/2020	[35-45] %	[65-75] % (hour band: 13:00-13:59 UTC) [50-60] % (hour band: 10:00-10:59 UTC) [50-60] % (hour band: 9:00-9:59 UTC)	[60-70] %	[80-90] % (hour band:13:00-13:59 UTC) [80-90] % (hour band: 9:00-9:59 UTC) [80-90] % (hour band: 10:00-10:59 UTC)

- (240) In Summer 2019 IATA Season and Winter 2019/2020 IATA Season, Germany estimated that DLH's share in slot holding at Munich airport was respectively [45-55] % and [35-45] %. Consequently, DLH's operations represented a significant share of the airport capacity during that airport's opening hours.
- (241) In addition, in Summer 2019 IATA Season, DLH's highest share during any specific hour band at Munich airport reached [75-85] %. That hour band corresponded to the most congested hour band at Munich airport ([90-100] %). In Winter 2019/2020 IATA Season, DLH's highest share during any specific hour band at Munich airport reached [65-75] %. That hour band corresponded to the most congested hour band at Munich airport ([80-90] %). At peak times, DLH's slot holding at Munich airport would thus represent most of the available capacity at that airport.
- (242) In Summer 2019 IATA Season and Winter 2019/2020 IATA Season, Germany estimated that the average congestion rate during the relevant opening hours of Munich airport amounted to respectively [70-80] % and [55-65] %.
- (243) In Summer IATA Season and Winter IATA Season, although Munich airport is coordinated, there are still available slots for entry or expansion at the airport. However, capacity is fully used during peak times in Summer IATA Season and there is limited capacity available during peak times in Winter IATA Season (below 20 %).

DLH's competitors' slot holdings

- (244) In Summer 2019 IATA Season, the second- and third-largest slot holders at Munich airport were respectively easyJet and Condor, with a share in slot holding of approximately 2 % each. In Winter 2019/2020 IATA Season, the second- and third-largest slot holders at Munich airport were respectively easyJet (with a share in slot holding of approximately 2 %) and British Airways (with a share in slot holding of approximately 1 %).
- (245) In addition, DLH deployed by far the largest fleet at the airport with [100-200] aircraft in July 2019. According to DLH's estimates, the second-largest carriers operating a base at Munich airport were Condor and TUIfly (3 aircraft each).

Conclusion on DLH's market power

- (246) Given (i) DLH's high shares of weekly frequencies and deployed seats at Munich airport in both IATA Seasons (above [65-70] %); (ii) DLH's significant share of Munich airport capacity ([50-60] % on average in Summer IATA Season and up to [75-85] % at peak times; [35-45] % in Winter IATA Season and up to [65-75] % at peak times), (iii) the limited airport capacity available at Munich airport at peak times, and (iv) the fragmentation of the capacity allocated to other carriers (the largest based carrier operating 3 aircraft, compared to [100-200] aircraft for DLH), the Commission preliminarily finds that, for the purposes of this Decision, DLH appears to have SMP on the market for the provision of passenger air transport services to and from Munich airport.

3.3.6.4.3. Düsseldorf airport

DLH's shares of frequencies and seats

- (247) At Düsseldorf airport, DLH's market shares exceeded 40 % based on weekly frequencies and deployed seats (Summer 2019 IATA Season: [50-60] % based on weekly frequencies and [45-55] % based on deployed seats; Winter 2019/2020 IATA Season: [50-60] % based on weekly frequencies and [45-55] % based on deployed seats).

DLH's slot holding and airport's congestion

IATA Season	DLH's average slot holding	DLH's three highest slot holdings	Airport's average congestion rate	Airport's three highest congestion rates
Summer 2019	[40-50] %	[55-65] % (hour band: 16:00-16:59 UTC) [50-60] % (hour band: 15:00-15:59 UTC) [50-60] % (hour band: 8:00-8:59 UTC)	[80-90] %	[90-100] % (hour band: 8:00-8:59 UTC) [90-100] % (hour band: 9:00-9:59 UTC) [90-100] % (hour band: 15:00-15:59 UTC)
Winter 2019/2020	[30-40] %	[50-60] % (hour band: 17:00-17:59 UTC) [45-55] % (hour band: 9:00-9:59 UTC) [35-45] % (hour band: 16:00-16:59 UTC)	[60-70] %	[90-100] % (hour band: 9:00-9:59 UTC) [80-90] % (hour band: 17:00-17:59 UTC) [70-80] % (hour band: 16:00-16:59 UTC)

- (248) Germany estimated that DLH's share in slot holding at Düsseldorf airport was above 40 % only in Summer 2019 IATA Season ([40-50] %). Consequently, DLH's operations represented a significant share of the airport capacity during the relevant airport's opening hours only during Summer IATA Season.
- (249) In addition, in Summer 2019 IATA Season, DLH's highest share during any specific hour band at Düsseldorf airport reached [55-65] %.
- (250) In Summer 2019 IATA Season and Winter 2019/2020 IATA Season, Germany estimated that the average congestion rate during the relevant opening hours of Düsseldorf airport amounted to respectively [80-90] % and [60-70] %.
- (251) In Summer IATA Season, as reflected by the actual level of congestion, Düsseldorf airport is a coordinated airport with limited available capacity (below 13 % on average), especially at peak times where the airport capacity is fully used. In Winter IATA Season, although Düsseldorf airport is coordinated, the actual level of congestion indicates that there are still available slots for entry or expansion at the airport. As an exception, there is limited capacity available at peak times (below 20 %).

