

### **Case Study 1: Whither State Aid?**

Ireland was something of an outlier in terms of most of the project countries, in that the State provided relatively limited support to the country's primary airlines (Aer Lingus and Ryanair) and to the primary airports (Cork and Dublin, which are both operated by the Dublin Airports Authority (Daa)<sup>1</sup>). The Irish State has not taken an ownership stake in either of the primary airlines based in Ireland (Aer Lingus and Ryanair). Aer Lingus received €150 million in debt facility to support its liquidity.

The majority of the money provided has been allocated to airports. Cork and Shannon airports both received a one-year operational and capital grant of €32 million. Shannon received another €6.1 million in order to complete a project (baggage screening) that had been put on hold due to the pandemic. The very small regional airports (Ireland West Airport Knock, Kerry Airport, and Donegal Airport) received: €6 million as aid under the temporary framework for state aid measures; €6 million in capital grant funding for 2020; €14 million in capital grant funding for 2021-2025 (this is part of an on-going grant, and not a specific response to Covid-19). These airports do not form a significant part of the present case study. Dublin airport (the State's largest and by far most significant) will be the focus of this case study. It received €20 million in damages compensation as a result of the pandemic in 2021 pursuant to Art.107(2)(b) of the TFEU.<sup>2</sup> Daa plc received €40 million participation in the Daa's €500 million bond issuance.

At several points during the pandemic, there were calls from trade unions for a more active State approach. In March 2020, the unions at Daa (the airport operator) called for the dividend Daa pays annually to the State to be retained in the company, and used to support employee costs. In both 2020 and 2021, Daa did not pay a dividend to the State.<sup>3</sup> In July 2020, the Fórsa trade union called for a 'sectoral approach' to long-term planning for recovery in the aviation sector. It was also noted by an IALPA (the pilots branch of Fórsa) representative before a Parliamentary committee that Ireland was 'an outlier' in terms of restricting travel without providing compensatory support to the aviation industry.<sup>4</sup> It was noted that, while the UK and Spain had backed the 'pillar airlines' of the IAG Group (BA and Iberia), the Austrian and French subsidiaries of IAG had not received state support and had been liquidated or stopped trading.<sup>5</sup>

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<sup>1</sup> Daa is a semi-State company, which, although State-owned, is operated as a commercial entity- see further the Irish report in WP3.

<sup>2</sup> "This measure is in direct response to the impact of COVID-19 on airports with greater than 1 million passengers (annual average over the two preceding financial years, 2018 and 2019). This measure will provide State airports with the flexibility to roll out route incentives/charge rebates, in consultation with airlines, with a view to supporting recovery and growth of connectivity": OECD, *State Support to the Air Transport Sector: Monitoring developments related to the Covid-19 crisis* (22 April 2021), 54.

<sup>3</sup> [https://www.oireachtas.ie/en/debates/debate/special\\_committee\\_on\\_covid\\_19\\_response/2020-07-24/3/](https://www.oireachtas.ie/en/debates/debate/special_committee_on_covid_19_response/2020-07-24/3/). Daa's dividend payment to the State seems to be a developing matter since Daa announced in April 2023 its Board had decided not to "provide for the payment of a dividend" in 2022, and that the Board "also has concerns [about the] ability to pay a dividend over the next number of years": <https://www.daa.ie/daa-group-announces-return-to-profit-in-2022-as-passenger-numbers-rebound/>

<sup>4</sup> Irish Air Line Pilots Association, "IALPA Opening Statement to Joint Oireachtas Committee on Transport and Communication Networks" (9 February 2021) [https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint\\_committee\\_on\\_transport\\_and\\_communications\\_networks/submissions/2021/2021-02-09\\_opening-statement-and-submission-evan-cullen-president-irish-airline-pilots-association\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_transport_and_communications_networks/submissions/2021/2021-02-09_opening-statement-and-submission-evan-cullen-president-irish-airline-pilots-association_en.pdf).

<sup>5</sup> [https://www.oireachtas.ie/en/debates/debate/special\\_committee\\_on\\_covid\\_19\\_response/2020-07-24/3/](https://www.oireachtas.ie/en/debates/debate/special_committee_on_covid_19_response/2020-07-24/3/)

However, the Irish State did not take any specific measures to boost IR/employment support in the sector. Indeed, in October 2020, the Minister for Finance opined that there was nothing any government could do to compensate airlines for the impact of Covid-19 on the aviation sector.<sup>6</sup> It was noteworthy that the Government (formerly the owner of Aer Lingus) did not intervene in any way (even to exert ‘moral pressure’) during the course of the industrial relations problems at Aer Lingus during the pandemic (see below).

The focus of this case study is to explore the reasons why the Irish State, in contrast to other Member States (within this study), did not put in place extensive and specific aid measures for the aviation sector.

