

## Portugal

### Main Developments Since 2019

The main developments in the area of State aid law in Portugal since our last country report in mid-2019 concern measures to mitigate the impact of the coronavirus pandemic on the economy, Portugal's recovery and resilience plan, complaints against the auction of 5G radio frequency utilisation rights and the rescue and restructuring of Portugal's state-owned airlines TAP and SATA.

#### I. The COVID-19 Measures

The pandemic of COVID-19 took a heavy toll on all areas of business in Portugal, with a particularly strong impact in the tourism and hospitality sector, which is of considerable relevance to the Portuguese economy.

As a result, a substantial number of decisions by the European Commission (Commission) concerning aid granted by Portugal in 2020 and 2021 are related to measures notified under the Temporary Framework for State Aid Mea-

sures to support the economy in the current COVID-19 Outbreak,<sup>1</sup> aimed, in particular, at addressing liquidity needs of SMEs in sectors particularly affected by the pandemic, such as tourism, hospitality, cultural activities, restaurants, commerce and services open to consumers,<sup>2</sup> and at supporting investment in R&D, testing and production of products relevant to the containment of the coronavirus outbreak.<sup>3</sup>

#### II. Recovery and Resilience Plan

By decision dated 16 June 2021,<sup>4</sup> the Commission endorsed Portugal's €16.6 billion recovery and resilience plan (RRP) supporting the implementation by 2026 of crucial investment and reform measures put forward by Portugal to emerge stronger from the COVID-19 pandemic, in particular measures to secure Portugal's (i) green transition (including, in particular, energy efficiency in residential buildings, production of hydrogen and

renewable gases, protection of vulnerable forest areas), (ii) digital transition (including, in particular, upgrading technological equipment in schools and training centres, modernising and digitisation of the National Health Service, digital skills training for SME and their workers), and (iii) economic and social resilience (including, in particular, establishment of the Portuguese National Promotional Bank investing in viable firms to address the structural problems of limited access to finance and undercapitalisation; supporting access to housing; upgrading science facilities in schools and universities to raise enrolment rates in natural science, technology and engineering courses; modernisation of justice and business environment).

#### III. Zero Emission Buses and Supporting Infrastructure

By the time the Commission had endorsed Portugal's RRP, it had already approved a measure supporting Portugal's green transition. On 10 June 2021, the Commission cleared a €40 million aid scheme to support the purchase of 120 to 140 hydrogen and electricity powered buses (Zero Emissions Buses) and the setting up of the necessary recharging or refuelling infrastructure as being compatible with the internal market pursuant to Article 107(3)(c) TFEU and the Guidelines on State aid for environmental protection and energy.<sup>5</sup>

Within the transport and mobility sector, Portugal targets a 40% reduction in greenhouse gas emissions compared to 2005, as well as the incorporation of a 20% share of renewable energy in final energy consumption. Currently, more

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- 1 Communication from the Commission - Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak, 19 March 2020 [2020] OJ C 91/1.
- 2 Commission Decision of 22 March 2020, SA.56755 Guarantee schemes related to Covid-19; Decision of 27 November 2020, SA.59450 PT Direct Grants Micro and Small Companies COVID-19; Decision of 20 January 2021, SA.61048 Amendment to SA.59450 (2020/N) - 'COVID-19: Direct grants to micro, small and medium companies in specific sectors' - measures 'Apoiar.PT' and 'Apoiar Restauração'; Decisions of 20 May 2020, SA.57049 COVID19 – TF measure to preserve employment on the Azores Islands I and SA.57050 COVID19 – TF measure to preserve employment on the Azores Islands II; Decision of 22 May 2020, SA.57494 Covid-19 – Direct grant and loan guarantee scheme – Autonomous Region of Madeira.
- 3 Commission Decision of 17 April 2020, SA.57035 COVID-19 Support to R&D projects, testing -infrastructures and production of COVID-19 related products.
- 4 Commission press release dated 16 June 2021, IP/21/2985.
- 5 Commission Decision of 10 June 2021, SA.62618 Portugal - Zero Emission Buses and respective supporting infrastructure.

than 95% of public passenger transport bus fleets are diesel powered. The aid scheme (i) will increase the competitiveness of Zero Emission Buses by covering a substantial part of their higher acquisition price and the costs of setting up of the necessary refuelling and recharging infrastructure and (ii) is expected to deliver overall CO<sub>2</sub> savings of 67,200 tons to 78,400 tons until 2035 as well as to contribute to a very significant reduction of other pollutants.

