

POMOC PAŃSTWA – PORTUGALIA**Pomoc państwa SA.58101 (C/2020) (ex 2020/N) – Pomoc na ratowanie spółki SATA****Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej****(Tekst mający znaczenie dla EOG)**

(2020/C 294/03)

Pismem z dnia 18 sierpnia 2020 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Portugalię o swojej decyzji w sprawie wszczęcia postępowania określonego w art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej dotyczącego wyżej wspomnianego środka pomocy.

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

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Otrzymane uwagi zostaną przekazane władzom portugalskim. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

SATA Azores Airlines *Sociedade Anónima* (zwana dalej „SATA”) jest spółką należącą w całości do Regionu Autonomicznego Azorów i prowadzącą działalność w sektorze transportu lotniczego. SATA obejmuje pięć pełnowłasnościowych spółek: SATA Air Açores, SATA Internacional – Azores Airlines, Azores Vacations America, Azores Airlines Vacations Canada oraz SATA Gestão de Aeródromos.

SATA jest największą spółką w Regionie Autonomicznym Azorów i zatrudnia około 1150 pracowników, co czyni ją tam największym pracodawcą. SATA Air Açores i SATA Internacional – Azores Airlines, S.A. świadczą usługi pasażerskiego i towarowego transportu lotniczego na trasach objętych zobowiązaniami z tytułu świadczenia usług publicznych lub na zasadach komercyjnych. SATA odnotowała powtarzające się straty operacyjne, które sprawiły, że jej kapitał własny w ostatnich latach i obecnie jest ujemny. Te trudności finansowe pogłębiły się ze względu na skutki pandemii COVID-19, które doprowadziły do prawie całkowitego wstrzymania działalności SATA do czerwca 2020 r.

Od 2017 r. Autonomiczny Region Azorów zaradził częściowo niedoborom środków własnych i problemom związanym z wypłacalnością spółki poprzez zatwierdzenie trzech podwyższeń kapitału, w ramach których większość kwot już wypłacono. Portugalia twierdzi, że podwyższenia kapitału, o których mowa, nie przyniosły SATA korzyści gospodarczej, ponieważ jedyny udziałowiec SATA – Regionalny Rząd Azorów – działał jako prywatny inwestor funkcjonujący w normalnych warunkach rynkowych. Portugalia podkreśliła, że jedynym scenariuszem alternatywnym byłoby uznanie niewypłacalności SATA, która w odniesieniu do jedynego udziałowca pociągnęłaby za sobą skutki finansowe przekraczające koszty środków wsparcia.

W celu wsparcia SATA Portugalia zgłosiła gwarantowaną pożyczkę w ramach pomocy na ratowanie w wysokości 169 mln EUR jako pomoc na ratowanie zgodnie z wytycznymi dotyczącymi pomocy państwa w celu ratowania i restrukturyzacji zagrożonych przedsiębiorstw niefinansowych⁽¹⁾ („wytyczne dotyczące ratowania i restrukturyzacji”) obejmującą potrzeby w zakresie płynności SATA na kolejne 6 miesięcy, do końca stycznia 2021 r.

Na obecnym etapie Komisja ma wątpliwości, czy podwyższenia kapitału zapewnione przez Region Autonomiczny Azorów stanowią pomoc niezgodną z prawem, czy pomoc na restrukturyzację, a jeśli tak, to czy obecnie zgłoszona pomoc na ratowanie spełnia jeden z warunków zgodności z rynkiem wewnętrznym na podstawie art. 107 ust. 3 lit. c) Traktatu o funkcjonowaniu Unii Europejskiej, określonych w pkt 70 i 71 wytycznych dotyczących ratowania i restrukturyzacji, a mianowicie zasadę „pierwszy i ostatni raz”.

⁽¹⁾ Dz.U. C 249 z 31.7.2014, s. 1.

TEKST PISMA

The European Commission ('the Commission') wishes to inform the Portuguese Republic that, having examined the information supplied by your authorities regarding past and planned public financing in favour of SATA Air Açores — Sociedade Açoriana de Transportes Aéreos S.A. ('SATA Air Açores' or 'SATA' or 'the beneficiary'), it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU').

The Commission also wishes to inform the Portuguese Republic that it has decided not to raise any objections to individual aid to SATA Air Açores related to the provision of public service obligations or services of general economic interest related to air transport to the Region Azores and to the management of the airports in the same Region, on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) and Article 106 (2) of the TFEU.

The Commission has based its decision on the following considerations:

1. PROCEDURE

- (1) Following pre-notification contacts ⁽¹⁾, on 13 August 2020, Portugal notified to the Commission its plans to grant rescue aid in favour of SATA. Portugal amended and completed the notification on 14 August 2020.
- (2) Portugal agreed exceptionally to waive the rights deriving from Article 342 TFEU in conjunction with Article 3 of the EC Regulation 1/1958 ⁽²⁾ and to have the decision adopted and notified pursuant to Article 297 TFEU in English.

2. DESCRIPTION**2.1. The beneficiary: activities and operating subsidiaries**

- (3) SATA Air Açores is a *Sociedade Anónima* (limited liability company) ⁽³⁾ and holding of other companies that is based in the Azores Autonomous Region of Portugal ('the Region'). SATA Air Açores was incorporated in 1941 and is fully owned by the Government of the Region. SATA employs 1 400 persons, of which 1 150 locally in the Region and 250 in Lisbon. SATA Air Açores controls various companies: SATA Internacional — Azores Airlines, S.A. ('Azores Airlines'), SATA — Gestão de Aeródromos, S.A. ('SATA Gestão de Aeródromos' or 'SGA') and Azores Vacations America and Azores Vacations Canada.
- (4) SATA Air Açores provides air transport passenger and cargo services with routes under public service obligations ('PSO') ⁽⁴⁾, or on commercial basis. SATA Air Açores serves the nine islands of the Region through inter-island air transport of the Azores Archipelago, for a total of 14 routes, under PSO entrusted exclusively to SATA Air Açores by means of a 5-year public service contract expiring on 30 September 2020. SATA Air Açores was the only airline that submitted a bid for these routes in 2015. In 2019, SATA Air Açores operated more than 15 000 flights, with six Dash Bombardier planes which carried around 766 000 passengers.
- (5) Azores Airlines was incorporated in December 1990 and has an administrative hub in Ponta Delgada and one operational base in Lisbon. Azores Airlines operates without compensation i) 3 PSO routes connecting the five gateways of the Azores (São Miguel, Terceira, Santa Maria, Horta and Pico islands) to mainland Portugal, ii) a PSO route linking Ponta Delgada to Funchal (Madeira island) and iii) international flights for regular routes in the North Atlantic to Boston, Oakland, Toronto and Montreal. Azores Airlines also operates niche tourist markets and charter services. Even if the abovementioned PSO routes are open to all operators willing to comply with the PSOs imposed on the routes, Azores Airlines is the only airline operating these PSO routes. In 2019, Azores Airlines operated around 7 000 flights, through six medium course Airbus 320 planes serving around 946 000 passengers.
- (6) SATA Gestão de Aeródromos, incorporated in 2005, is dedicated to the management of the aerodromes of Pico, Graciosa, Corvo and São Jorge, as well as the Flores island terminal. Portugal alleges that the management of these airports is not economically attractive for private parties, contrary to the airports of São Miguel and Terceira, which are operated by the Vinci Group.

⁽¹⁾ The contacts started on 20 July 2020 and involved, until the notification, four technical discussions in videoconferences and exchanges about the draft submissions and analyses of financial and business data in connection with Portugal's pre-notified plans.

⁽²⁾ Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385, p. 58).