Alongside the establishment of the single aviation market, standardised regulations have been implemented to guarantee effective operation of fair competition and a high and uniform level of safety for passengers.<sup>7</sup> The European Parliament has frequently emphasised that the liberalisation of air transport “must balance the interests of both consumers and the industry”<sup>8</sup> and requested principles to govern State aid to airlines and airports, which have been established under Article 107 TFEU.

In March 2020 the Commission adopted a temporary framework modifying the rules surrounding State aid to minimise the risk of serious economic downturn. The framework was amended six times and expired 30 June 2022.<sup>9</sup> Articles 107(2)b, 107(3)b and 107(3)c TFEU formed the legal basis allowing Member States to act promptly and address the effects of COVID-19 on their economy, while Article 107(1) ensures that any aid granted by a Member State does not fragment or distort competition within the internal market.<sup>10</sup> Article 107(2)b permitted aid to remedy ‘damage caused by natural disasters or exceptional occurrences’, 107(3)b clarified that any aid to remedy a serious disturbance in the economy was compatible with the internal market and 107(3)c highlighted that Member States can notify to the Commission aid schemes to meet acute liquidity needs and support businesses facing financial difficulties exacerbated by the pandemic.<sup>11</sup> Under section 9 of the guidelines to the temporary measures, the Commission clarified that due to the limited size of the EU budget, the main response will come from Member States’ national budgets.<sup>12</sup> Additionally, it is worth noting, the Commission set out various measures outside the scope of EU State aid control that Member States could undertake without the involvement of the Commission. These included horizontal supports such as, but not limited to, a wage subsidy scheme and deferral of corporation tax payments.<sup>13</sup> This is the

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<sup>6</sup> Barry O’Halloran, Charlie Taylor, Vivienne Clarke, “Ryanair Cork and Shannon winter closures hit jobs and recovery efforts” *The Irish Times* (15 October 2020) <https://www.irishtimes.com/business/transport-and-tourism/ryanair-cork-and-shannon-winter-closures-hit-jobs-and-recovery-efforts-1.4381813>.

<sup>7</sup> European Parliament. *Air Transport: Market Rules*. Fact Sheets on the European Union – 2023. Page 2. [https://www.europarl.europa.eu/erpl-app-public/factsheets/pdf/en/FTU\\_3.4.6.pdf](https://www.europarl.europa.eu/erpl-app-public/factsheets/pdf/en/FTU_3.4.6.pdf)

<sup>8</sup> *Ibid.* Page 5.

<sup>9</sup> European Commission. *State aid: Commission will phase out State aid COVID Temporary Framework*. 12 May 2022. [https://competition-policy.ec.europa.eu/state-aid/coronavirus/temporary-framework\\_en](https://competition-policy.ec.europa.eu/state-aid/coronavirus/temporary-framework_en)

<sup>10</sup> Article 107 (1) Treaty on the Functioning of the European Union. Part Three: Union Policies and Internal Actions. Official Journal 115, 09/05/2008. P.0091-0092.

<sup>11</sup> European Commission. *Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*. (2020/C 91 I/01). 2020. Page 3. [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOC\\_2020\\_091\\_I\\_0001](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOC_2020_091_I_0001)

<sup>12</sup> *Ibid.* Page 2.

<sup>13</sup> *Ibid.* Page 3.

route Ireland adopted in response to the COVID-19 pandemic in relation to its two main airlines, Aer Lingus and Ryanair. For the purposes of this study, this paper will focus mainly on Ryanair and the response from Ireland in relation to financially assisting Irish airports, rather than support and maintaining its two main airlines, which accounted for an estimated 70-80 per cent of the Irish market with regard to the number of passengers.<sup>14</sup>

The onset of travel restrictions in March 2020 as a result of COVID-19 engendered prolonged uncertainty for the aviation industry, with traffic down 90% for the period from March to December of that year. Ireland's response was to provide fiscal support to its airports, which included €116m under an EU State aid approved COVID-19 Supplementary Support Scheme.<sup>15</sup> Speaking at a Seanad debate, the Minister for Transport outlined how the aviation sector has been able to avail of a range of Government supports for businesses. The supports include the wage subsidy schemes (Temporary Wage Subsidy Scheme (TWSS) and Employment Wage Subsidy Scheme (EWSS), waiver of commercial rates, tax clawback, the Covid restriction support scheme, the credit guarantee scheme, and the Strategic Banking Corporation of Ireland, SBCI, working capital scheme.<sup>16</sup> It was estimated in a 2021 spending review that approximately €521.20m in supports were made available to Irish airports and airlines under the schemes,<sup>17</sup> with the majority of support made available to Irish airports rather than its airlines. Illustrated in the spending review, Ireland was the only country in the comparative analysis of EU countries under consideration that provided the majority of support to airports rather than airlines. Ireland asserted that this reflected the strength of Irish based airlines pre-Covid,<sup>18</sup> which did not require Exchequer supports,<sup>19</sup> positioning them as financially secure to withstand the pandemic.