DLH's competitors' slot holdings

- (252) As an approximation of the relative strengths of DLH and its competitors at Düsseldorf airport, the Commission notes that DLH deployed [40-50] aircraft at the airport in July 2019. According to DLH's estimates, four other air carriers operated a base at Düsseldorf airport: Ryanair (7 aircraft), TUIfly (7 aircraft), Condor (5 aircraft), and easyJet (2 aircraft).

Conclusion on DLH's market power

- (253) In the Initial Decision the Commission found that, despite the limited airport capacity available at Düsseldorf airport and DLH's average slot holding of [40-50] % in Summer 2019 IATA Season (but of only [30-40] % in Winter 2019/2020 IATA Season), DLH's highest slot holding did not exceed [55-65] % at any hour band. The Commission thus considered in the Initial Decision that it was possible for DLH's competitors to build up a substantial slot portfolio using the airport capacity not allocated to DLH.
- (254) The Commission noted in addition that DLH's competitive advantage in terms of size of the fleet deployed at Düsseldorf airport was less pronounced than at Frankfurt or Munich airports ([40-50] aircraft, compared to 7 aircraft for each of its two largest competitors).
- (255) In light of the above, the Commission found that, for the purposes of the Initial Decision, DLH did not have SMP on the market for the provision of passenger air transport services to and from Düsseldorf airport.
- (256) The General Court found in the Judgment that an overall assessment of those criteria demonstrated the existence of a very high slot holding, including during peak hours, on the part of DLH, a very high congestion rate of the airport, characterised by almost complete congestion during peak hours, and the weak position of DLH's competitors. Consequently, according to the General Court, the Commission could not properly find that DLH did not hold SMP at Düsseldorf airport, at least during Summer 2019 IATA Season.
- (257) Moreover, according to the General Court, the criteria which had led the Commission to find that DLH enjoyed SMP at Frankfurt and Munich airports were not materially different from those concerning Düsseldorf airport, at least as regards Summer 2019 IATA Season. The figures concerning Düsseldorf airport were in essence comparable with or even exceeded those characterising the competitive situation at Frankfurt and Munich airports during Winter 2019/2020 IATA Season, in respect of which the Commission found that the DLH held SMP.
- (258) Following the findings of the General Court in the Judgment with respect to the Commission's conclusion as to the non-existence of SMP at Düsseldorf airport, the Commission has doubts as to whether DLH has SMP at Düsseldorf airport. That issue will be assessed in the framework of the formal investigation procedure. The Commission invites Germany as well as the interested parties to submit their comments in this respect.

3.3.6.4.4. Vienna airport***DLH's shares of frequencies and seats***

- (259) At Vienna airport, DLH's market shares exceeded 40 % based on weekly frequencies and deployed seats (Summer 2019 IATA Season: [55-65] % based on weekly frequencies and [50-60] % based on deployed seats; Winter 2019/2020 IATA Season: [50-60] % based on weekly frequencies and [45-55] % based on deployed seats).

DLH's slot holding and airport's congestion

IATA Season	DLH's average slot holding	DLH's three highest slot holdings	Airport's average congestion rate	Airport's three highest congestion rates
Summer 2019	[35-45] %	[50-60] % (hour band: 14:00-14:59 UTC) [50-60] % (hour band: 18:00-18:59 UTC) [50-60] % (hour band: 10:00-10:59 UTC)	[70-80] %	[80-90] % (hour band: 8:00-8:59 UTC) [80-90] % (hour band: 10:00-10:59 UTC) [80-90] % (hour band: 7:00-7:59 UTC)
Winter 2019/2020	[25-35] %	[40-50] % (hour band: 18:00-18:59 UTC) [40-50] % (hour band: 15:00-15:59 UTC) [40-50] % (hour band: 16:00-16:59 UTC)	[50-60] %	[70-80] % (hour band: 11:00-11:59 UTC) [60-70] % (hour band: 16:00-16:59 UTC) [60-70] % (hour band: 8:00-8:59 UTC)

- (260) Germany estimated that DLH's share in slot holding at Vienna airport was above [35-45] % only in Summer 2019 IATA Season ([35-45] %). Consequently, DLH's operations represented a significant share of the airport capacity during the relevant airport's opening hours only during Summer IATA Season.
- (261) In addition, in Summer 2019 IATA Season, DLH's highest share during any specific hour band at Vienna airport reached [50-60] %. That hour band does not correspond to one of the three most congested hour bands at Vienna airport.
- (262) In Summer 2019 IATA Season and Winter 2019/2020 IATA Season, Germany estimated that the average congestion rate during the relevant opening hours of Vienna airport amounted to respectively [70-80] % and [50-60] %.
- (263) In Summer IATA Season and Winter IATA Season, although Vienna airport is coordinated, there are still available slots for entry or expansion at the airport. However, there is limited capacity available during peak times in Summer IATA Season (below 20 %).