#### IV. Auction of 5G Radio Frequency Utilisation Rights

According to press reports, incumbent telecommunications operators have submitted State aid complaints to the Commission against the rules adopted by the regulator ANACOM for the (still ongoing) auction of radio frequency utilisation rights which foresees a bundle of advantages granted to new entrants, including (i) a reserve to new entrants of a part of the spectrum auctioned (relevant for 2G, 3G and 4G technologies) which, in addition, is not subject to any of the conditions typically inherent in the award of such rights (concerning population coverage and network development), (ii) non-reserved spectrum (relevant for 5G technologies) being subject to significantly less onerous population coverage obligations than if acquired by incumbents (and also much less onerous than the obligations linked to spectrum acquired by incumbents in past auctions), (iii) new entrants acquiring non-reserved spectrum having access to national roaming of incumbents in all bands, again subject only to insignificant population coverage obligations, and (iv) a reduction by

50% of the spectrum utilisation fee for the first three years. It is understood that the complainants argue that the discrimination against incumbents inherent in the advantages granted to new entrants violates the principles enshrined in the national and EU legal framework.<sup>6</sup>

#### V. The TAP Saga (So Far)

By decision dated 10 June 2020, the Commission approved individual aid in the form of a subsidised loan of up to €1.2 billion to be granted by Portugal to address the immediate liquidity needs of the TAP group (TAP) (Rescue Aid Approval).<sup>7</sup> TAP provides air transport and related services, mainly within, out of and to Portugal. At the time, TAP SGPS, TAP's holding company, and thus TAP as a whole was controlled jointly by the Portuguese State (which held 50% of TAP SGPS' share capital) and Atlantic Gateway, a private consortium (which held 45%), the remaining 5% were held by TAP employees.<sup>8</sup> As TAP was considered to have been in difficulties on 31 December 2019, the aid fell outside the Temporary Framework and was therefore assessed and approved under the Rescue and Restructuring Guidelines (R&RG) as rescue aid.

On 10 December 2020, Portugal submitted a draft of the restructuring plan for TAP (Restructuring Plan) which, according to a statement published by TAP, foresees the granting of restructuring aid of €3.2 billion and which rests on capacity, fleet and workforce reductions aimed at allowing TAP, and in particular the airline TAP SA, to maintain a size that is suitable to react to the recovery as soon as it happens, keeping its leading position in Lisbon's hub and its strategy of connection between Europe, South and North America and Africa.

Prior to the submission of the Restructuring Plan, on 22 July 2020, Ryanair had brought an action for annulment of the Rescue Aid Approval before the General Court. Ryanair had based its complaint on five pleas, including on a breach of the duty to state reasons enshrined in Article 296 TFEU, arguing that the Commission had not justified that the conditions set out in point 22 of the R&RG concerning the granting of rescue aid to a company belonging to a group were met (in particular given the fact that 45% of TAP's share capital were held by a private consortium).<sup>9</sup> In its judgment dated 19 May 2021,<sup>10</sup> the Court upheld that plea and annulled the Rescue Aid Approval on that ground.

6 Including, in particular, Directive 2002/20/EC (Authorisation Directive), OJEU 2002 L108/21; Directive 2002/21/EC (Framework Directive), OJEU 2002 L108/33; and Directive 2018/1972 (European Electronic Communications Code) [2018] OJ L321/36.

7 Commission Decision of 10 June 2020, SA.57369 (2020/N) – COVID-19 – Portugal – Aid to TAP.

8 Since October 2020, the Portuguese State holds 72.5% of the share capital and solely controls TAP.

9 Pursuant to point 22 of the R&RG, in order for the aid to be compatible with the internal market, the Commission has to examine (i) whether the beneficiary of the aid belongs to a group, (ii) whether the difficulties faced by the beneficiary are intrinsic and are not the result of an arbitrary allocation of costs within the group, and (iii) whether those difficulties are too serious to be dealt by the group itself.