Ryanair CEO Michael O'Leary stated in a press release in March 2020 that:

*"Ryanair is a resilient airline group, with a very strong balance sheet, and substantial cash liquidity, and we can, and will, with appropriate and timely action, survive through a prolonged period of reduced or even zero flight schedules, so that we are adequately prepared for the return to normality, which will come about sooner rather than later as EU Governments take unprecedented action to restrict the spread of Covid-19."*<sup>20</sup>

Consequently, on account of prolonged restrictions, specifically in Ireland, the magnitude of the pandemic was underestimated and the balance sheets became affected. The frustrations were first noticed when Ryanair brought an action against An Taoiseach and the Attorney General seeking to

<sup>14</sup> Jane Burmanje, Mary Ellen O'Keeffe, and Luke Daly, *Spending Review 2021: Examination of State Funding to the Aviation Sector during the Covid-19 Crisis* (Department of Public Expenditure and Reform, November 2021), 10. <https://assets.gov.ie/205040/00d4235b-2f5d-4b21-8a7d-0aa69cdec7fb.pdf>

<sup>15</sup> Department of Transport. *Minister of State Naughton announces Review of the Regional Airports Programme*. Published 21 November 2022. <https://www.gov.ie/en/press-release/cd68a-minister-of-state-naughton-announces-review-of-the-regional-airports-programme/>

<sup>16</sup> Houses of the Oireachtas. Seanad Éireann debate. *Covid-19 (Aviation): Statements*. 26 February 2021. <https://www.oireachtas.ie/en/debates/debate/seanad/2021-02-26/14/>

<sup>17</sup> Jane Burmanje, Mary Ellen O'Keeffe, and Luke Daly, *Spending Review 2021: Examination of State Funding to the Aviation Sector during the Covid-19 Crisis* (Department of Public Expenditure and Reform, November 2021), 11. <https://assets.gov.ie/205040/00d4235b-2f5d-4b21-8a7d-0aa69cdec7fb.pdf>

<sup>18</sup> *Ibid.* Executive Summary. i.

<sup>19</sup> *Ibid.* Page 5.

<sup>20</sup> Ryanair Holdings plc. *Ryanair Taking Urgent Action To Respond To Covid-19 Update*. March 2020. <https://corporate.ryanair.com/news/ryanair-taking-urgent-action-to-respond-to-covid-19-update-mon-16-march-2020/>

challenge the legality of travel advice published by the Government of Ireland in late July 2020.<sup>21</sup> Ryanair contended the travel advice regulating outward bound travel and those entering the State having to limit their movements, unless arriving from a “green list” jurisdiction, was unlawful. According to Ryanair, the advice constituted restrictions on travel and the Government exceeded its executive powers and trespassed into the sphere of legislative power.<sup>22</sup> Ryanair’s claims were ultimately rejected with the High Court declaring, “the Government acted lawfully in providing travel advice and public health advice in respect of the coronavirus pandemic on a non-statutory basis”.<sup>23</sup> We note this action taken by Ryanair as an illustration of the airline’s litigious approach. It may have been that the airline discussed the restrictions with the Government before it launched its action. Nevertheless, to sue the government in the midst of what had been recognised as a pandemic by the World Health Organization suggests that Ryanair sees the courts as a venue to challenge any government action which the airline believes impedes its business.

Ireland remained in a position of not financially providing the airlines with State aid. However, horizontal supports, such as the Temporary Wage Subsidy Scheme (TWSS), later developing into the Employment Wage Subsidy Scheme (EWSS), were introduced to enable employers to retain employees on their payroll. This was available to employers whose turnover fell 30%. Aer Lingus availed of €56m in wage subsidy support in 2021.<sup>24</sup> Ryanair availed of the scheme, receiving €84m in fiscal year (FY) 2021<sup>25</sup> and €82m in FY 2022, which was wound down significantly in the second half of FY 2022.<sup>26</sup>

The public health advice in relation to air travel was constantly changing, prompting the grounding of flights and effectively resulting in huge financial losses for airlines across the EU. As a result, financial aid to airlines was necessary and unavoidable. Member States adopted measures that guaranteed the viability of air transport operators, while European institutions implemented measures to facilitate national authorities in their efforts to mitigate the impact of the pandemic.<sup>27</sup> Illustrated in the spending review from Ireland’s Department of Public Expenditure and Reform, of the support that has been awarded to the aviation sector in each country analysed in the EU, airlines were awarded the most support.<sup>28</sup> Under the temporary framework adopted by the European Commission as discussed previously, thirty four cases of State aid to European airlines were approved without

<sup>21</sup> *Ryanair DAC v an Taoiseach* [2020] IHEC 673

<sup>22</sup> Mary Carolan. *Ryanair loses High Court action over Ireland’s travel advice: Airline claimed measures amounted to legal restriction on travel in and out of the country*. The Irish Times. October 2020. <https://www.irishtimes.com/business/transport-and-tourism/ryanair-loses-high-court-action-over-ireland-s-travel-advice-1.4370292>