DLH's competitors' slot holdings

- (264) As an approximation of the relative strengths of DLH and its competitors at Vienna airport, the Commission notes that DLH deployed [80-90] aircraft at the airport at the beginning of 2020. According to DLH's estimates, two other air carriers operated a base at Vienna airport: Ryanair (8 aircraft) ⁽¹⁴³⁾ and Wizz Air (5 aircraft).

⁽¹⁴³⁾ Ryanair announced that the base at Vienna airport used by its subsidiary Lauda would be used by other subsidiaries (<https://www.aviation24.be/airlines/ryanair/lauda/ryanair-subsiary-laudamotion-closes-vienna-base-300-jobs-lost/>).

Conclusion on DLH's market power

- (265) In the Initial Decision, the Commission found that (i) DLH's average slot holding was only [35-45] % in Summer 2019 IATA Season (and only [25-35] % in the Winter 2019/2020 IATA Season), and its highest slot holding did not exceed [50-60] % at any hour band, (ii) there were still slots available at Vienna airport, and (iii) there were two relatively strong competitors at the airport. The Commission thus considered in the Initial Decision that it was possible for DLH's competitors to build up a substantial slot portfolio using the airport capacity not allocated to DLH.
- (266) Therefore, the Commission found that, for the purposes of the Initial Decision, DLH did not have SMP on the market for the provision of passenger air transport services to and from Vienna airport.
- (267) The General Court found in the Judgment that an overall assessment of those criteria demonstrated the existence of a high slot holding, including during peak hours, on the part of DLH, a very high congestion rate of the airport, characterised by almost complete congestion during peak hours, and the weak position of the DLH's competitors. Consequently, according to the General Court, the Commission could not properly find that DLH did not hold SMP at Vienna airport, at least during Summer 2019 IATA Season.
- (268) Moreover, according to the General Court, the criteria which had led the Commission to find that DLH enjoyed SMP at Frankfurt and Munich airports were not materially different from those concerning Vienna airport, at least as regards Summer 2019 IATA Season. The figures concerning Vienna airport were in essence comparable with or even exceeded those characterising the competitive situation at Frankfurt and Munich airports during Winter 2019/2020 IATA Season, in respect of which the Commission had found that DLH held SMP.
- (269) Following the findings of the General Court in the Judgment with respect to the Commission's conclusion as to the non-existence of SMP at Vienna airport, the Commission has doubts as to whether DLH has SMP at Vienna airport. That issue will be assessed in the framework of the formal investigation procedure. The Commission invites Germany as well as the interested parties to submit their comments in this respect.

3.3.6.4.5. Brussels airport

- (270) At Brussels airport, DLH's market shares exceeded 40 % based on weekly frequencies and deployed seats, without nevertheless reaching [40-50] % (Summer 2019 IATA Season: [40-50] % based on weekly frequencies and [40-50] % based on deployed seats; Winter 2019/2020 IATA Season: [40-50] % based on weekly frequencies and [40-50] % based on deployed seats).

DLH's slot holding and airport's congestion

IATA Season	DLH's average slot holding	DLH's three highest slot holdings	Airport's average congestion rate	Airport's three highest congestion rates
Summer 2019	[20-30] %	[40-50] % (hour band: 7:00-7:59 UTC) [30-40] % (hour band: 6:00-6:59 UTC) [30-40] % (hour band: 18:00-18:59 UTC)	[50-60] %	[70-80] % (hour band: 7:00-7:59 UTC) [70-80] % (hour band: 4:00-4:59 UTC) [60-70] % (hour band: 18:00-18:59 UTC)

IATA Season	DLH's average slot holding	DLH's three highest slot holdings	Airport's average congestion rate	Airport's three highest congestion rates
Winter 2019/2020	[10-20] %	[30-40] % (hour band: 8:00-8:59 UTC) [20-30] % (hour band: 7:00-7:59 UTC) [20-30] % (hour band: 19:00-19:59 UTC)	[40-50] %	[60-70] % (hour band: 8:00-8:59 UTC) [50-60] % (hour band: 9:00-9:59 UTC) % [50-60] % (hour band: 18:00-18:59 UTC)

(271) The level of congestion at Brussels airport before the COVID-19 outbreak was moderate. Air carriers willing to expand or enter at Brussels airport did not face any significant barrier. Therefore, DLH was constrained not only by competitors already active at Brussels airport (representing an aggregated market share of at least [45-55] % in both IATA Seasons) but also by the threat of expansion of those competitors and entry of new competitors. The strong constraints to which DLH was subject are illustrated by DLH's average slot holding, which reached at most [15-25] % in 2019.