10 Case T-465/20 *Ryanair DAC v European Commission* [2021] ECLI:EU:T:2021:284.

However, for overriding reasons of legal certainty, the Court suspended the effects of the annulment until the adoption of a new decision by the Commission.

As a consequence of this judgment, by decision dated 16 July 2021 the Commission reapproved the rescue aid, presumably this time stating the reasons for which it considers the requirements in point 22 of the R&RG to be met (the decision is not yet published). On the same day, the Commission decided to open a formal investigation into the Restructuring Plan.<sup>11</sup> According to the related press release (this decision is not yet published either),<sup>12</sup> the Commission's doubts as to the compatibility of the Restructuring Plan with the R&RG revolve around the question of whether TAP or market operators would sufficiently contribute to the restructuring costs and whether appropriate measures to limit the distortions of competition created by the aid would accompany the restructuring.

Meanwhile, by decision of 23 April 2021, the Commission had approved, based on Article 107(2)(b) TFEU, aid in the amount of €462 million to make good the damage suffered by the airline TAP SA as a consequence of the COVID-19 outbreak due to the imposition of travel restrictions and other containment measures.<sup>13</sup>

## VI. The SATA Saga (So Far)

On 18 August 2020, the Commission authorised, for a period of 6 months, individual aid in the form of a public guarantee to a bank loan of up to €133 million to address the immediate liquidity needs of the SATA group (SATA) (Rescue Guarantee).<sup>14</sup> SATA provides air transport, airport management and related services, to a significant extent under public service obligations (PSOs), within, out of and to the Autonomous Region of the Azores (RAA), its sole owner. As SATA was considered to have been in difficulties on 31 December 2019, the aid fell outside the Temporary Framework and was therefore assessed under the R&RG. From the information submitted by the Portuguese authorities to the Commission it transpired that, in order to mitigate the significant financial difficulties SATA was already facing at the time, the RAA had implemented several capital increases in SATA in 2017, 2018 and 2020 in the aggregate amount of approximately €73 million (Capital Increases). As these Capital Increases likely qualified as unlawful R&R aid (the compatibility of which with the R&RG was also doubtful), the Commission questioned whether the 'one-time-last-time' principle foreseen in point 71 of the R&RG or the exception to it provided in

point 72(c) of the R&RG was fulfilled in relation to the Rescue Guarantee. It therefore initiated the formal investigation procedure over the Capital Increases and the Rescue Guarantee. However, as the Rescue Guarantee was considered necessary to ensure continuity of the discharge of essential air transport connectivity PSOs in the RAA, the Commission, in light of points 99 and 103 of the R&RG, authorised the granting of the Rescue Guarantee based on Articles 107(3)(c) and 106(2) TFEU for a period of up to 6 months.

Together with the notification of the restructuring plan and aid supporting the implementation of that plan (consisting of a total capital increase of €180-250 million, to be provided in 2021 and 2022 and public guarantees of €140-200 million), Portugal asked for a prolongation of the Rescue Guarantee and for authorisation of additional guarantees of up to €122.5 million for the coverage of SATA's liquidity needs related to the discharge of its PSOs. For various reasons, including the potential non-compliance with the 'one-time-last-time' principle, the Commission had doubts as to the compatibility of the restructuring plan and the additional R&R aid notified and thus extended the formal investigation to these measures by decision dated 30 April 2021.<sup>15</sup> However, as in the previous decision and for the same reasons, the Commission, based on Articles 107(3)(c) and 106(2) TFEU, authorised the prolongation and increase of the Rescue Guarantee until conclusion of the assessment of the restructuring plan.