⁽³⁾ *Sociedade Anónima* is listed in Annex I (Types of undertaking referred to in point (a) of Article 1(1)) to Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182, 29.6.2013, p. 19.

⁽⁴⁾ See list of 176 PSO routes reported to the Commission (DG Transport and Mobility) as of September 2019, including SATA https://ec.europa.eu/transport/sites/transport/files/pso_inventory_table.pdf

- (7) The Portuguese authorities consider that the management and operation of the airports of these islands Pico, Graciosa, Corvo and São Jorge, as well as the Flores island terminal are services of general economic interest ('SGEI') ⁽⁵⁾. Air traffic in each of these airports has been below 200 000 passengers per year in the last three years ⁽⁶⁾. Portugal reported to the Commission the SGEI of these five airports in 2016-2017 ⁽⁷⁾. Indeed Portugal considers that the need to ensure connectivity of an isolated area of the European Union justifies the SGEI, in view of the lack of alternative means of transport available and in light of the criteria set out in the Guidelines on State aid to airports and airlines ('Aviation Guidelines') ⁽⁸⁾.
- (8) SATA also owns two tour operators in North America since 1985: Azores Vacations America and Azores Vacations Canada. Their business focus is on connecting North America, mainland Portugal and the Region throughout the year.
- (9) SATA handles all of the air-cargo within the Azores islands, that is around 2 900 tonnes per year, and around 1 500 tonnes per year from Azores to other destinations, that is nearly 60 % of total air-cargo outside Azores, including fish (around 60 %), mail (around 10 %) and medical supplies.
- (10) At present, Transportes Aéreos Portugueses S.A. Ryanair, Arkefly and Jetairfly serve commercial, non PSO routes between the Azores archipelago and the rest of the territory of the Union. As to direct routes, Ryanair connects the Azores with London, Manchester and Frankfurt. Jetairfly has a route connecting Azores with Brussels. Arkefly connects Azores with Amsterdam and Tenerife in the Canary Islands (Kingdom of Spain).

2.2. Financial situation of the beneficiary and past public financial support

- (11) SATA experienced increasing financial difficulties at least over the past seven years. Portugal informs that SATA Air Açores fulfils at present the criteria under domestic law for being placed in collective insolvency proceedings: around [...] ^(*) % of total debt to suppliers in 2019 is overdue; in 2019, the amount of EUR 464 million the liabilities exceeded by far assets worth EUR 234 million.
- (12) Between 2014 and 2019, despite annual turnover growing at ca. 5,1 %, SATA posted continuous net income losses, worsening since 2017. Accordingly, SATA's equity that was already negative in 2014 decreased to become deeply negative by 31 December 2019, whilst net debt increased by 63 % in the same period.

Table 1

SATA: main consolidated figures 2014-2019 (EUR million)

	2014	2015	2016	2017	2018	2019
Turnover	185,1	180,5	205,4	216,6	211,1	232,6
Net income	- 34,78	- 22,18	- 14,19	- 41,22	- 63,79	- 53,43
Debt to Suppliers	- 21,3	- 34,2	- 45,3	- 55,8	- 48,3	- 47,5
Cash & equivalents	9,6	6,3	6,7	3,8	5,7	6,7
Financial Debt	- 162,3	- 161,1	- 160,8	- 167,2	- 214,1	- 256,1
Net Debt	- 152,7	- 154,8	- 154,1	- 163,4	- 208,4	- 249,4
Own Funds (Equity)	- 55,8	- 78,5	- 94,6	- 135,6	- 156,3	- 230,3

Source: Consolidated annual accounts and Annex 2.2 of Notification

- ⁽⁵⁾ The concession relating to airport public services in support to civil aviation in Graciosa, Pico, São Jorge and Corvo islands was awarded to SGA by contract of 1 of July 2005, executed under the terms of Regional Government Resolution no. 102/2005, of 16 of June, for a period of 10 years, renewable for periods of 5 years, up to a maximum duration of 20 years.
- ⁽⁶⁾ In 2019, when the number of passengers (departing and arriving) between 2017 and 2019 was the highest in all five airports, the number of passengers was as follows: Pico (144 787), Graciosa (57 013), Corvo (8 825) São Jorge (80 629) and Flores (63 568).
- ⁽⁷⁾ Report at https://ec.europa.eu/competition/state_aid/public_services/2016_2017/portugal_en.pdf
- ⁽⁸⁾ Guidelines on State aid to airports and airlines, point 72, OJ C 99 of 4.4.2014, p. 3.
- ^(*) Confidential information

- (13) Among other measures supporting liquidity such as guarantees or credit facilities that SATA Air Azores regularly serviced and reimbursed when fallen due, the Regional Government partly addressed the shortfall of own funds and solvency and approved three capital increases in SATA Air Azores since 2017, of which EUR 72,6 million were already paid to the company ('the capital increases'):
- EUR 21 580 735 were provided in 2017;
 - EUR 27 000 000 were provided in 2018;
 - EUR 80 000 000 were approved in 2020, from which EUR 24 000 000 have already been paid, the remaining amount being due by 2023.
- (14) In respect of the capital increases, Portugal explains that they aimed at complying with the Portuguese Companies Code regarding situations of loss of half of paid-in share capital due to accumulated losses. This situation requires shareholders to deliberate on and consider providing fresh capital to remedy the losses.

2.3. Air transport services and contribution to economic development

- (15) The Region is an archipelago composed of nine volcanic islands, located in the North Atlantic Ocean, about 1 400 km away from mainland Portugal and populated with 245 000 inhabitants. The Region has a small and dispersed market with limited economies of scale: six islands are below 250 km² and seven islands have less than 15 000 inhabitants each. The islands can be reached from the mainland in two to three days by sea or two hours by plane. The Region is totally dependent of air transport, especially during winter, when weather conditions often render unavailable maritime transport. The gross domestic product per capita in the Region amounts to 68 % of the Union average. Portugal stresses that the Azores is one of the ultra-peripheral outermost regions of the European Union.
- (16) According to the Portuguese authorities, PSO flights guaranteeing air connections inter-island and between the Region and Portugal mainland provided by SATA Air Açores and Azores Airlines are services of general economic interest ('SGEI'). The public tenders for the provision of SGEI typically do not attract other bidders. In the last public tender for the entrustment of those SGEIs in 2015, SATA Air Açores was the only company bidding for the inter-island connection PSOs. This is also the case for Azores Airlines, which is the only company serving the other inter-island connection PSO (Funchal — Ponta Delgada) and the 3 PSO routes connecting the Region and the mainland. Yet these four routes are open to all airlines complying with the PSO imposed by Portugal on the routes. TAP Air Portugal has not bid for the PSOs routes to connect Lisbon with Horta and Pico Island since April 2015. EasyJet ceased to fly on a PSO route in 2017, as the company could not ensure the requested frequency.
- (17) According to Portugal, the international routes operated by Azores Airlines are particularly important for the Region, considering the spread around the world of the Azorean migrant communities. The Azorean diaspora is estimated at 1,5 million people, most of them in North America. SATA ensures connections with diaspora communities, which are key for the region's economy. Around 113 000 passengers came from North America in 2019 and the number of passengers from that continent has been increasing significantly in the last few years.
- (18) Finally, SATA is the largest company and one of the most important employers of the Region. According to Portugal, SATA generates around 5,2 % of the regional GDP and participates in the development of tourism in the region, carrying c.a. 40 % of the passengers arriving to Azores. The tourism sector has been increasing and now represents over 10 % of the regional GDP, with related effects on direct and indirect jobs in Azores.