<sup>23</sup> *Ryanair DAC v an Taoiseach* [2020] IHEC 673

<sup>24</sup> Barry O’Halloran. *Aer Lingus saw Covid wage supports worth €56m last year*. The Irish Times. November 2022. <https://www.irishtimes.com/business/2022/11/08/aer-lingus-saw-covid-wage-supports-worth-56m-last-year/>

<sup>25</sup> Ryanair Group. Annual Report 2022. July 2022. Page 172. <https://investor.ryanair.com/wp-content/uploads/2022/07/Ryanair-2022-Annual-Report.pdf>

<sup>26</sup> *Ibid.*

<sup>27</sup> Tania Pantazi. *State Aid to Airlines in the Context of Covid-19: Damages, Disturbances, and Equal Treatment*. Journal of European Competition Law & Practice, Volume 13, Issue 4, June 2022, Pages 268–277, <https://doi.org/10.1093/jeclap/lpab071> Page 1.

<sup>28</sup> Jane Burmanje, Mary Ellen O’Keeffe, and Luke Daly, *Spending Review 2021: Examination of State Funding to the Aviation Sector during the Covid-19 Crisis* (Department of Public Expenditure and Reform, November 2021). Page 17. <https://assets.gov.ie/205040/00d4235b-2f5d-4b21-8a7d-0aa69cdec7fb.pdf>

objection as of 30 April 2021.<sup>29</sup> Sixteen of the schemes were based on Article 107(2)b to remedy damage caused by an exceptional occurrence and eighteen of the schemes were based on Article 107(3)b to remedy a serious disturbance in the economy.<sup>30</sup>

Lufthansa, Air France, KLM and SAS are among the airlines within the EU that received substantial amounts in State aid agreed by the European Commission. In May 2020 Lufthansa agreed a €9bn deal with Germany in which the German government received a twenty percent stake in the airline. The deal combined a €6bn recapitalisation measure and a €3bn three-year loan from state-backed KfW bank and private banks.<sup>31</sup> Air France received a €7bn aid measure in the same month. In June 2020 KLM received €3.4bn of aid support that consisted of bank loan guarantees and a direct loan from the Dutch state. While State aid supporting airlines was being authorised by the European Commission, Ireland remained in a position of providing horizontal supports only to its airlines. Moreover, Ireland ranked last in the European Union for the amount of state aid it provided companies in 2020 in proportion to the size of its economy.<sup>32</sup> Ireland gave out €0.93bn in State, which accounted for 0.26 per cent of national GDP, the lowest proportion in the bloc.<sup>33</sup>

In May 2020 the Irish Government established the Pandemic Stabilisation and Recovery Fund (PSRF), part of The Ireland Strategic Investment Fund (ISIF) which is managed by the National Treasury Management Agency (NTMA), a state body that provides asset and liability management services for the Irish Government. The ISIF agreed commercial terms with Aer Lingus for a three-year debt facility totalling €350m, “[t]his is the second facility agreed between ISIF and Aer Lingus, building on a €150m debt facility agreed in December 2020”.<sup>34</sup> During this same period the UK established the Covid Corporate Financing Facility (CCFF) in which Ryanair accessed a short-term loan of £600m (approx. €690m), repayable at rates of between 0.2 and 0.6%.<sup>35</sup> Eligibility for the funding from the UK facility required businesses to be “investment-grade rated, make a “material contribution” to the UK, and in sound financial health prior to the outbreak”.<sup>36</sup> Thus, although loans were granted to the two main airlines, from separate jurisdictions, they were nowhere near the scale of what was granted to their EU counterparts.

Ryanair filed sixteen lawsuits in relation to State aid provided to EU airlines authorised by the European Commission. The lawsuits specifically targeted State aid approvals to Lufthansa, Air France-KLM, Condor and SAS, with Ryanair asserting the European Commission violated principles of EU law. Ryanair primarily relied on: (1) misapplication of the State aid Temporary Framework; (2)

<sup>29</sup> Tania Pantazi. *State Aid to Airlines in the Context of Covid-19: Damages, Disturbances, and Equal Treatment*. Journal of European Competition Law & Practice, Volume 13, Issue 4, June 2022, Pages 268–277, <https://doi.org/10.1093/jeclap/lpab071> Page 3.