Conclusion on DLH's market power

(272) Given (i) DLH's moderate shares of weekly frequencies and deployed seats at Brussels airport in both IATA Seasons (at most [40-50] %); (ii) DLH's limited slot holding position at Brussels airport in both IATA Seasons (below [20-30] % on average), and (iii) the available slot capacity at Brussels airport in both IATA Seasons, the Commission preliminarily considers that, for the purposes of this Decision, DLH does not appear to have SMP on the market for the provision of passenger air transport services to and from Brussels airport.

3.3.6.4.6. Stuttgart airport

(273) At Stuttgart airport, DLH's market shares exceeded 40 % based on weekly frequencies and deployed seats (Summer 2019 IATA Season: [45-55] % based on weekly frequencies and [45-55] % based on deployed seats; Winter 2019/2020 IATA Season: [50-60] % based on weekly frequencies and [50-60] % based on deployed seats).

DLH's slot holding and airport's congestion

IATA Season	DLH's average slot holding	DLH's three highest slot holdings	Airport's average congestion rate	Airport's three highest congestion rates
Summer 2019	[20-30] %	[40-50] % (hour band: 4:00-4:59 UTC) [30-40] % (hour band: 8:00-8:59 UTC) [30-40] % (hour band: 16:00-16:59 UTC)	[50-60] %	[80-90] % (hour band: 4:00-4:59 UTC) [70-80] % (hour band: 8:00-8:59 UTC) [70-80] % (hour band: 16:00-16:59 UTC)

IATA Season	DLH's average slot holding	DLH's three highest slot holdings	Airport's average congestion rate	Airport's three highest congestion rates
Winter 2019/2020	[10-20] %	[30-40] % (hour band: 17:00-17:59 UTC) [20-30] % (hour band: 5:00-5:59 UTC) [20-30] % (hour band: 9:00-9:59 UTC)	[30-40] %	[60-70] % (hour band: 17:00-17:59 UTC) [50-60] % (hour band: 9:00-9:59 UTC) [40-50] % (hour band: 5:00-5:59 UTC)

(274) The level of congestion at Stuttgart airport before the COVID-19 outbreak was moderate. Air carriers willing to expand or enter at Stuttgart airport did not face any significant barrier. Therefore, DLH was constrained not only by competitors already active at Stuttgart airport (representing an aggregated market share of at least [35-45] % in both IATA Seasons) but also by the threat of expansion of those competitors and entry of new competitors. The strong constraints to which DLH was subject are illustrated by DLH's average slot holding, which reached at most [20-30] % in 2019.

Conclusion on DLH's market power

(275) Despite DLH's market shares above [50-60] % based on weekly frequencies and deployed seats at Stuttgart airport, given (i) DLH's limited slot holding position at Stuttgart airport in both IATA Seasons (below [20-30] % on average), and (ii) the available slot capacity at Stuttgart airport in both IATA Seasons, the Commission preliminarily considers that, for the purposes of this Decision, DLH does not appear to have SMP on the market for the provision of passenger air transport services to and from Stuttgart airport.

3.3.6.4.7. Hamburg airport

(276) At Hamburg airport, DLH's market shares exceeded 40 % based on weekly frequencies and deployed seats (Summer 2019 IATA Season: [45-55] % based on weekly frequencies and [45-55] % based on deployed seats; Winter 2019/2020 IATA Season: [50-60] % based on weekly frequencies and [50-60] % based on deployed seats).

DLH's slot holding and airport's congestion

IATA Season	DLH's average slot holding	DLH's three highest slot holdings	Airport's average congestion rate	Airport's three highest congestion rates
Summer 2019	[20-30] %	[30-40] % (hour band: 8:00-8:59 UTC) [30-40] % (hour band: 16:00-16:59 UTC) [30-40] % (hour band: 17:00-17:59 UTC)	[50-60] %	[70-80] % (hour band: 8:00-8:59 UTC) [60-70] % (hour band: 16:00-16:59 UTC) [60-70] % (hour band: 17:00-17:59 UTC)

IATA Season	DLH's average slot holding	DLH's three highest slot holdings	Airport's average congestion rate	Airport's three highest congestion rates
Winter 2019/2020	[20-30] %	[20-30] % (hour band: 16:00-16:59 UTC)	[40-50] %	[40-50] % (hour band: 9:00-9:59 UTC)
		[20-30] % (hour band: 10:00-10:59 UTC)		[40-50] % (hour band: 18:00-18:59 UTC)
		[20-30] % (hour band: 9:00-9:59 UTC)		[40-50] % (hour band: 16:00-16:59 UTC)

(277) The level of congestion at Hamburg airport before the COVID-19 outbreak was moderate. Air carriers willing to expand or enter at Hamburg airport did not face any significant barrier. Therefore, DLH was constrained not only by competitors already active at Hamburg airport (representing an aggregated market share of at least [35-45] % in both IATA Seasons) but also by the threat of expansion of those competitors and entry of new competitors. The strong constraints to which DLH was subject are illustrated by DLH's average slot holding, which reached at most [20-30] % in 2019.

