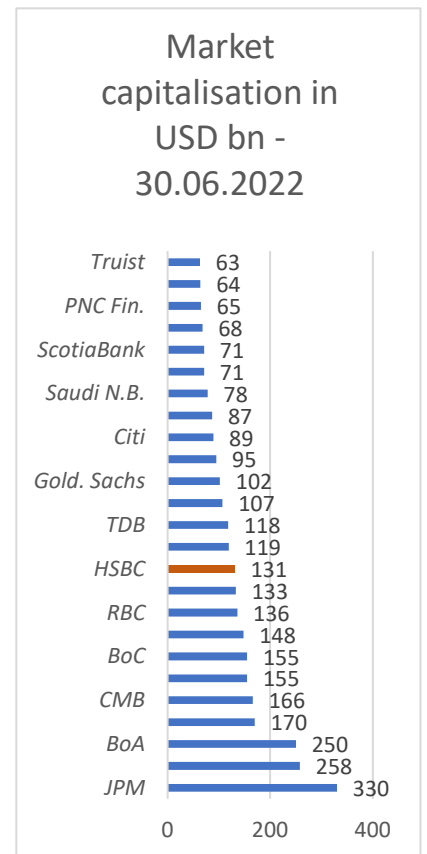
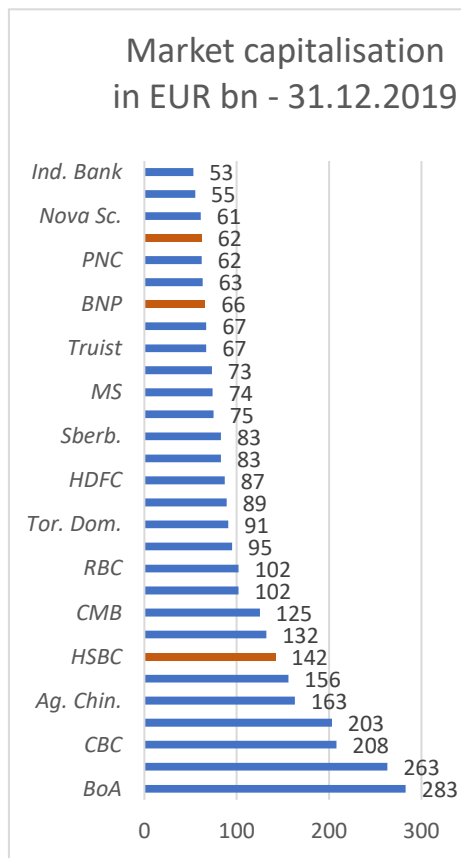
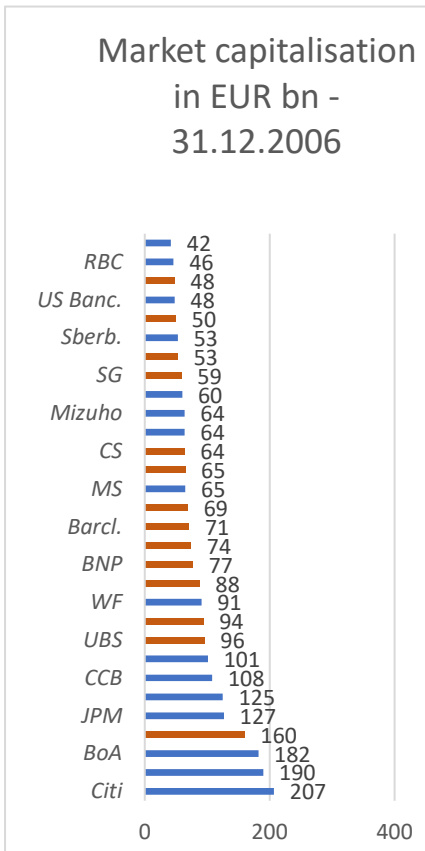


11.30 *Panel Discussion: Navigating State Aid in a Post-Pandemic Environment*
 Leo Flynn, Eoin Kealy, Jacques Derenne

- **Global overview EU v non-EU**
 - compare marginalisation of EU banks in the financial crisis: where are EU airlines globally?
 - Non-EU airlines benefitted from direct subsidies w/o any conditions
 - level playing field?
 - FSR?