<sup>30</sup> *Ibid.*

<sup>31</sup> The Guardian. *Lufthansa agrees €9bn bailout with German government*. 26 May 2020. <https://www.theguardian.com/business/2020/may/26/lufthansa-9bn-bailout-german-government-coronavirus-flights>

<sup>32</sup> Naomi O’Leary. *Ireland ranks last in EU for pandemic state aid to companies*. The Irish Times. March 2021. <https://www.irishtimes.com/business/economy/ireland-ranks-last-in-eu-for-pandemic-state-aid-to-companies-1.4505678>

<sup>33</sup> *Ibid.*

<sup>34</sup> National Treasury Management Agency. *ISIF extends support for Aer Lingus with new €200m debt facility*. March 2022. <https://isif.ie/news/isif-extends-support-for-aer-lingus-with-new-200m-debt-facility>

<sup>35</sup> Paul Kelso. *Coronavirus: Airlines among businesses given Bank of England bailouts*. Sky News. June 2020. <https://news.sky.com/story/coronavirus-airlines-among-businesses-given-bank-of-england-bailouts-12000568>

<sup>36</sup> *Ibid.*

misapplication of Articles 107(3)b or 107(2)b TFEU; (3) the principle of non-discrimination; (4) the freedom to provide services; (5) the freedom of establishment; (6) the failure to initiate a formal investigation procedure; and (7) violating its duty to state reasons.<sup>37</sup> Of the cases filed, Ryanair has been successful in six State aid annulments, with two of the victories decided in May 2023. In its most recent decisions, the General Court annulled State aid totalling €130m from Italy to airlines holding an Italian licence and the significant €6bn provided to Lufthansa. In the context of the Italian aid scheme, the General Court concluded the Commission did not provide in a clear and unequivocal fashion the obligation to state reasons imposed on it by Article 296 TFEU,<sup>38</sup> emphasising that “[a]ccording to settled case-law, a decision not to initiate the formal investigation procedure in respect of notified aid must set out the reasons for which the Commission takes the view that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the internal market”.<sup>39</sup> Akin to this was the significant legal victory by Ryanair and the annulment of the €6bn recapitalisation funding by Germany to Lufthansa. The funding consisted of three components, an equity participation of circa €300m, a €4.7bn silent participation not convertible to shares (‘Silent Participation I’) and a silent participation of €1bn that had the aspects of a convertible debt instrument (‘Silent Participation II’).<sup>40</sup> The Court found the applicants (Ryanair and Condor) were entitled to challenge the merits of the contested decision, as they proved their status as direct competitors to the Lufthansa group. The Court claimed the aid granted by Germany was liable to have a substantial effect on the competitive position of the applicants and was capable of causing the loss of an opportunity to make a profit.<sup>41</sup> The Court indicated the Commission failed to factor in all conditions to support a recapitalisation measure and appropriately assess whether Lufthansa (‘DLH’) could have raised part of the finance on the markets for the entirety of its needs.<sup>42</sup> Similarly, the Court found the Commission failed to include a step-up mechanism “incentivising Lufthansa to buy back Germany’s shareholding as quickly as possible”.<sup>43</sup> Additionally, the Court’s analysis confirmed the Commission made a “manifest error of assessment” by not considering Lufthansa held significant market power at certain airports.<sup>44</sup> In the cases of TAP and KLM, the Court annulled the Commission’s decisions based on lack of reasoning. In the case of KLM, the General Court highlighted in its decision that Air France had benefited from pandemic-related aid that had been approved by the Commission constituting a contextual factor, as KLM and Air France are members of the same group.<sup>45</sup> The General Court claimed the Commission failed to explain in its ruling why the assistance given to the French company had no

<sup>37</sup> Dima Tuffaha. *EU State Aid During Covid-19: Discrimination Between Airlines?*. Master’s Thesis in European and International Trade Law. Spring 2022. Lund University. Page 39. <https://lup.lub.lu.se/student-papers/search/publication/9085124>

<sup>38</sup> Court of Justice of the European Union. Judgement of the General Court Case T-268/21 | *Ryanair/Commission* (Italy - aid scheme - COVID-19). Press Release No 85/23. Luxembourg. 24 May 2023. <https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-05/cp230085en.pdf>

<sup>39</sup> *Ibid*

<sup>40</sup> Court of Justice of the European Union. Judgement of the General Court in joined Cases T-34/21 | *Ryanair v Commission* and T-87/21 | *Condor Flugdienst v Commission* (Lufthansa; COVID-19). Press Release No 75/23. Luxembourg. 10 May 2023. <https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-05/cp230075en.pdf>

<sup>41</sup> *Ibid*

<sup>42</sup> *Ibid*

<sup>43</sup> *Ibid*

<sup>44</sup> *Ibid*

<sup>45</sup> General Court of the European Union. *Judgment in Case T-643/20 Ryanair DAC v Commission*. Press Release No 84/21. Luxembourg. 19 May 2020. <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-05/cp210084en.pdf>