Conclusion on DLH's market power

(278) Despite DLH's market shares above [50-60] % based on weekly frequencies and deployed seats at Hamburg airport, given (i) DLH's limited slot holding position at Hamburg airport in both IATA Seasons (below [20-30] % on average), and (ii) the available slot capacity at Hamburg airport in both IATA Seasons, the Commission preliminarily considers that, for the purposes of this Decision, DLH does not appear to have SMP on the market for the provision of passenger air transport services to and from Hamburg airport.

3.3.6.4.8. Hannover Airport

(279) At Hannover airport, DLH's market shares exceeded [40-50] % based on weekly frequencies and deployed seats, without nevertheless reaching [40-50] % (Summer 2019 IATA Season: [40-50] % based on both weekly frequencies and deployed seats; Winter 2019/2020 IATA Season: [40-50] % based on weekly frequencies and [40-50] % based on deployed seats).

DLH's slot holding and airport's congestion

IATA Season	DLH's average slot holding	DLH's three highest slot holdings	Airport's average congestion rate	Airport's three highest congestion rates
Summer 2019	[5-10] %	[10-15] % (hour band: 7:00-7:59 UTC)	[15-20] %	[25-30] % (hour band: 11:00-11:59 UTC)
		[10-15] % (hour band: 17:00-17:59 UTC)		[25-30] % (hour band: 8:00-8:59 UTC)
		[10-15] % (hour band: 8:00-8:59 UTC)		[25-30] % (hour band: 10:00-10:59 UTC)

IATA Season	DLH's average slot holding	DLH's three highest slot holdings	Airport's average congestion rate	Airport's three highest congestion rates
Winter 2019/2020	[5-10] %	[10-15] % (hour band: 7:00-7:59 UTC)	[15-20] %	[25-30] % (hour band: 9:00-9:59 UTC)
		[10-15] % (hour band: 19:00-19:59 UTC)		[20-25] % (hour band: 13:00-13:59 UTC)
		[10-15] % (hour band: 13:00-13:59 UTC)		[20-25] % (hour band: 17:00-17:59 UTC)

(280) The level of congestion at Hannover airport before the COVID-19 outbreak was low. Air carriers willing to expand or enter at Hannover airport did not face any significant barrier. Therefore, DLH was constrained not only by competitors already active at Hannover airport (representing an aggregated market share of at least [45-55] % in both IATA Seasons) but also by the threat of expansion of those competitors and entry of new competitors. The strong constraints to which DLH was subject are illustrated by DLH's average slot holding, which reached at most [5-10] % in 2019.

Conclusion on DLH's market power

(281) Given (i) DLH's moderate shares of weekly frequencies and deployed seats at Hannover airport in both IATA Seasons (at most [40-50] %); (ii) DLH's limited slot holding position at Hannover airport in both IATA Seasons (below [5-10] % on average), and (iii) the available slot capacity at Hannover airport in both IATA Seasons, the Commission preliminarily considers that, for the purposes of this Decision, DLH does not appear to have SMP on the market for the provision of passenger air transport services to and from Hannover airport.

3.3.6.4.9. Conclusion

(282) In the Initial Decision, the Commission considered that, for the purposes of that Decision, DLH had SMP only at Frankfurt and Munich airports. Therefore, in line with point 72 of the Temporary Framework and given that the Measure exceeds EUR 250 million, Germany had to propose additional measures to preserve effective competition at Frankfurt and Munich airports.

(283) The Commission found that for the other relevant airports (i.e., Düsseldorf, Vienna, Brussels, Stuttgart, Hamburg, Hannover, Berlin Tegel and Palma de Mallorca), considering DLH's lack of SMP, there was no requirement for Germany to propose additional measures in light of point 72 of the Temporary Framework.

(284) Following the findings of the General Court in the Judgment, the Commission has doubts as to whether DLH has SMP at other relevant airports than Frankfurt and Munich airports, specifically at Düsseldorf and Vienna airports, and, therefore, as to whether Germany would need to propose additional measures at airports other than Frankfurt and Munich airports in light of point 72 of the Temporary Framework. This question will be assessed in the framework of the formal investigation procedure. The Commission invites Germany as well as the interested parties to submit their comments in this respect.

3.3.6.5. Assessment of the scope of the commitments proposed by Germany

(285) Under point 72 of the Temporary Framework, in proposing additional measures to preserve effective competition, Member States may in particular offer structural or behavioural commitments foreseen in the Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004. Under that Notice, commitments that are structural in nature, such as the commitment to divest a business unit, are, as a rule, preferable⁽¹⁴⁴⁾.