2.4. Impact of the COVID-19 outbreak on SATA's results, liquidity prospects

- (19) SATA faces the impacts of the legal and regulatory restrictions imposed on companies and individuals within the aviation sector. The public policy measures or recommendations taken on health grounds to address the COVID-19 outbreak in Portugal or other countries — government travel restrictions and quarantine orders — caused numerous flight cancellations and route suspensions⁽⁹⁾, which worsened an already critical situation:
- On 19 March 2020, SATA Azores Airlines had to focus its operational activity at Ponta Delgada airport, and SATA Air Açores had to suspend PSO connections from all Azores islands to Terceira island, and viceversa;
 - On 25 March 2020, SATA Air Açores' regional inter-island PSO flights and all flights providing connections outside the Region were suspended except for PSO flights concerning cargo transport or cases of *force majeure*, provided that they were authorized by the Regional Health Authority;
 - On 4 May 2020, air connections to and from Azores Islands were suspended until 31 May 2020.

⁽⁹⁾ Portugal adopted a state of emergency on 18 March 2020, having effect as of 19 March, extended twice until 2 May, then succeeded by the state of calamity, which was in force until 31 May 2020.

— On 29 May 2020, SATA Air Açores' air connections between all the islands of the Region under the PSOs were gradually restarted; from 1 July 2020, SATA Air Açores, inter-island connections could be fully resumed.

- (20) Portugal alleges that all these measures or recommendations had a major impact on SATA and aggravated its financial situation. SATA's revenues were drastically reduced in March, April and May 2020, resulting in a negative cash flow position.
- (21) SATA's financial situation is at present characterised by pressing and immediate obligations falling due: i) the group owes EUR [0-50] million debt to suppliers, of which over [...] % is overdue; ii) a considerable financial effort is required to repay EUR [0-100] million bank debt including capital and interests due in 2020, of which SATA already paid EUR [0-80] million by June 2020, and is expected to pay the remaining EUR [0-20] million during the second half of 2020.

2.5. Description of the notified rescue aid

- (22) The objective of the notified rescue aid is to provide temporary liquidity to SATA to maintain its viability. The rescue aid will take the form of a public guarantee to a bank loan of EUR 169 million maximum ('the guaranteed rescue loan'), which corresponds to SATA's liquidity needs in the next six months. Portugal will determine the amount(s) of loan and the financial institutions concerned following the consultation of the market by SATA.
- (23) The prospective liquidity plan of SATA for all of its current activities drawn up by the Portuguese authorities shows indeed that SATA urgently needs liquidity to meet a cash shortfall of EUR 169 million until end January 2021. The cash forecasts are built on expected operating revenues and costs, including wage and other normal costs, accumulated backlog payments, fuel or airplane lease, impact from vouchers and reimbursement policies, etc.
- (24) In the amendment provided to the notification (recital (1)), Portugal submits that the amount of State aid necessary to guarantee continuity of the provision of the essential services by the SATA Group is EUR 133 million. This covers the projected liquidity needs until end January 2021 that are critical to maintain the essential functions of connectivity provided by the beneficiary, namely intra-islands PSOs, PSOs routes with mainland⁽¹⁰⁾ and the SGEI provided by the airports⁽¹¹⁾. This amount excludes the costs of commercial routes of SATA and liquidity needs of Azores Vacations America and Azores Vacations Canada.
- (25) Projections in the liquidity plan were made in the context of current uncertainty and widespread disruption of normal patterns of business activity about future projections of the airline business. Indeed Portugal stresses that it is impossible for any liquidity plan to fully identify and quantify the impact of all COVID-19 related uncertainties and implications on SATA Group's activity and projections.
- (26) The financial cost of the guaranteed rescue loan, including the interest rate and the guarantee premium, will not be lower than the reference rate 12-month EURIBOR plus 400 basis points. The loan guarantee will be terminated within 6 months of the date of the rescue authorised by the Commission, unless a restructuring plan is submitted for approval before. In this case, the loan guarantee will be automatically extended until the Commission decides on the restructuring plan.
- (27) Whilst Portugal prefers presenting to the Commission a restructuring plan [...]

2.6. Observations of the Portuguese authorities

2.6.1. Counterfactual to the rescue measure

- (28) Portugal claims that, in the absence of the guaranteed rescue loan, the beneficiary would fail to meet immediate and significant payments falling due. SATA's failure would in turn disrupt territorial continuity of Portugal mainland and the Azores (recital (16)). Since transport by sea from the mainland to the Region depend on weather conditions and are no alternative to air transport, Portugal indicates a risk of disruption of an important service which is hard to replicate and where it would be difficult for any competitor to step in quickly.
- (29) Portugal stresses that, before the COVID-19 outbreak, tenders opened to ensure PSO flights within the Region were not attractive to other airlines. Competing airlines did not show durable interest in ensuring complementary or alternative connections to and from destinations operated by SATA in the mainland and North America either. Examples show that lack of profitability made unsustainable the business case of maintaining new routes⁽¹²⁾. In the past five years, 14 airlines tried to operate in the Azores, mostly by providing charter flights, unsuccessfully.
- (30) Portugal points out that the Azores is an economy on a development path but with critical challenges to overcome. In that context, SATA has an important systemic role for the Region and its tourism in particular, so that its exit would have severe negative consequences. An important segment of companies — namely hotels, restaurants, social and cultural events, retail shops and other tourism-related activities — would have increased difficulties without support to the operations of SATA in bringing tourists and people from the diaspora. Most of those companies that may survive COVID-19 crisis only due to support of the Portuguese government through temporary subsidized work and measures which allow them to defer due payments, need tourism to ramp up.

⁽¹⁰⁾ The liquidity needs include the 14 PSO routes serviced by Sata Air Açores, Airport Services (SGA) and the PSO Sata Azores Airlines (four PSO routes: PDL-FNC-PDL / PDL-LIS-SMA / LIS-PIX-LIS / LIS-HOR-LIS), excluding commercial routes of Sata Azores Airlines.

⁽¹¹⁾ Airports in Pico, Graciosa, Corvo and São Jorge, as well as the Flores island terminal.

⁽¹²⁾ Delta cancelled its route from New York (JFK) to Ponta Delgada (PDL), launched in 2018.

2.6.2. Recent public financial support to SATA

- (31) Portugal considers that the capital increases funded by the Region since 2017 (recitals (13) and (14)) should not be qualified as State aid. The Regional Government of Azores is the sole shareholder of SATA and acted as a private investor operating in normal market conditions⁽¹³⁾. The analysis was driven by the conduct of a private holding company or a private group of undertakings pursuing a structural policy and guided by prospects of profitability in the longer term⁽¹⁴⁾. As the only relevant counterfactual would have been the default of SATA, the financial impact for the sole shareholder would have been greater than the costs of the supporting measures. Therefore, a comparable shareholder with similar economic exposure to the undertaking concerned would have acted in the same terms as the Regional Government of Azores.
- (32) Portugal also argues that SATA does not operate under normal market conditions by reason of the provision of SGEIs through the PSO routes. Therefore, since the situation of SATA's shareholder cannot be compared with that of a private group not operating under such obligations, market conditions should be assessed by reference to the objective assigned to SATA.⁽¹⁵⁾
- (33) Portugal argues that, should the capital increases entail State aid, any such aid would in any case be compatible with the internal market. The measures allegedly contribute to well-defined objectives of common interest related to socio-economic cohesion of the internal market, by increasing the mobility of Union citizens and the connectivity of the regions and promoting regional development. Services provided by SATA are essential for an outermost region of the Union characterized by higher unemployment and lower economic growth in relation to both the Union and Portugal, which is highly dependent on air transport for economic activity, tourism, imports and exports and for mobility.