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- EU hub carriers are in global competition with US, Middle-East-China

Rank		Airline	Country	Passengers (m)		
2021	2019			2021	21 v 20	21 v 19
1	1	American Airlines	USA	123.8	88%	-21%
2	3	Southwest Airlines	USA	123.3	82%	-24%
3	2	Delta Air Lines	USA	103.2	87%	-37%
4	11	Ryanair	Ireland	97.1	253%	-35%
5	7	United Airlines	USA	72.7	91%	-38%
6	12	China Southern Airlines	China	68.6	3%	-36%
7	10	China Eastern Airlines	China	64.5	6%	-38%
8	9	IndiGo	India	48.4	39%	-35%
9	8	Turkish Airlines	Turkey	44.8	60%	-40%
10	14	Air China	China	44.0	3%	-40%
11	5	SkyWest Airlines	USA	35.5	75%	-16%
12	13	Spirit Airlines	USA	30.8	67%	-11%
13	4	JetBlue Airways	USA	30.1	111%	-30%
14	15	Wizz Air	Hungary	27.1	166%	-32%
15	6	Xiamen Airlines	China	26.1	-3%	-34%
16	26	Volaris	Mexico	24.4	66%	11%
17	17	Shenzhen Airlines	China	24.3	-5%	-36%
18	23	Lufthansa	Germany	23.5	31%	-68%
19	37	Azul	Brazil	23.3	58%	-16%
20	21	Alaska Airlines	USA	23.3	89%	-35%
21	28	Sichuan Airlines	China	22.5	10%	-27%
22	34	Air France	France	21.8	24%	-58%
23	63	Aeroflot Russian Airlines	Russia	21.4	47%	-42%
24	59	Spring Airlines	China	21.3	15%	-5%
25	38	Frontier Airlines	USA	20.7	84%	-9%
26	52	LATAM Airlines Brazil	Brazil	20.6	29%	-44%
27	16	EasyJet	UK	20.4	-58%	-79%
28	55	Pegasus	Turkey	20.2	37%	-34%
29	35	Hainan Airlines	China	19.9	14%	-44%
30	61	Emirates Airline	UAE	19.6	199%	-65%
31	45	GOL	Brazil	18.8	12%	-48%
32	68	ANA	Japan	18.8	44%	-64%
33	22	Shandong Airlines	China	18.7	3%	-28%
34	31	Qatar Airways	Qatar	18.6	218%	-43%
35	40	Juneyao Air	China	18.4	17%	-16%
36	60	S7 Airlines	Russia	17.8	44%	27%
37	49	Republic Airways	USA	17.7	102%	-6%
38	24	Vueling Airlines	Spain	15.8	64%	-54%
39	76	VivaAerobus	Mexico	15.3	88%	27%
40	18	Saudia	KSA	14.9	35%	-54%
41	32	Pobeda	Russia	14.4	59%	40%
42	80	KLM Royal Dutch Airlines	Netherlands	14.0	25%	-60%

• **Comments on some points of Covid-19 TF**

- 15 – 15bis – 15ter TF (107(2) b) scope):
 - including for undertakings in difficulty – no “one time last time”
 - progressive stricter interpretation of 107(2) b)
 - causal link: compensate “*damage directly caused by restrictive measures precluding the beneficiary, de jure or de facto, from operating its economic activity or a specific and severable part of its activity.*” (notification template not updated)
 - economic downturn not a causal link
 - as from 2021 include all forms of aid (equity, etc.)