⁽¹⁴⁴⁾ Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1, paragraph 15.

(286) On 29 May 2020, Germany proposed the following measures:

- Germany committed that **DLH would divest up to 24 slots/day** ⁽¹⁴⁵⁾ at each of Frankfurt airport and Munich airport (including both winter and summer slots) for a base of four aircraft, **and additional assets** as required by the Slot Coordinator to allow for a transfer of those slots by way of a partial take-over of an air carrier within the meaning of the Slot Regulation, ⁽¹⁴⁶⁾ to one air carrier to allow it to newly enter the market and establish a base at Frankfurt airport and to one air carrier to allow it to newly enter the market and establish a base at Munich airport (the »new entrants«) ⁽¹⁴⁷⁾. To **ensure the viability of DLH's hub-and-spoke network** ⁽¹⁴⁸⁾ at each of Frankfurt airport and Munich airport, DLH would not be obliged to divest more than three departure slots and three arrival slots in any one of the three one-hour periods at each of Frankfurt airport and Munich airport. If a request was made for the divestment of more than three departure slots or three arrival slots in any one of those three one-hour periods, DLH had to offer the purchasers the next closest slot to the time requested.
- In addition, Germany committed that, upon request of the purchasers, DLH would make available to the purchasers: (i) **access to the airport infrastructure** or facilities at Frankfurt airport and Munich airport not covered by the above, on the same terms as those granted to DLH by the airport managers; (ii) **overnight parking stands** for the aircraft to be based at Frankfurt airport and/or Munich airport; (iii) **relevant staff** (cabin/cockpit) to operate the bases.

(287) The main purpose of the commitments proposed by Germany was to ensure that DLH would divest the assets and rights necessary for the establishment or expansion of operating bases by competitors at the congested airports where DLH held SMP and to create conditions to sustain effective competition in the longer term at these airports.

(288) Lack of access to slots constitutes a significant barrier to entry or expansion at Europe's busiest airports ⁽¹⁴⁹⁾. By virtue of the Slot Regulation, slots are essential for airlines' operations as only air carriers holding slots are entitled to get access to the airport infrastructure services delivered by airport managers of coordinated airports and, consequently, to operate routes to or from these airports. Under the Slot Regulation, slots cannot be traded. They may however be exchanged or transferred between airlines in certain specified circumstances, subject to the explicit confirmation from the Slot Coordinator under the Slot Regulation.

(289) In the Initial Decision, based on its previous experience in merger and antitrust cases in the aviation sector, the Commission considered that a commitment by DLH to transfer part of its business, including slots at congested airports where it had SMP, to allow competitors to set up bases was the most effective competition measure to prevent undue distortions of competition. The Commission also considered that that remedy was attractive from a competition standpoint because it would have a structural effect on competition with DLH in the relevant markets where DLH held SMP.

(290) In addition, the Commission considered that the amount of 24 slots/day was sufficient to establish viable operations at Frankfurt airport and Munich airport by, for example, basing four aircraft and operating three rotations per day with each of them. As slots are not linked to any specific route, competitors would be able to use them according to their business plan (i.e., on any route of their choice). This would allow the competitor(s) to achieve economies of scale/scope and to compete more effectively with DLH.

⁽¹⁴⁵⁾ A potential acquirer might wish to acquire fewer than 24 slots. It was not for DLH to choose to divest less than 24 slots per day.

⁽¹⁴⁶⁾ Considering the treatment of the acquisition by easyJet of slots and overnight parking stands as a partial take-over of an air carrier, it was understood that those additional assets did not necessarily include aircraft or employment contracts. The remedy taker might get access to aircraft and staff on the market instead.

⁽¹⁴⁷⁾ The same purchaser could acquire the business package at both Frankfurt airport and Munich airport.

⁽¹⁴⁸⁾ A hub-and-spoke system of an air carrier at an airport tends to concentrate its arrivals and departures in banks of two- to three-hour intervals, resulting in a large number of arrivals followed by a large number of departures. The Commission acknowledged that it could be necessary for the stability of DLH's operations to ensure sufficient access to airport capacity during the mentioned banks.

⁽¹⁴⁹⁾ See e.g. Cases M.5440 – Lufthansa/Austrian Airlines, paragraph 354; M.3770 – Lufthansa/Swiss, paragraph 34.