2.6.3. Compatibility of the rescue measure

- (34) Portugal considers that the guaranteed rescue loan can be declared compatible with the internal market pursuant to the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty⁽¹⁶⁾. In that respect, the Portuguese authorities consider that the beneficiary has received no rescue or restructuring aid in the past ten years. As a subsidiary argument, Portugal also stresses that the rescue aid aims to remedy a serious disturbance in its economy (Article 107 3 b) TFEU). Portugal does not allege, however, that SATA would be eligible to aid under the Temporary framework for state aid measures to support the economy in the current COVID-19 outbreak⁽¹⁷⁾

3. ASSESSMENT OF THE MEASURES

- (35) The Commission first assesses whether the envisaged guaranteed rescue loan and the past capital increases under scrutiny entail State aid to the beneficiary under Article 107(1) TFEU, and then whether such aid is lawful and compatible with the internal market.

3.1. Existence of State aid

- (36) According to Article 107(1) TFEU, '[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (37) Portugal has notified the guaranteed rescue loan to SATA as constituting State aid. In the meantime, Portugal considers that the increases of capital of SATA funded by the Region since 2017 should not be qualified as State aid (recitals (31) and (32)).
- (38) The qualification of a measure as aid within the meaning Article 107(1) TFEU requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must distort or threaten to distort competition and affect trade between Member States; (iii) the measure must confer an advantage on its recipient; and (iv) that advantage must be selective. It is therefore appropriate to examine separately whether the guaranteed rescue loan and the capital increases qualify as aid.

⁽¹³⁾ Portugal refers to the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01), para. 66 and 74.

⁽¹⁴⁾ Cases Italy v. Commission (Alfa) (C-305/89) and Italy v. Commission (Lanerossi) (C-303/88) EU:C:1991:142.

⁽¹⁵⁾ Joined Cases *Chronopost SA*, (C-83/01 P, C-93/01 P and C-94/01 P), paragraph 38, EU: C2003:388.

⁽¹⁶⁾ OJ C 249, 31.7.2014, p. 1.

⁽¹⁷⁾ 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 91 I, 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 112 I, 4.4.2020, p. 1, and Communications from the Commission C(2020) 3156 final of 8 May 2020 and C(2020) 4509 final of 29 June 2020 on the 2nd and 3rd 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, and OJ C 218, 2.7.2020, p. 3.

3.1.1. Measures imputable to the State financed through State resources

- (39) The guaranteed rescue loan is to be granted by the government of the Autonomous Region of Azores, with resources from its budget. The capital increases of the beneficiary were also subscribed by the Region from resources of the same budget. For the purposes of Article 107(1) TFEU, resources of regional local authorities such as regions are State resources and decisions of such authorities should be regarded as 'imputable to the State' ⁽¹⁸⁾. The guaranteed rescue loan and the capital increases are thus imputable to the State and financed through State resources.

3.1.2. Measures distorting or threatening to distort competition and affect trade between Member States

- (40) The air passenger transport and cargo services sector in which the beneficiary is active is open to competition and trade between Member States. Other airlines licensed in the European Union such as Ryanair, Jetairfly, and Arkefly provide air transport services connecting the Azores Region with a few cities of the Union (recital (10)). Therefore, the guaranteed rescue loan and the capital increases are liable to affect trade between Member States.
- (41) By granting access to funding at conditions which it would not otherwise obtain on the market, the guaranteed rescue loan and the capital increases are liable to improve the position of the beneficiary in relation to actual or potential competing undertakings such as Ryanair, Jetairfly, and Arkefly, that have not had access to similar State support from Portugal or that have to finance their operations at market conditions. The guaranteed rescue loan and the capital increases consequently distort or threaten to distort competition.

3.1.3. Selective measures

- (42) The guaranteed rescue loan is to be granted through the exercise of discretion in favour of the beneficiary for an ad hoc amount determined by reference to its specific liquidity needs. The capital increases were also granted through the exercise of similar discretion for ad hoc amounts. Neither the loan nor the capital increases were part of a broader, general, economic policy measure to provide support to undertakings active in the air transport or other economic sectors, in a comparable legal and economic situation. As the Court has stated, where individual aid is at issue, the identification of the economic advantage is, in principle, sufficient to support the presumption that a measure is selective ⁽¹⁹⁾. This is so regardless of whether there are operators on the relevant markets that are in a comparable factual and legal situation. Therefore, the Commission concludes that guaranteed rescue loan and the capital increases are selective.

3.1.4. Measures must confer an advantage on its recipient

- (43) The Commission has to examine whether the rescue loan and the capital increases qualify as aid in that they confer an advantage on the beneficiary. That would be the case if a market operator holding the shares of the beneficiary in a situation as close as possible to that of the Region would not take similar decisions and grant the loan and the capital increases at the same conditions in the same circumstances. The market operator in question ought to leave aside any benefits expected in its situation as public authority. ⁽²⁰⁾

The capital increases

- (44) When the Region subscribed the capital increases as of 2017, the beneficiary had posted continuous negative earnings in the past three years at least (Table 1). As a result, no dividends could be distributed to the shareholder. Likewise, in the absence of absorption of the cumulated losses reducing the value of the shares that the Region had already paid in, the fresh capital entered the negative equity base of the beneficiary.
- (45) By that moment, the beneficiary had relatively significant negative equity by reference to its turnover and to its net debt (Table 1). It follows that the book value of the assets of the beneficiary would have been insufficient to meet the repayment of the debt, if the creditors had requested so. As a result, unless the assets would have been sold above their book value, it is excluded that the shareholder could expect any residual proceeds ensuing from the liquidation of the beneficiary. Given the corporate status of limited liability company of the beneficiary (*sociedade anónima*), a hypothetical liquidation of the beneficiary as of 2017 or thereafter would not have caused the shareholder to be held liable to pay any residual liability left unpaid. In other words, the exposure that an alternative market shareholder in the same situation as the Region was in 2017, would have been nihil, if one leaves aside the consequences that the Region could expect in its capacity as public authority.
- (46) In the circumstances, the shareholder of the beneficiary could not expect a market conform return of the capital increases of 2017 unless based on unrealistic or unreasonable assumptions. As a precondition for any possible expectation of positive return, the beneficiary would have needed to generate net earnings of a sufficient magnitude so as to bring its EUR 94,6 million negative equity to a positive figure (Table 1). With respect to possible assumptions, it does not appear at this stage that the decision to carry out the capital increases in 2017 and thereafter was taken on the basis of economic evaluations comparable to those which, in similar circumstances, a rational market economy operator with characteristics similar to those of the Regional Government of Azores would have had carried out to determine the profitability or economic advantages of the capital increases, before deciding on the purported investment.

⁽¹⁸⁾ T-267/08 and T-279/08 *Région Nord-Pas-de-Calais / Commission*, EU:T:2011:209.

⁽¹⁹⁾ See judgment of 4 June 2015 *Commission v MOL*, Case C-15/14 P, EU:C:2015:362, paragraph 60.

⁽²⁰⁾ Case C-300/16 P *Commission v Frucona Košice*, EU:C:2017:706, paragraph 59; and Case C-124/10 P *Commission v EDF*, EU:C:2012:318, paragraphs 78, 79 and 103.

- (47) Moreover, in the absence of such ex ante evaluations, it is patent that the expected return whether in dividends or in appreciation of the value of the shareholding would have needed to be higher than a market benchmark of the (opportunity) cost of the equity. As a matter of fact, by way of illustration, in 2017, market conform remuneration or opportunity cost of equity injected into Portuguese companies in general could be estimated around 11,83 %⁽²¹⁾. It is established that SATA did not provide any annual return on capital invested to the shareholder between 2014 and 2016. It seems therefore excluded that, without a sizeable restructuring and a credible business plan accompanying the fresh capital, a market shareholder would have subscribed to the increases of SATA capital with a reasonable expectation of obtaining a market conform return.
- (48) It follows that, subject to any further evidence that Portugal should provide to sustain its claim that the capital increases would have been subscribed by a market investor, at this stage, the capital increases in question appear to have conferred an advantage on its recipient.