Finally, by decision of the same day, the Commission approved, based on Article 107(2)(b) TFEU,

11 Commission Decision of 16 July 2021, SA.60165 Restructuring aid to TAP SGPS.

12 Commission press release dated 16 July 2021, IP/21/3741.

13 Commission Decision of 23 April 2021, SA.62304 Portugal - COVID-19: Damage compensation to TAP Portugal. Following the granting of the aid in the form of provision of equity within the framework of a capital increase in TAP SA, the Portuguese state now holds approximately 92% of the share capital of TAP SA.

14 Commission Decision of 18 August 2020, SA.58101 Rescue aid to SATA Group.

15 Commission Decision of 30 April 2021, SA.58101 (2020/C) and SA.62043 (2021/C) – Portugal - Rescue aid and Restructuring aid to SATA Group.

aid in the amount of €12 million to make good the damage suffered by the SATA Air Açores and Azores Airlines as a consequence of the COVID-19 outbreak due to the imposition of travel restrictions and other containment measures.<sup>16</sup>

## VII. Other Developments

As referred to in the previous country report:

(i) the Commission had opened a formal investigation procedure concerning the Madeira Free Zone aid scheme, foreseeing several tax reductions, for suspected incompatibility with the 2007 and 2013 Commission approval decisions,<sup>17</sup> according to which the granting of the tax reductions was conditional on activities being carried out and jobs being created in Madeira. On 4 December 2020, the Commission adopted a negative decision with recovery (not yet published), which has been challenged before the General Court by both Portugal and the Autonomous Region of Madeira;<sup>18</sup>

(ii) the Portuguese bank BCP had brought an action for annulment<sup>19</sup> of the decision by which the Commission approved further restructuring aid for Novo Banco in the context of the sale by the Portuguese Resolution Fund, sole owner of Novo Banco, of 75% of

its shares to Lone Star.<sup>20</sup> BCP has withdrawn that action on 9 September 2020; and

(iii) a Coimbra court had referred to the Court of Justice a question for preliminary ruling on whether, in case of aid declared incompatible and ordered to be recovered by the Commission, the 10-year limitation period foreseen in Article 17 of the Procedural Regulation (2015/1589) also applied to the relationship between the Member State to whom the recovery decision is addressed and the beneficiary from whom the aid is to be recovered. In its judgment dated 30 April 2020, the Court of Justice answered the question in the negative, stating that the limitation period applicable to the relationship between Member State

and beneficiary is a matter of national law, subject to the principles of equivalence and effectiveness.<sup>21</sup>

Finally, as referred to in the Country Report of 2017, the Commission had initiated an in-depth investigation into various suspected State aid measures granted to EMEF, a State-owned company active in the railway maintenance sector, in the form of capital injections, grants to cover losses, loans and guarantees in an aggregated amount of more than €50 million.<sup>22</sup> However, on 6 March 2020, the Commission adopted a decision (not yet published) finding that the measures did not constitute State aid.

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<sup>16</sup> Commission Decision of 30 April 2021, SA.61771 COVID - 19 - SATA - compensation of damages resulting from extraordinary events.

<sup>17</sup> Commission Decision of 6 July 2018, SA.21259 (2018/C) (ex 2018/NN) – Portugal, Zona Franca da Madeira (ZFM), Regime III [2019] OJ 2019 C 101/7; Press release IP/18/4384. Commission Decision of 27 June 2006, State Aid N 421/2006 – Portugal, Zona Franca da Madeira; Decision of 2 July 2013, SA.34160 – Portugal, Zona Franca da Madeira.

<sup>18</sup> Pending Cases T-95/21 and T-131/21.

<sup>19</sup> Case T-298/18 *Banco Comercial Português and Others v Commission*.

<sup>20</sup> Commission Decision of 11 October 2011, Case SA. 49275 (2017/N) – Portugal, Sale of Novo Banco with additional aid in the in the context of the 2014 Resolution of Banco Espírito Santo, S.A.

<sup>21</sup> Case C-627/18 *Nelson Antunes da Cunha* [2020] ECLI:EU:C:2020:321.

<sup>22</sup> Commission Decision of 2 June 2016, State Aid SA.41727 (2016/C) (ex 2016/NN) – Portugal - Alleged aid to EMEF.

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