- **Section 3.11 recap measures: interpretation issues**

- 72 TF

*If the beneficiary of a COVID-19 recapitalisation measure above EUR 250 million is an undertaking with **significant market power** on at least one of the relevant markets in which it operates, Member States must propose additional measures to preserve effective competition in those markets. In proposing such measures, Member States may in particular offer **structural or behavioural commitments** foreseen in **Commission Notice on remedies** acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.*

- merger type provision: and 107(3) b)?
- SMP test (TF) lower than market dominance (EUMR)
- penalise EU hub carriers (slots) – purely EU internal perspective overlooking the importance of hub-airports in intercontinental traffic
- slot regulation to be taken into account

- 76 TF – notion of “undertaking” v “companies”

State aid shall not be used to cross-subsidise economic activities of integrated **undertakings** that were in **economic difficulties** already on 31 December 2019. A clear account separation shall be put in place in integrated **companies** to ensure that the recapitalisation measure does not benefit those activities.

- Who is in difficulty? The undertaking or the company?

- 77bis: derogation to coupon ban and access to financial markets

- New provision in January 2021

hybrid capital instruments issued at the **same time** as, with the **same level of subordination** as, and with a coupon no more than 150 bps higher than the coupon on the **COVID-19 hybrid capital** instruments. Moreover the COVID-19 hybrid capital instruments should correspond to more than 20% of the overall hybrid issuance;

hybrid capital instruments issued **after any COVID-19 recapitalisation**, provided that the **proceeds** from those instruments are **used exclusively to redeem the COVID-19** recapitalisation instruments and/or hybrid capital instruments issued in accordance with the present point 77bis; and

COVID-19 hybrid capital instruments whenever they are **sold by the State to private investors** (i.e. not public authorities) at a price equal to or greater than the par value of the hybrid instrument plus any accrued unpaid coupons including compound interest.

- exception to ensure that Covid-19 recap beneficiaries can return to financial markets (hybrid instruments with coupon)

- 78bis : evolution since Finnair (State existing shareholder and pari passu)

Where the State is an existing shareholder, i.e. before the COVID-19 equity injection, and:

*a. the State injects **new equity under the same conditions as private investors and pro rata** to its existing shareholding (or below), and*

*b. the **private participation is significant** (in principle at least 30% of the new equity injected), and*

*c. the State's new equity injection constitutes **State aid because of its particular circumstances**, for instance because of another measure benefitting the company,*

*it is **not necessary** to impose specific conditions as regards the **State's exit** and the following shall apply:*

i. points 61 and 62 do not apply to such a COVID-19 equity injection measure;

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- ii. in derogation from points 74, 75 and 78, the **acquisition ban** and the **cap on the remuneration** of the management are limited to **three** years;
- iii. in derogation from point 77, the **dividend ban is lifted** for the holders of the new shares. For existing shares, the dividend ban is lifted, provided the holders of those existing shares are altogether diluted to below 10% in the company. If holders of existing shares are not altogether diluted to a share in the company below 10%, the dividend ban applies to existing shareholders for three years. In any event, the remuneration due for COVID-19 hybrid capital and subordinated debt instruments held by the State shall be paid before any dividends are paid to shareholders in a given year;
- iv. the requirements in section 3.11.7 do not apply except for the reporting obligations under point 83 that shall apply for three years; and
- v. all the other conditions laid down in section 3.11 apply *mutatis mutandis*.

○ Remuneration of the State and exit strategy (63, 64, 64bis, 64ter – 85 TF)

62. The Commission may accept alternative mechanisms, provided they overall lead to a similar outcome with regard to the incentive effects on the exit of the State and a similar overall impact on the State's remuneration.

63. The beneficiary should, have at any time, the possibility to **buy back the equity stake that the State has acquired**. To ensure that the State receives appropriate remuneration for the investment, the **buy-back price should be the higher** amount of (i) the nominal investment by the State increased by an annual interest remuneration 200 basis points higher than presented in the table below⁷²; or (ii) the market price at the moment of the buy-back.