The guaranteed rescue loan

- (49) The effect of the public measures affecting air traffic in connection with the COVID-19 outbreak have worsened the prospects of the beneficiary's already critical financial situation, as evidenced by the current and expected operating results until January 2021 (recital (23)). The financial situation and prospects of the beneficiary mean that it cannot likely reimburse the guaranteed rescue loan, thus excluding that it could obtain a similar loan at market terms without a public guarantee of the Region.
- (50) The assessment of whether a market operator in a situation as close as possible to that of the Region would grant the same guaranteed rescue loan does not contradict that the guarantee in question provides an advantage to the beneficiary with regard to market conditions. First, there is no prima facie evidence that the granting of the guarantee can be ascribed to behaviour and decisions which a market shareholder would follow. In that regard, Portugal only puts forward reasons which, however pertinent for a public authority would be irrelevant for a market shareholder (section 2.6.1). Second, Portugal does not assess the loan as being necessary to preserve or increase the value of and/or return from the shareholding in the beneficiary, based on a solid and credible financial assessment of expected returns thereof for the risk taken. The guaranteed rescue loan is being considered in order to allow time to the beneficiary to draw-up a restructuring plan, the contents and result of which are unknown before granting it.
- (51) Therefore, the guaranteed rescue loan provides funding at a lower cost than the beneficiary could obtain on the market, if at all. Therefore, a market operator in a situation as close as possible to that of the Region would not provide a similar loan. The guaranteed rescue loan thus appears, at this stage to confer an economic advantage on the beneficiary.

3.2. Conclusion on the existence of aid

- (52) In light of the above, the Commission preliminarily concludes that the guaranteed rescue loan in favour of SATA Air Açores involves State aid under Article 107(1) TFEU and that, at this stage, the capital increases appear to involve State aid under the same article.
- (53) The Commission will therefore assess their lawfulness and compatibility with the internal market.

3.3. Lawfulness of the aid

- (54) The guaranteed rescue loan has not yet been granted to the beneficiary and Portugal has thus observed the stand-still obligation laid down in Article 108(3) TFEU. Therefore, the guaranteed rescue loan does not constitute unlawful State aid.
- (55) However, since the capital increases — which at this stage are considered to involve State aids- have been granted to the beneficiary without being notified, they constitute unlawful State aid.

3.4. Compatibility of the aid with the internal market

- (56) Under Article 107(3)(c) TFEU, the Commission can authorise aid if it is granted to promote the development of certain economic sectors and if that aid does not adversely affect trading conditions to an extent contrary to the common interest.
- (57) In view of the nature and aims of the State aid at stake and the claims of the Portuguese authorities in the notification, the Commission will assess whether the rescue loan complies with the provisions on rescue aid laid down in the R&R Guidelines.

⁽²¹⁾ The 7,6 % equity risk premium in Portugal 2017 is added to Government 10 year bond yields of 4,23 % in January 2017. The estimate of cost of equity is a market estimate for all Portuguese companies based on the capital asset pricing model, disregarding the volatility of individual shares. A more refined estimation for a particular company should be based on a company-specific (β) indicator of volatility. The remuneration of volatile shares, i.e. with $\beta > 1$, should normally be higher than 11,83 % (e.g. 15,38 % with $\beta = 1,3$) and the remuneration of less volatile shares should be lower, with $\beta > 1$.

- (58) Before that, given the observations of the Portuguese authorities that if the capital increases constituted State aid, any such aid is compatible with the internal market, the Commission will also assess this claim. As noted in the R&R Guidelines, rescue aid can only take the form of loans or guarantees, which excludes an injection of fresh capital (R&R Guidelines, point 55). Likewise, restructuring aid must be conditional on the implementation of a restructuring plan restoring the long-term viability of the beneficiary within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions that should exclude any further State aid (R&R Guidelines, points 46 to 52). The Portuguese authorities have not presented a restructuring plan nor argued that SATA or the Region had drawn up or implemented any such plan in connection with the capital increases. Therefore, if the capital increases amounted to unlawful rescue or to restructuring aid, the compatibility thereof under the R&R Guidelines is doubtful.
- (59) Likewise, in the absence of specific rules derogating to the application of the R&R Guidelines to aid granted in the form of capital increases in outermost regions enacted by the Union legislator, the Commission also doubts that such aid in the form of capital injections could be declared compatible with the internal market with a view to promoting regional development or cohesion in outermost regions, as Portugal argues (recital (33)).
- (60) As regards the guaranteed rescue loan, rescue aid is by nature urgent and temporary assistance for the short time needed to work out a restructuring plan after analysing the circumstances which gave rise to the difficulties and develop an appropriate plan to remedy those difficulties (R&R Guidelines, point 26). The notified rescue aid adheres to that general principle as it arises in a situation of particular urgency in the airline sector that affects the beneficiary's ability to meet its payment and financial obligations.

3.4.1. Eligibility

- (61) In order to be eligible for rescue aid, an undertaking must qualify as an undertaking in difficulty for the purposes of section 2.2 of the R&R Guidelines. In particular, point 20 of the R&R Guidelines explains that an undertaking is considered to be in difficulty when, without intervention by the State, it will almost certainly be condemned to going out of business in the short or medium term. This would be the case when at least one of the circumstances described in letters a) to d) of point 20 of the R&R Guidelines occurs.
- (62) As explained in recital (28) and Table 1, SATA Air Açores presented a negative total equity amount of EUR 230 million in 2019, decreasing every year from EUR 55,8 million negative equity in 2014 which shows that at least half of its subscribed share capital had disappeared since 2014. It follows that, based on the equity position, SATA Air Açores was also in difficulty in 2015, 2016, 2017 and 2018. Likewise, as explained in recital (11), SATA Air Açores fulfils at present the criteria under domestic law for being placed in collective insolvency proceedings at the request of its creditors.
- (63) It follows that, the beneficiary, at present and since 2014 at least, qualifies as an undertaking in difficulty pursuant to points 20(a) and (c) of the R&R Guidelines.
- (64) According to point 21 of the R&R Guidelines, a newly created undertaking is not eligible for rescue aid. The beneficiary is not a newly created undertaking for the purposes of the R&R Guidelines since it was established in 1941, so more than three years ago (see recital (3)).
- (65) According to point 22 of the R&R Guidelines, a company belonging to or being taken over by a larger business group is not normally eligible for rescue aid, except where it can be demonstrated that the company's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself. The beneficiary is not part of a larger business group, as it is fully owned by the Azorean regional government. In the case of SATA, it is apparent that the difficulties at issue have been aggravated by the unprecedented public measures taken by Portugal and other countries with respect to air transport (see recital (19)).