bearing on the compatibility of the assistance given to KLM.<sup>46</sup> The decision lacked information on the shareholder structure of Air France and KLM in addition to the organic, economic, and functional connections between Air France-KLM holding company and its subsidiaries.<sup>47</sup> The latter only stated that the Dutch government had confirmed the financing provided to KLM would not be utilised by Air France.<sup>48</sup> Similarly, in the case of TAP the General Court annulled the Commission's decision on the basis the Commission neither verified nor specified whether the beneficiary was part of a group. The Court outlined that in order to provide rescue aid to a company three cumulative conditions delineated in point 22 of the guidelines must be met to qualify as compatible with the internal market. The Court found the Commission had only provided details on the financial situation of the beneficiary and on the difficulties caused by the pandemic without specifying the intragroup relationships between TAP and its shareholder companies.<sup>49</sup> It is noted that a lack of reasoning represented the highest risk of annulment. Due to the volume of aids notified to the Commission during the pandemic and considering their urgency, the Commission only had a limited amount of time to assess each project and conclude its decisions.<sup>50</sup> Following the Lufthansa decision a spokesperson from the Commission stated that "a quick decision was made", as the application for aid was requested during the worst of the pandemic and "it's very important during times of crisis to be able to act quickly".<sup>51</sup> The swift decisions taken by the Commission early on in the pandemic provided a route for Ryanair to challenge EU competition regulations characterising them as discriminatory. Ryanair CEO Michael O'Leary viewed this as Governments "selectively gifting billions of euros to their inefficient flag carriers" and categorised the airlines as "the crack-cocaine junkies of the state-aid world".<sup>52</sup> O'Leary argued that during times of crisis transparency surrounding state aid is key and should be provided to everyone.<sup>53</sup> For Ryanair, the pandemic showed the best and worst of the EU in various ways. It was good in terms of trying to coordinate travel with the COVID passport, but not on enforcing competition rules. Ryanair staff were observing Governments supporting their airlines with billions of euro in other European jurisdictions knowing their employer would not be 'saved', as the measures implemented focussed on the national picture.<sup>54</sup>

This ultimately allows us to suggest that Ireland took the decision to not support its airlines on account of the threat of Ryanair suing for breach of EU state aid (competition) rules. As noted above, the Irish State did not implement any specific measures to boost IR/ employment support in the sector. Ryanair CEO Michael O'Leary has been openly critical of the Irish Government and trade unions and has

<sup>46</sup> Annabelle Lepière. *COVID-19: EU General Court upholds Ryanair's appeals against aid to KLM and TAP*. CMS Law-Now. 01 June 2021. <https://cms-lawnow.com/en/ealerts/2021/06/covid-19-eu-general-court-upholds-ryanair-s-appeals-against-aid-to-klm-and-tap>

<sup>47</sup> *Ibid*

<sup>48</sup> *Ibid*

<sup>49</sup> Annabelle Lepière. *COVID-19: EU General Court upholds Ryanair's appeals against aid to KLM and TAP*. CMS Law-Now. 01 June 2021. <https://cms-lawnow.com/en/ealerts/2021/06/covid-19-eu-general-court-upholds-ryanair-s-appeals-against-aid-to-klm-and-tap>

<sup>50</sup> *Ibid*

<sup>51</sup> Naomi O'Leary. *EU court backs Ryanair's challenge against Lufthansa state bailout*. The Irish Times. 10 May 2023. <https://www.irishtimes.com/business/2023/05/10/eu-court-backs-ryanairs-challenge-against-lufthansa-state-bailout/>

<sup>52</sup> Rupert Neate. *Ryanair to challenge EU court ruling on French and Swedish state aid*. The Guardian. 17 February 2021. <https://www.theguardian.com/business/2021/feb/17/ryanair-appeal-eu-court-ruling-french-swedish-state-aid-airline-covid-bailout>

<sup>53</sup> *Ibid*

<sup>54</sup> Interview with Ryanair representatives, 15 December 2022.

previously been recognised as the “bête noire of trade unionism”,<sup>55</sup> famously stating that “hell would have to freeze over or that he would cut off both his arms before he would negotiate with trade unions”.<sup>56</sup> In 2007, Ryanair brought a case against the Irish Labour Court for “attempting to impose trade union recognition through the back door ... upon a very high pay multinational company like Ryanair” and succeeded. However, in 2017 Ryanair “bowed to pilot pressure”,<sup>57</sup> and agreed to recognise trade unions. The caveat to this was the airline would insist on dealing separately with unions in each country rather than staff bargaining collectively across the group.<sup>58</sup> The majority of collective labour agreements negotiated during this period only started to come into force in 2020, when the pandemic hit. Horizontal supports, such as wage subsidy schemes, were implemented by the Irish Government to ensure workers had access to finances and support was available for businesses to retain staff on their payroll. Ryanair negotiated with unions and staff reps and immediately said it would continue to pay staff 50% of their wages even though flights were grounded and no work was available. The wage subsidy schemes were vital during this time but posed issues for aviation sector workers. The schemes were designed for ‘typical’ jobs with standardised rosters which did not suit the structure of how the aviation sector operates. The prolonged grounding of flights and airport base closures in Ireland triggered immense criticism towards the Irish Government, from both Ryanair and Aer Lingus, by not adopting the EU traffic light system. In September 2020, both airlines pleaded for a State support package for the industry, six months following the start of the pandemic.<sup>59</sup> Ireland remained in the position of financially supporting the airports only with an application to the European Commission for State aid totalling €116m.<sup>60</sup> This was allocated to Irish regional airports to compensate them for the damage caused by Covid as well as providing the State airports the flexibility to roll out route incentives/charge rebates.<sup>61</sup>