- (291) The Commission therefore considered in the Initial Decision, that the scope of the additional measures proposed by Germany was, in principle, appropriate and effective to preserve effective competition in Frankfurt airport and Munich airport as required by point 72 of the Temporary Framework.
- (292) However, following the findings of the General Court in the Judgment as to the existence of SMP at Düsseldorf and Vienna airports, ⁽¹⁵⁰⁾ the Commission has doubts that the scope of the additional measures proposed by Germany, limited to Frankfurt airport and Munich airport, is compliant with point 72 of the Temporary Framework. That issue will be assessed in the framework of the formal investigation procedure. The Commission invites Germany as well as the interested parties to submit their comments in this respect.
- (293) In addition, following the General Court's findings as to the Commission's failure to demonstrate, in the Initial Decision, why it was appropriate (i) to exclude competitors already based at Frankfurt and Munich airports from the first stage of the procedure, ⁽¹⁵¹⁾ by reference to the structure and particular characteristics of the market at issue, including the position of the parties and other players on the market, ⁽¹⁵²⁾ and (ii) to require that the divestiture of the slots at issue be subject to remuneration, ⁽¹⁵³⁾ the Commission has doubts that the additional measures proposed by Germany to preserve effective competition at Frankfurt airport and Munich airport specifically are in line with point 72 of the Temporary Framework in regard of those aspects. Those issues will be assessed in the framework of the formal investigation procedure. The Commission invites Germany as well as the interested parties to submit their comments in this respect.

3.3.6.6. Other governance conditions

- (294) Point 73 of the Temporary Framework requires that „Beneficiaries receiving a COVID-19 recapitalisation measures are prohibited from advertising it for commercial purposes“. This requirement is met, since DLH and all the companies controlled by DLH committed not to advertise the State aid for commercial purposes (recital (72)) ⁽¹⁵⁴⁾.
- (295) Point 74 of the Temporary Framework states that as long as at least 75 % of the COVID-19 recapitalisation measures have not been redeemed, beneficiaries other than SMEs may not acquire a more than 10 % stake in competitors or other operators in the same line of business, including upstream and downstream operations. The Commission observes that DLH committed to respect this condition (recital (72)), taking into account the possible exception mentioned in point 75 of the Temporary Framework.
- (296) The Commission also notes that Germany confirmed that DLH would abide by the terms and conditions set out in point 76 of the Temporary Framework regarding the use of State aid in undertakings in difficulties already on 31 December 2019 (recital (75)).
- (297) Point 77 of the Temporary Framework states that as long as the COVID-19 recapitalisation measures have not been fully redeemed, beneficiaries cannot make dividend payments, nor non-mandatory coupon payments, nor buy back shares, other than in relation to the State (dividend ban). The Commission observes that DLH committed to respect that condition (recital (74)). For the sake of clarity, the conditions set out in point 77 of the Temporary Framework would not apply to transactions within LH Group that do not imply cash outflows from LH Group to other external third parties (i.e., intra-group dividend payments made to DLH by companies that are (directly or indirectly) fully owned by DLH). Similarly, the conditions set out in point 77 of the Temporary Framework would not apply in case

⁽¹⁵⁰⁾ See recitals (258) and (269).

⁽¹⁵¹⁾ As explained in recital (78) above, DLH had to offer the slots and the other assets for divestment from the adoption of the Initial Decision until the end of a period of **six full consecutive IATA seasons** after the last season for which the „use-it-or-lose-it rule“ would not apply in full. During the first phase of that period (from the adoption of the Initial Decision until the end of a period of **three IATA seasons** after the last season for which the „use-it-or-lose-it rule“ would not apply in full), the slots and the other assets would be made available firstly to new entrants for the establishment of a base. If no divestment to new entrants took place during that first phase, the slots and the other assets would be made available at Frankfurt airport and/or Munich airport alternatively to one new entrant or to one other air carrier for the expansion of its existing base (a „based carrier“).

⁽¹⁵²⁾ Judgment, paragraphs 472-479.

⁽¹⁵³⁾ Judgment, paragraphs 498-501.

⁽¹⁵⁴⁾ See point 73 of the Temporary Framework.

DLH provided financial support to the company following the approval of the COVID-19 recapitalisation measures in favour of the LH Group, by way of an equity injection or a loan, and all other shareholders provided at least the same support (*pari-passu* and *pro-rated*). The last exclusion is justified by the need not to dissuade private investment into the companies of LH Group, as such private investment would allow also for a faster redemption of the Measure. In any event, the above exceptions should not be construed in a way that would allow possible circumvention of the dividend ban.

- (298) Point 78 of the Temporary Framework states that „[a]s long as at least 75 % of the COVID-19 recapitalisation measures has not been redeemed, the remuneration of each member of the beneficiaries' management must not go beyond the fixed part of his/her remuneration on 31 December 2019. For persons becoming members of the management on or after the recapitalisation, the applicable limit is the lowest fixed remuneration of any of the members of the management on 31 December 2019. Under no circumstances, bonuses, other variable or comparable remuneration elements shall be paid". The Commission observes that the management of DLH would be subject to this condition (recital (73)). As DLH accounted for almost the entirety of LH Group's annual turnover, the Commission considers the commitment proportionate. Moreover, the Commission notes that, in order to avoid possible circumvention of that commitment, the remuneration cap and ban would apply to the management of all other companies of which DLH had control as long as it was also part of the management of DLH, Austrian Airlines AG, Brussels Airlines S.A./N.V., Eurowings GmbH, Lufthansa Cargo AG, Lufthansa Technik, LSG and Swiss International Air Lines Ltd. The Commission notes that DLH had to report regularly to the ESF in suitable form on compliance with the requirements regarding the remuneration of the management of the companies mentioned above (remuneration report). In case of doubt about compliance with the requirements regarding the remuneration of the corporate bodies mentioned above, the ESF, following a duly reasoned opinion of the monitoring trustee, had to submit the remuneration report to the Commission for approval.
- (299) The Commission therefore considers that the other governance conditions contained in points 73 to 78 of the Temporary Framework are fulfilled. This finding was upheld by the General Court in its Judgment, which was not appealed before the Court of Justice on those points.