3.4.2. Contribution to an objective of common interest

- (66) Under point 38(a) of the R&R Guidelines, in assessing whether the rescue aid can be declared compatible with the internal market, the Commission examines whether the State aid contributes to a well-defined objective of common interest in accordance with Article 107(3) TFEU. In that respect, the Member State must demonstrate that the aid aims to prevent social hardship or address a market failure. Under point 44 of the R&R Guidelines, this can be demonstrated in particular by showing that one of the circumstances listed from letter a) to g) are met.
- (67) In that regard, Portugal refers to circumstances mentioned under point 44(b), (c) and (d) of the R&R Guidelines, namely that there is a risk of disruption to an important service which is hard to replicate and where it would be difficult for any competitor simply to step in, that the exit of SATA would have potential negative consequences given its important systemic role in the Azores Region and that such exit would risk interrupting the SGEI that SATA provides.
- (68) The notified rescue aid seeks to prevent the immediate failure of the beneficiary to meet its payment obligations at present and in the most immediate future, with the possible immediate impact of disrupting or halting some of the activities referred to in recitals (16) to (18). On the basis of the information provided by Portugal, [...]
- (69) Since the beginning of the COVID-19 outbreak, SATA Air Açores has never completely stopped providing PSO flights (cargo and passengers) authorised by the Regional Health Authority because of indispensable supply activities linked to the ultra-peripheral location of the Açores islands. Two aircrafts ensured the supply of medical equipment and other necessary supplies from the mainland to the islands.

- (70) In the present circumstances triggered by the COVID-19 outbreak, it is not possible for any competitor, including those already active on the Portuguese market, to step in and fully or significantly replicate the role of SATA Air Açores. The continued connectivity on the routes from and to Azores and, a fortiori, in-between islands in the Azores which SATA Air Açores serves would thus vanish or be drastically reduced without the rescue aid.
- (71) As Portugal stresses, the PSO flights provided by SATA Air Açores and Azores Airlines are SGEI provided to the Region and Portugal. This is an important and predominant part of SATA activities (recital (24)). It is therefore established that potential failure of SATA Air Açores would lead to an interruption of the continuity of provision of the SGEI to the Region and Portugal.
- (72) Likewise, the Commission considers that the management of an airport may be considered an SGEI if part of the area potentially served by the airport would, without the airport, be isolated from the rest of the Union to an extent that would prejudice its social and economic development. Certain airports thus have an important role in terms of regional connectivity of isolated, remote or peripheral regions, in particular, in outermost regions of the Union. The Commission thus considers in principle that certain airports in the Union such as those in Azores can provide a SGEI, under certain conditions depending on the presence of other modes of transport, and in particular of high-speed rail services or maritime links served by ferries (Aviation Guidelines, point 72).
- (73) Based on the information provided by Portugal with respect to the size, location, alternative means of transport and services provided by SATA in the five airports which it manages, the Commission concludes that those five airports provide a SGEI for the Region, without which the connectivity and territorial continuity of Portugal and the Union would be curtailed (recitals (15) and (16)).
- (74) It is therefore established that, in the circumstances, the activity of management of the island airports which SATA carries out through SGA appears to provide a SGEI that is indispensable for the continuous provision of essential services of connectivity to the Region.
- (75) The Commission also notes that the failure of SATA, in the absence of a rescue aid, would cause a situation of severe hardship to the economy of Azores, which is an outermost region of the EU, facing several challenges imposed by its geographic distance from the Portuguese mainland and its socio-economic gap in relation to Portugal and the EU (recital (18) and (30)).
- (76) The consequences of a failure of the SATA would be particularly serious in the context of the social and economic crisis generated by the COVID-19 outbreak and would therefore greatly hinder the economic recovery path of the region. Many other companies in the value chain, particularly in the archipelago, would be affected by SATA's failure. A failure of SATA would lead to severe social and economic hardship for the Region and significant negative spill-over effects on important segments of the economy concerning tourism-related activities.
- (77) The Commission concludes that the information provided by Portugal demonstrates that, by allowing the beneficiary to meet its payment obligations in the near future, the rescue aid contributes to a well-defined objective of common interest as provided by points 44(b), (c) and (d) of the R&R Guidelines.

3.4.3. Appropriateness

- (78) Under point 38(c) of the R&R Guidelines, the Commission will not consider an aid measure to be compatible with the internal market if other, less distortive, measures allow the same objective to be achieved. In that respect, rescue aid must fulfil the conditions laid down in point 55 from letter a) to e) and point 56 of the R&R Guidelines.
- (79) As to letters a), c) and d) of point 55 of the R&R Guidelines, the Commission notes that the guaranteed rescue loan, covering net cash flow needs up to EUR 169 million is temporary in nature and serves the purpose of providing finance to all the activities currently carried out by SATA. Portugal committed to communicating to the Commission, no later than six months after the rescue aid measure has been authorised, a restructuring plan or, in any event, proof that the rescue loan has been repaid or a liquidation plan has been adopted.
- (80) According to Portugal, the rate of the guaranteed rescue loan, including the guarantee fee and the interest rate of the underlying loan shall not be lower than the reference rate 12-month EURIBOR plus 400 basis points. Accordingly, the interest rate is at least equal to the reference rate set out in the Reference Rate Communication for weak undertakings offering normal levels of collateralisation, which is currently 1-year IBOR plus 400 basis points⁽²²⁾ (see recital (25)), which is in line with requirements of points 55(b) and 56 of the R&R Guidelines.
- (81) The Commission notes the declaration by Portugal that the loan will be used only to meet the identified urgent liquidity needs of the beneficiary, and in particular will cover normal operating costs (see recital (23)). Accordingly, the beneficiary will not use the rescue aid to finance structural measures or other activities than its current operations (point 55(e) of the R&R Guidelines).

⁽²²⁾ Communication from the Commission on the revision of the method for setting the reference and discount rates, OJ C 14, 19.1.2008, p. 6

- (82) In view of the information provided by Portugal, the Commission concludes that the guaranteed rescue loan meets the conditions laid down in points 38(c), 55 and 56 of the R&R Guidelines and therefore the form of the aid allows the rescue of the beneficiary in the least distortive way.

3.4.4. Proportionality of the aid / aid limited to the minimum

- (83) Under point 38(e) of the R&R Guidelines, aid must not exceed the minimum needed to achieve the objective of common interest. As specified in point 60 of the R&R Guidelines, rescue aid must be restricted to the amount needed to keep the beneficiary in business for six months. In determining that amount, the Commission takes into account the outcome of the calculation under the formula set out in Annex I to the R&R Guidelines. The Commission will authorize any aid exceeding the result of that calculation only if it is duly justified by the provision of a liquidity plan setting out the beneficiary's liquidity needs for the coming six months.
- (84) The EUR 169 million amount of the guaranteed rescue loan required by Portugal to be approved as rescue aid exceeds the result of the formula set out in Annex I to the R&R Guidelines. Therefore, in line with point 60 of the R&R Guidelines, Portugal provided a liquidity plan setting out the beneficiary's liquidity needs for the coming six months, from August 2020 to January 2021.
- (85) The Commission has reviewed the liquidity plan and found that it reasonably reflects the liquidity needs of the beneficiary, to the extent they can be reasonably and prudently anticipated in the business and financial environment into which the beneficiary will be operating until January 2021.
- (86) In particular, the liquidity includes cash outflows related to legitimate expenses, such as wage and other operating costs, accumulated backlog payments, fuel hedging or plane lease costs etc. The aid does therefore not exceed the minimum necessary to keep the beneficiary in business with the same economic activities for the coming six months with a view to providing assistance for the time needed to analyse the circumstances which gave rise to the difficulties and to devise a restructuring plan to address them (see also point 26 of the R&R Guidelines). The fact that only EUR 133 million amount cash shortfall are required to cover liquidity needs which are critical to maintain the essential functions of connectivity provided by the beneficiary does not contradict this finding since the perimeter of (loss-making) operations covered is bigger (recital (24)).
- (87) The Commission therefore concludes that the notified rescue aid is restricted to a minimum amount, in line with point 60 of the R&R Guidelines and is consequently proportional.