With the two main airlines striving to deal with the difficulty of the pandemic, Ireland remained staunch in its position of not providing similar State aid packages that were being allocated to airlines across the EU. Stobart Air, operator of regional flights for Aer Lingus, ceased operations and entered liquidation in June 2021. It was argued the collapse of the regional airline should be a wake up call for the Irish Government to assist its airlines stating, “the lack of a targeted sectoral approach to preventing such eventualities like the Stobart Air collapse from happening has been highly questionable”.<sup>62</sup> Interviews also revealed there was a real fear Aer Lingus would collapse with the Minister of State at the Department of Transport noting, “the serious impact that Covid-19 has had

<sup>55</sup> Mark Paul. *Irish trade unions edge closer to Holy Grail of mandatory recognition by employers - but issues remain*. The Irish Times. 07 October 2022. <https://www.irishtimes.com/business/2022/10/07/trade-unions-edge-closer-to-holy-grail-of-mandatory-recognition-by-employers/>

<sup>56</sup> Colin Gleeson. *Hell might freeze over as Ryanair sits down with unions*. The Irish Times. 07 July 2018. <https://www.irishtimes.com/business/hell-might-freeze-over-as-ryanair-sits-down-with-unions-1.3556389>

<sup>57</sup> Ed Murray. *Ryanair Moves To Recognise Trade Unions*. Cantor Fitzgerald. 11 January 2018. <https://cantorfitzgerald.ie/ryanair-moves-recognise-trade-unions/>

<sup>58</sup> Dominic Coyle. *Ryanair turns the tables with union recognition*. The Irish Times. 15 December 2017. <https://www.irishtimes.com/business/transport-and-tourism/ryanair-turns-the-tables-with-union-recognition-1.3328478>

<sup>59</sup> Ralph Riegel. *Crippled aviation industry pleads for State aid*. The Irish Independent. 23 September 2020. <https://www.independent.ie/irish-news/crippled-aviation-industry-pleads-for-state-aid/39555184.html?>

<sup>60</sup> Houses of the Oireachtas. *Covid-19 Pandemic Supports*. Dáil Éireann Debate. 19 January 2022. <https://www.oireachtas.ie/en/debates/question/2022-01-19/195/>

<sup>61</sup> *Ibid*

<sup>62</sup> Daniel McConnell. *Collapse of Stobart Air should be a wake-up call for Government*. The Irish Examiner. 12 June 2021. <https://www.irishexaminer.com/opinion/commentanalysis/arid-40312199.html>



on Aer Lingus, and the outlook for 2021 is not positive”.<sup>63</sup> For an airline that was previously State-owned and in acute need of fiscal support, the Irish Government entered into confidential discussions with Aer Lingus about further financial support for the airline in February 2021. The Taoiseach (Prime Minister) Leo Varadkar declared that Aer Lingus would not be allowed to fail by stating that, “saving all jobs and saving all routes may not be possible but we do want to protect the company and ensure that it is there for essential connectivity in to the future”.<sup>64</sup> What transpired from the confidential discussions was Aer Lingus securing a €150m three-year debt facility loan from Ireland’s Strategic Investment Fund (ISIF) in February 2021 and not a State aid package similar to its European counterparts. This loan was propped up further by an additional €200m in March 2022, which it received from the same fund that is open to all medium and large-scale enterprises operating in sectors materially impacted by the pandemic.<sup>65</sup>

The European Union has succeeded greatly in creating an internal market since the liberalisation of air transport nearly 30 years ago.<sup>66</sup> A critically important sector that makes a vital contribution to the EU’s overall economy and employment, aviation supports close to 5 million jobs and contributes €300 billion, or 2.1% to European GDP.<sup>67</sup> The COVID-19 pandemic triggered huge financial losses for airlines globally and decimated the numbers of people travelling due to the containment measures. It was considered as one of the sectors hardest hit by the crisis and in effect would have a slow financial recovery. The Commission adopted a temporary framework modifying the rules surrounding State aid to minimise the risk of serious economic downturn.