3.3.7. Exit strategy of the State from the participation resulting from the recapitalisation and reporting obligations

- (300) Pursuant to point 79 of the Temporary Framework, „beneficiaries other than SMEs that have received a COVID-19 recapitalisation of more than 25 % of equity at the moment of intervention must demonstrate a credible exit strategy for the participation of the Member State, unless the State's intervention is reduced below the level of 25 % of equity within 12 months from the date of the granting of the aid" ⁽¹⁵⁵⁾. Pursuant to point 80 of the Temporary Framework, the exit strategy must lay out the plan of the beneficiary on the continuation of its activity and the use of the funds invested by the State, including a repayment schedule and the measures that the beneficiary and the State will take to abide by the repayment schedule.
- (301) DLH is a large undertaking that would receive a recapitalisation of more than 25 %. Accordingly, Germany submitted a business plan developed by DLH to redeem by [...] both the German loan as well as the instruments provided by the ESF. Germany explained that DLH intended to use both positive free cash flows of the business as well as proceeds from capital market issuances (including debt and equity) to redeem the State aid instruments ⁽¹⁵⁶⁾. In any case, Germany committed to receive and endorse a credible exit strategy within 12 months after the aid was granted, unless the State's intervention would be reduced below the level of 25 % of equity by that deadline.

⁽¹⁵⁵⁾ In line with footnote 52 of the Temporary Framework, hybrid instruments granted by the State should be counted as equity.

⁽¹⁵⁶⁾ Debt financings may include both secured as well as unsecured instruments: (i) Unsecured bonds including hybrid bonds, promissory notes, commercial paper as well as syndicated loans, (ii) Secured instruments such as Japanese Operating Leases, aircraft financings and potentially sale & lease back instruments. The decision on the financing instrument is taken by DLH on the basis of the following factors, amongst others: attractiveness of terms/cost of financing of the respective instrument; market size and available volumes for DLH; actual credit rating of DLH and expected rating outlook/migration.

- (302) In addition, Germany confirmed that DLH would report to Germany on the progress in the implementation of the repayment schedule in compliance with point 82 of the Temporary Framework. DLH and Germany would comply respectively with the publication and reporting obligations set out in points 83 to 84 the Temporary Framework (see recital (85)).
- (303) Finally, in line with point 85 of the Temporary Framework, Germany committed to notify a restructuring plan should the State's equity intervention not have been reduced below 15 % of the beneficiary's equity⁽¹⁵⁷⁾ within 6 years after the recapitalisation (see recital (85)).
- (304) The Commission therefore considers that the conditions contained in points 79 to 85 the Temporary Framework are fulfilled.

3.3.8. *Section 4 of the Temporary Framework*

- (305) Germany confirmed that it would comply with the reporting and monitoring obligations contained in section 4 of the Temporary Framework (see section 2.12).

3.3.9. *Conclusion regarding compatibility with section 3.11 of the Temporary Framework*

- (306) Following the General Court's Judgment, at this stage the Commission has doubts that the Measure meets all the compatibility conditions set out in section 3.11 of the Temporary Framework.

3.4. **Conclusion regarding compatibility with Article 107(3)(b) TFEU**

- (307) In the light of the findings above, at this stage the Commission has doubts that the Measure meets all the compatibility conditions set out in the Temporary Framework, and consequently whether it could be declared compatible with Article 107(3)(b) TFEU.

4. CONCLUSION

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) TFEU, requests Germany to submit its comments and to provide all such information as may help to assess the compatibility of the Measure, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the recipient of the aid immediately.

The Commission warns Germany that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

When submitting comments Germany as well as the interested parties should limit themselves, in principle, to information that concerns the situation existing before the adoption of the Initial Decision and that could have been made available to the Commission at that time.

If this letter contains confidential information which should not be published, please inform the Commission within 15 working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter.

⁽¹⁵⁷⁾ In line with footnote 52 of the Temporary Framework, hybrid instruments granted by the State should be counted as equity.

Your request should be sent electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
1049 Bruxelles/Brussel
BELGIQUE/BELGIË
Stateaidgreffe@ec.europa.eu

Yours faithfully,

For the Commission
Margrethe VESTAGER
Executive Vice-President