3.4.5. Negative effects

- (88) Under point 38(f) of the R&R Guidelines, the negative effects of the aid on competition and trade between Member States must be sufficiently limited, so that the overall balance of the measure is positive. In the case of rescue aid, the Commission considers that this condition is met when recipients of aid under those R&R Guidelines are not in recurrent difficulties over time that were not properly addressed with rescue or restructuring aid granted earlier or are still recipients of previous unlawful aid which the Commission has declared to be incompatible with the internal market and ordered recovery thereof.
- (89) In that respect, under points 70 and 71 of the R&R Guidelines, aid can be granted to undertakings in difficulty in respect of only one rescue or restructuring operation. Therefore, where less than ten years have elapsed since rescue aid, restructuring aid or temporary restructuring support were granted to the beneficiary in the past, including any such aid granted before the entry into force of the R&R Guidelines and any non-notified aid, the Commission will not allow further aid (the 'one time, last time' principle).
- (90) The Commission has not identified unlawful aid to SATA in respect of which the Commission has adopted a negative decision and Portugal also informed in the notification that the beneficiary has not benefited from such earlier unlawful aid, which is in line with requirements of point 94 of the R&R Guidelines.
- (91) However, the Commission considers at this stage that the capital increases involve unlawful State aid to SATA (recital (55)). If the formal investigation confirms this preliminary finding, such an aid amounts to unlawful rescue or restructuring aid, given the situation of difficulty characterised by negative equity in which SATA was in 2017 and thereafter when the aid was granted (recital (12) and Table 1). The compatibility of any such unlawful aid is also doubtful at this stage (recital (58)).
- (92) The R&R Guidelines permit exceptions to the one time last time principle in exceptional and unforeseeable circumstances for which the beneficiary is not responsible (point 72 c) of the R&R Guidelines).
- (93) Portugal claimed in the notification that the beneficiary has not benefited from any rescue aid, restructuring aid or temporary restructuring support in the past ten years. In addition, Portugal alleges that the guaranteed rescue loan also serves to remedy a serious disturbance of its economy and that it meets an objective of common interest by maintaining air transport connectivity in an outermost region of the Union. However Portugal has not explicitly alleged that a possible exception to the one time last time principle would be justified due to exceptional and unforeseeable circumstances for which SATA is not responsible or that the constraints of the activity of SATA in the Region constitute such circumstances owing to Azores being an outermost region.

- (94) It is apparent at this stage that the losses of SATA in its operations between, at the earliest, 2014 and 2017 which caused the capital increase, were recurrent and structural and not due to exceptional and unforeseeable circumstances. Portugal seems to acknowledge this given its intention to remedy henceforth through a restructuring of SATA, announcing a plan in the next six months at the latest.
- (95) On the other hand, the COVID-19 outbreak is an exceptional and unforeseeable occurrence and has undoubtedly impacted the operating results of the beneficiary since March 2020, prompting the notification of urgent rescue aid. However the magnitude of the losses incurred seems to be relatively limited in terms of decrease of turnover (section 2.4), and, in any event, does not match the urgent liquidity needs expected for the next six-months nor sufficient to justify the recurrent operating losses of the beneficiary since at least 2014.
- (96) In addition, Portugal mentions that the Azores is an outermost region, without specifying further whether this territorial status in the TFEU and the costs borne by SATA would have prompted the capital increases in 2017 or whether this status would justify a breach of the one time last time principle or constitute exceptional and unforeseeable circumstances for which the beneficiary would not be responsible. In effect, the Azores is listed in Article 355(1) TFEU, so that the TFEU fully applies in accordance with Article 349 TFEU⁽²³⁾. Moreover, there is at present no specific provision enacted by the Council (and the Parliament as appropriate) derogating to State aid rules in the ambit of the R&R Guidelines for the territories listed in Article 355 TFEU.
- (97) According to the case law of the Court of Justice, it is up to the Member State to invoke possible grounds of compatibility and to demonstrate that the conditions for such compatibility are met⁽²⁴⁾. It follows that, at this stage, in the absence of specific observations of Portugal in this respect, the 'one time, last time' principle does not seem to be satisfied so that the guaranteed rescue aid loan does not meet the conditions of compatibility set out in points 70 and 71 of the R&R Guidelines, as qualified by point 72 c) thereof.
- (98) It is therefore for Portugal to demonstrate that the capital increases since 2017 do not involve State aids, so that the condition that more than ten years have elapsed since rescue aid, restructuring aid or temporary restructuring support were granted to the beneficiary in the past, including any non-notified aid, is met. In addition, if the capital increases amounted to State aid, Portugal could still invoke an exception owing to the fact that there would exist exceptional and unforeseeable circumstances for which the beneficiary would not be responsible. It is therefore for Portugal to identify such circumstances and demonstrate that the beneficiary would not be responsible and why they are exceptional and unforeseeable.

3.4.6. Application of section V of the R&R Guidelines regarding SGEIs

- (99) In assessing State aid to SGEI providers in difficulty under the R&R Guidelines, the Commission considers that the specific application of the principles therein should be adapted where necessary to take account of the specific nature of SGEI and, in particular, of the need to ensure continuity of service provision in accordance with Article 106(2) of the Treaty (R&R Guidelines, point 14). In that respect, where the Commission finds that R&R aid cannot be found compatible, the Commission may authorise the payment of such aid and for a limited duration as is necessary to ensure continuity of the SGEI until a new provider is entrusted. (points 99 and 103 of the R&R Guidelines).
- (100) While at this stage there is no definitive finding that the guaranteed rescue loan is incompatible with the internal market, it is established that SATA manages five airports which provide SGEI in the Region and also operates SGEI for PSO routes that are essential for air transport connectivity (recitals (71), (73) and (74)). Therefore point 103 of the R&R Guidelines calls for the performance of these particular tasks and services assigned to SATA is not obstructed until the Commission takes a final view on the compatibility of the guaranteed rescue loan with the internal market.
- (101) Indeed, point 103 of the R&R Guidelines may apply where the Commission has already concluded that the unlawful aid under scrutiny cannot be found compatible with the internal market and it is sufficient condition for its application that there is a risk that the Commission may find that an SGEI provider is not able to comply with the conditions of these guidelines⁽²⁵⁾.

⁽²³⁾ Pursuant to Article 349 TFEU, the Council may adopt specific measures aimed, in particular, at laying down the conditions of application of the Treaties to those regions, including State aids, without undermining the integrity and the coherence of the Union legal order, including the internal market and common policies.

⁽²⁴⁾ C-364/90 Italy v Commission, EU:C:1993:157, paragraph 20.

⁽²⁵⁾ The (2004) R&R Guidelines (Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244, 1.10.2004, p. 2-17) that predated the present R&R Guidelines, did not contain a specific section on rules applicable to providers of SGEI, such as those now set out in section V thereof. In case practice under the earlier (2004) R&R Guidelines, the Commission, whilst raising doubts on compatibility of R&R aid, authorised continuation of rescue aid during formal proceedings, in circumstances where discontinuation of the aid could have obstructed the performance of a public service, based on prima facie evidence of a genuine SGEI. See Commission Decision (2009)5088 final of 2.7.2009 in case No C19/2009 (ex N 64/2009)- Denmark — Restructuring aid to TV2 Denmark A/S, point 77 and conclusion, OJ C 207 02.09.2009, p. 2.