64. As an alternative, the State may sell at any time its equity stake at market prices to purchasers other than the beneficiary. Such a sale requires, in principle, an open and non-discriminatory consultation of potential purchasers or a sale on the stock exchange. The State may give existing shareholders, i.e. shareholders before the COVID-19 recapitalisation, priority rights to buy at the price resulting from the public consultation. If the State sells its equity stake at a price below the minimum price laid down in point 63, the governance rules laid down in section 3.11.6 shall continue to apply at least until four years after the COVID-19 equity injection measure was granted.

64bis If the State is the only existing shareholder, the redemption of COVID-19 recapitalisation may take the following form, notwithstanding point 64. Provided two years have passed since the granting of COVID-19 recapitalisation:

a. the sales process referred to in point 64 is not required, and

b. the open and non-discriminatory consultation referred to in point 64 may be replaced by a valuation of the beneficiary performed by an entity independent from that beneficiary and from the State. If that **independent valuation** establishes a **positive market value**, the State is deemed to have exited from the COVID-19 recapitalisation, even if the beneficiary remains State-owned. Nevertheless, if the positive market value is less than the minimum price laid down in point 63, the governance rules laid down in section 3.11.6 shall continue to apply until four years after the grant of the COVID-19 recapitalisation measure. For COVID-19 recapitalisation measures that exceed EUR 250 million, the Member State shall submit that independent valuation to the Commission. The Commission may in any case on its own initiative request the submission of the independent valuation and may evaluate it to ensure that it complies with the standard set to ensure transactions that are in line with market conduct.

64ter If the State is one of several existing shareholders, the redemption of the COVID-19 recapitalisation may take the following form, **alternatively to point 64**. Provided two years have passed since the granting of the COVID-19 recapitalisation:

a. For the part of the COVID-19 equity that the State would **need to retain in order to restore its shareholding** to that before the COVID-19 recapitalisation, the possibility of **point 64bis is applicable**. If the State sells a significant fraction of the shares of the beneficiary undertaking to private investors via a **competitive process** as referred to in point 64, that process can be **considered as an independent valuation** for the purposes of point 64bis.

b. For **the rest of the COVID-19 equity, point 64 applies**. This includes in particular the need to conduct a competitive process. The State does not have the priority rights mentioned in point 64 as it already exercised that right under application of letter (a) above.⁷³

When the redemption of the COVID-19 recapitalisation concerns only a fraction of the COVID-19 equity, letters (a) and (b) above apply to that fraction of the COVID-19 equity.

Point 85 TF not to confuse with % of bans – different % of own funds (equity + hybrid)

*If six years after the COVID-19 recapitalisation the **State's intervention** has not been reduced **below 15% of beneficiary's equity**, a **restructuring plan** in accordance with the Rescue and Restructuring Guidelines must be notified to the Commission for approval. The Commission will assess whether the actions contemplated in the restructuring plan ensure the beneficiary's viability, also with a view of EU objectives and national obligations linked to the green and digital transformation, and the exit of the State without adversely affecting trade to an extent contrary to the common interest. [...].*

- Phasing out 30 June 2022 – transition since July 2022 ?
 - Undertakings placed in difficulty because of Covid-19
 - Not R&R cases
 - But suddenly, these beneficiaries are facing back to rules normally applying to undertakings in difficulty
 - R&R
 - No eligibility to other compatible aid (R&D, regional aid, IPCEI, energy, etc.)
- **Some lessons learned for EU case-law**
 - Statistics (to be updated)
 -
 - 107(3) b
 - Covid crisis led to serious disturbance in the economy;
 - measures presumed to be in the interest of the EU;
 - no need for measures to 'remedy' the serious disturbance
 - no need for balancing test
 - no need to examine in the abstract every measure conceivable
 - 107(3) c – mainly R&R
 - [TBC]
 - 107(2) b
 - No requirement to compensate all victims of exceptional occurrence
 - No requirement to compensate entire damage
 - MS free to compensate only undertakings having strong links with that MS – no discrimination on ground of nationality
 - 18 TFEU (systemic airlines, national operating licence)
 - Travel restrictions and containment measures are exceptional occurrences
 - Assessment of damage (compensation period, quantification by comparison to same period in 2019, direct causal link)
 - 107(3) b + 107(2) b possible if anti-overcompensation mechanism