This case study illustrates the approach Ireland adopted in relation to State aid to the airline sector during the COVID-19 pandemic, despite the EU implementing the temporary framework to assist with the crisis. Ireland remained firm in not providing State aid packages to its airlines, specifically Aer Lingus. We suggest that Ryanair’s litigious disposition factored into the government’s decision, and that Ryanair’s subsequent litigations for breach of EU state aid (competition) rules supports such a concern. From Ryanair’s perspective, although Irish and based in Ireland, it is the only genuine ‘European’ airline, as its home State only amounts to a fraction of its overall market.<sup>68</sup> The State aid packages provided to other airlines across the EU tended to be ‘national’ in focus, providing the opportunity to Ryanair to challenge the legality of the potentially discriminatory State aid in the Courts. Ryanair views the courts as a venue to challenge any Government action which the airline

<sup>63</sup> Houses of the Oireachtas. Seanad Éireann debate. *Covid-19 (Aviation): Statements*. Vol. 274 No. 9. 26 February 2021. <https://www.oireachtas.ie/en/debates/debate/seanad/2021-02-26/14/>

<sup>64</sup> Mary Regan. *Government won't allow Aer Lingus to fail – Varadkar*. Raidió Teilifís Éireann. 18 February 2021. <https://www.rte.ie/news/business/2021/0218/1197962-varadkar-on-aer-lingus/>

<sup>65</sup> Ciara O'Brien. *Aer Lingus agrees further €200m debt facility with ISIF*. The Irish Times. 22 March 2022. <https://shorturl.at/cizU4>

<sup>66</sup> Tania Pantazi. *State Aid to Airlines in the Context of Covid-19: Damages, Disturbances, and Equal Treatment*. Journal of European Competition Law & Practice, Volume 13, Issue 4, June 2022, Pages 268–277, <https://doi.org/10.1093/jeclap/lpab071> Page 3

<sup>67</sup> European Commission. *Mobility and Transport: Air*. [https://transport.ec.europa.eu/transport-modes/air\\_en#:~:text=A%20strategically%20important%20sector%20that,or%202.1%25%20to%20European%20GDP.](https://transport.ec.europa.eu/transport-modes/air_en#:~:text=A%20strategically%20important%20sector%20that,or%202.1%25%20to%20European%20GDP.)

<sup>68</sup> Though we note that Lufthansa is also a significant European airline due to Austrian, Brussels, and Swiss airlines being part of the company’s portfolio. We also note that Lufthansa has stated its interest in purchasing ITA (Italy), LOT (Poland), and TAP (Portugal) airlines. If this were to arise, Lufthansa’s position in Europe and as a carrier to overseas destinations would be significant. Ryanair does not have the combination of European (and adjacent countries) and overseas reach.

believes impedes its business, even during times of crisis. The majority of the fiscal support for the sector in Ireland was provided to the airports to assist with the effects of the pandemic.

We identify the Irish Government's position as one that endeavours to straddle a fine line. Aviation is remarkably important to the island nation (particularly as a means of facilitating its historical ties to the US). And yet, the Government's focus seemed to be on supporting airports, instead of airlines. The approach identifies Government's role as facilitating an entry point (ports) into the country, but the actual travel to these ports has been left to private sector entities.

## Case-study evaluation

Please, evaluate your case study by using the following indicators and give a brief explanation of your evaluation

Criteria	Evaluation on a scale of 1-5 (1=minimum, 5=max)	1	2	3	4	5
		<input type="checkbox"/>	<input type="checkbox"/>	X	<input type="checkbox"/>	<input type="checkbox"/>
Innovation	<p><b>Explanation:</b> to what degree does the topic/subject analysed in the case study deviate from existing practices and legal frameworks? Why the case study is innovative?</p> <p>The innovation lies in assessing how litigation, or the threat thereof, can itself be an IR strategy (one which we argue was employed by Ryanair).</p>					

Criteria	Evaluation on a scale of 1-5 (1=minimum, 5=max)	1	2	3	4	5
		<input type="checkbox"/>	<input type="checkbox"/>	X	<input type="checkbox"/>	<input type="checkbox"/>
Transferability	<p><b>Explanation:</b> to what degree can the results/lessons learnt in the case-study be transferred along the air transport value chain? other sectors? other countries?</p> <p>Ryanair is a vital player in most of the VIRAL countries. The litigation strategy directly impacts on certain countries (e.g. DE, IT) as a result of CJEU decisions. The strategy of litigation is one that can be seen in most of these countries over the years.</p>					

Criteria	Evaluation on a scale of 1-5 (1=minimum, 5=max)	1	2	3	4	5
		<input type="checkbox"/>	<input type="checkbox"/>	X	<input type="checkbox"/>	<input type="checkbox"/>
Inclusiveness	<p><b>Explanation:</b> to what degree does the topic/subject analysed in the case-study see the involvement of partners and public actors?</p> <p>The case study focuses on the role of the state and the employer; there is little direct involvement by trade unions.</p>					

Criteria	Evaluation on a scale of 1-5 (1=minimum, 5=max)	1	2	3	4	5
		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	X
Covid-19 causality	<p><b>Explanation:</b> to what degree is the topic/subject analysed in the case-study directly related to the Covid-19 outbreak?</p> <p>The case study focuses on a litigation strategy in the context of Covid-19 and its immediate aftermath.</p>					