- (102) In the present case, the Commission has doubts on compatibility, which *a fortiori* calls for the performance of the tasks and provision of the essential services in question is preserved during the formal investigation. For otherwise, on the one hand, without the indispensable liquidity, the beneficiary could be put in an irreversible situation and be obstructed from ensuring the performance of the SGEI. On the other hand, the users could be irremediably deprived of all or some of the SGEI in question. And this could likely happen given the liquidity situation of SATA (recitals (23) and (24)) when there is strong likelihood that no alternative provider would, at this point in time, minimally provide, let alone replicate, the services (recitals (10) (68) and (76)), thus risking a serious threat to the connectivity of the islands of an outermost region.
- (103) The Commission therefore applies point 103 of the R&R Guidelines so as to avoid an irreversible situation of discontinuation of essential air transport connectivity SGEI in the Azores Region during the conduct of formal proceedings, since there is there is a risk that the Commission may find that SATA is not able to comply with the conditions of these guidelines.
- (104) In the present case, the Commission takes into account the submission of Portugal regarding the PSOs that SATA discharges. The Commission also notes the evidence that Portugal submits to the effect that the PSOs discharged by Azores Airlines on the four PSO routes open to all airlines have not so far attracted any alternative service providers; that alternative airlines exited routes connecting the Region (recital (10)); that only an extremely limited number of routes connecting Azores with the rest of the Union are being served by four other airlines licensed in the European Union (recital (10)). Continuous service provision in those PSO routes provide indispensable air transport connectivity.
- (105) The air transport services under PSO are combined in this case with the SGEI provided through the five airports which SATA guarantees in an outermost Region, which is *a fortiori* especially sensitive and even vital in the context of the COVID-19 outbreak and its induced effects on essential passenger and cargo transport (see recitals (6) and (9) for recent role of SATA).
- (106) Likewise, in addition to the estimated liquidity which are indispensable to maintaining the connectivity of the Region without covering other liquidity needs of the beneficiary, the Commission takes into account the stated intention of Portugal to submit a restructuring plan within such relatively limited period or otherwise liquidate the beneficiary (recital (27)) and the terms of the notified guaranteed rescue loan, which are in line with the R&R Guidelines (recital (82)).
- (107) At this stage, the Commission cannot conclude on the compatibility of the guaranteed rescue aid loan with the internal market, because of its doubts on the compliance with the 'one time, last time' principle, and on whether exceptional and unforeseeable circumstances of which SATA is not responsible can be validly claimed in respect of the capital increases.
- (108) Nevertheless, pursuant to point 103 of the R&R guidelines, the Commission considers justified to provide at this stage for authorisation of the payment of rescue aid strictly limited to the amount up to EUR 133 million and for a duration of six months as it is necessary to ensure continuity of the SGEI in the air transport services and the airport management services provided at present by SATA and its subsidiaries (recitals (3) to (7), (71) and (77)). The Commission notes in that respect the amendment which Portugal provided to the notification, submitting that the minimum amount of state aid necessary to guarantee continuity of the provision of the essential services by the SATA Group is EUR 133 million (recital (24)).
- (109) The Commission considers that the interest rate that Portugal commits to applying is an appropriate interest rate, since the guaranteed loan will cover normal operating costs for a definite and short period. It is thus appropriate that the costs of the guaranteed loan to SATA be no lower than the reference rate 12-month EURIBOR plus 400 basis points and that the loan guarantee will be terminated within six months of the date of the present decision.
- (110) However, the Commission must verify that any aid to SATA is effectively proportionate and used to cover only the liquidity needs which are critical to maintain the essential functions of connectivity provided by the beneficiary in the next six months. To that effect, it is necessary that Portugal provides without delay any information requested by the Commission regarding the payment of the aid and the use to which it is put. Moreover, it is necessary that Portugal reports every month starting from the date of the present decision showing the use to which the guaranteed loan has been put and providing, if appropriate, an updated plan of liquidity needs for the next month and until the end of the six month period.

3.4.7. Transparency

- (111) According to point 38(g) of the R&R Guidelines, Member States, the Commission, economic operators and the public must have easy access to all relevant acts and pertinent information about the aid awarded. This means that Portugal must respect the provisions on transparency laid down in point 96 of the R&R Guidelines. The Commission notes that Portugal undertakes to respect those obligations. The relevant information will be made available on the website:

<https://www.portaldiplomatico.mne.gov.pt/sobre-nos/gestao-e-transparencia/documentos-legais>

3.5. Conclusion on the compatibility of the notified aid

- (112) In the light of the findings above, the Commission concludes that, at this stage, neither the capital increases nor the guaranteed rescue loan appear to meet the conditions of compatibility with the internal market, in particular those set out in the R&R Guidelines. The Commission cannot therefore consider at the present stage that those aids, and in particular the rescue aid provided to the beneficiary as notified, are compatible with the internal market.
- (113) However, pursuant to Article 106(2) TFEU in conjunction with points 99 and 103 of the R&R Guidelines, the Commission deems compatible with the internal market the aid that is necessary to ensure continuity of the SGEI provided by SATA and its subsidiaries, in the form of a guaranteed loan limited to a maximum amount of EUR 133 million, for a duration of six months from the adoption of the present decision, provided that it is remunerated with an appropriate interest rate and that the aid only covers liquidity needs and costs related to ensuring essential air transport connectivity of the Azores Region. Portugal should report every month starting from the date of the present decision showing the use to which the guaranteed loan has been put, providing if appropriate an updated liquidity plan until the end of the six-month period and supply without undue delay any information which the Commission would require in that respect.

4. CONCLUSION

In the light of the foregoing considerations, the Commission has accordingly decided:

- not to raise objections to individual aid to SATA Air Açores for a period of six months in an amount not exceeding EUR 133 million of liquidity needs of its essential activities related to the provision of public service obligations related to air transport to the Region Azores and to the management and operation of services of general interest in the airports in the same Azores Region, on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) and Article 106(2) TFEU and
- acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, request the Portuguese Republic to submit, within one month of the date of receipt of this letter, its comments and to provide all such information as may help to assess the compatibility of the capital increases of SATA Air Açores subscribed by the Region of Azores since 2017 and of the guaranteed rescue loan to SATA Air Açores with all the conditions applicable to the rescue aid. The information should include, in particular:
 1. evidence showing that the decision to carry out the capital increases in 2017 and thereafter was taken on the basis of economic evaluations comparable to those which, in similar circumstances, a rational market economy operator with characteristics similar to those of the Regional Government of Azores would have had carried out to determine the profitability or economic advantages of the capital increases;
 2. in the absence of such economic evaluations, objective and verifiable evidence dating back to the period before or simultaneous to the capital increases and showing i) that the capital increases fall to be ascribed to the Regional Government of Azores acting as a private market operator, and not as public authority, ii) that it took a decision to make an investment in SATA, iii) the nature and subject-matter of the capital increases, the context, the objective pursued and the rules to which capital increases of the kind at issue are subject; evidence or information post-dating the decision to increase capital will not be taken into account;
 3. observations with supporting evidence to the effect that the capital increases since 2017 were granted in exceptional and unforeseen circumstances of which SATA is not responsible or that such circumstances thereafter should be taken into account to assess the compatibility of the rescue aid; or observations with supporting evidence to the effect that the capital increases remedied a shortfall of adequate ex ante determination of a compensation for the services of general interest that SATA provided and/or obligations that had to SATA discharge.
 4. a detailed explanation of the circumstances and concrete steps to be taken to ensure and maintain the continuity of the PSO air transport services that SATA provides, if SATA would no longer be entrusted with the provision thereof, and of the airport management services that SATA provides, including the duration necessary to select one or various alternative providers for the air transport and airport management services concerned;
 5. the conditions and time-frame in which an open call for expression of interest of alternative providers bidding for various SGEI or PSO services or bundles thereof could be organised with a view to launching a procedure to select one or various tenderers capable of providing these SGEI or PSO services at the least cost to the Region, with a compensation properly defined objectively in advance that cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit.

The Commission requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately and wishes to remind the Portuguese Republic that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 16 of Council Regulation (EU) 2015/1589, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns the Portuguese Republic 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.