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- **TCF as amended**

- Less directly relevant to airlines except liquidity aid in the form of guarantees for liquidity needs generated by energy crisis (section 2.2)
- New (30) to (32): R&R language? Not in main sections

(30) The Commission considers that **certain financial needs** may require **different tools** than those covered by sections 2.1, 2.2 and 2.3 of this Communication. This might in particular be the case where the current crisis leads **not only to liquidity needs but also to considerable losses** that may undermine the beneficiary's ability to service its debt and point at **solvency needs**. In cases where large amounts of aid are granted to individual beneficiaries and where the ability of those beneficiaries to **service their debt**, based on their past earning capacity, seems challenging, Member States may consider asking for information from the beneficiaries about their projected future earnings capacity to continue servicing the debt, with the aim of assessing whether the use of different tools, such as **solvency support**, may be or may become more adequate to address their financial needs.

(31) In specific circumstances, Member States may consider that undertakings severely affected by the current crisis require **solvency support** that cannot be sufficiently provided via private sources alone. Where undertakings would cease or downsize operations without such solvency support and when ceasing or downsizing operations would threaten energy markets or other markets which are of systemic importance for the economy (or for the security and resilience of the internal market), such solvency support might be considered compatible based on Article 107(3)(b) TFEU.

(32) The Commission considers the **following general principles** as particularly relevant in the required **case-by-case** assessment:

a. the aid must be **necessary, appropriate and proportionate** to avoid a sudden exit from the market of such undertakings and must in any case not exceed the **minimum needed** to ensure its viability;

b. a company belonging to or being taken over by a **larger business group** is not eligible for aid, except where it can be demonstrated that the company's difficulties 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. In such cases, a substantial contribution by the group to the costs of the solvency measure will typically be required;

c. state aid must be granted on terms that afford the State a **reasonable remuneration** such as an appropriate share of future gains in value of the beneficiary, in view of the amount of State equity injected in comparison with the remaining equity of the company after losses, including foreseeable losses without the aid measure, have been accounted for;

d. where aid takes the form of subordinated debt or other hybrid capital instruments, the overall remuneration of such instruments must adequately factor in the characteristics of the instrument chosen, including its level of subordination and all modalities of payment;

e. **appropriate competition measures** in line with the principles set out in the 2014 Rescue and Restructuring Guidelines will be necessary. Based on the specificities of each potential case and the relevant competitive landscape, **divestments of assets** may also be required as a **compensatory measure**. Furthermore, **behavioural measures**, including commitments ensuring an effective ban on bonus payments or other variable payments, dividend payments, and acquisitions will be required;

f. for each beneficiary, Member States must undertake a **long-term viability assessment** and, where considered appropriate by the Commission, notify to the Commission for **approval a restructuring plan** in accordance with the Rescue and Restructuring Guidelines within a specified period of time.

- Undertakings in difficulty because of Covid and TF phased out? (transition to June 2022 enough?)
- Undertakings in difficulty more specifically mentioned as possible beneficiary of TCF aid
 - 107(2) b : direct link to undertakings in difficulty : point (36) now
 - 107(3) b : only footnote (54), in passing, with respect to sanctions...

Considering the specific situation of two subsequent crises that have affected undertakings in multiple ways, Member States may choose to provide aid under this Communication also to undertakings in difficulty

- exception in article 1(4) c) GBER not consistently adapted for SMEs? (stops at Dec 2021)