General Court of the European Union
PRESS RELEASE No 59/20
Luxembourg, 13 May 2020

Press and Information

Judgments in Case T-607/17 Volotea v Commission, T-716/17 Germanwings v Commission, and T-8/18 easyJet v Commission

The General Court dismisses the actions against the Commission decision declaring illegal the aid from Italy to several airlines serving Sardinia

The operators of the Sardinian airports were not the beneficiaries of the aid but merely intermediaries between the Autonomous Region and the airlines, which must therefore reimburse it the public aid

By the judgments easyJet v Commission (T-8/18), Volotea v Commission (T-607/17) and Germanwings v Commission (T-716/17), delivered on 13 May 2020, the General Court **dismissed the actions brought by the airlines easyJet, Volotea and Germanwings** ('the airlines') **seeking the annulment of the decision of the European Commission of 29 July 2016 which declared partly incompatible with the internal market the aid granted by Italy to several European airlines, including the three at issue, serving Sardinia**.[1]

According to that decision, the aid scheme instituted, in Italy, by the Autonomous Region of Sardinia ('the Region') for the development of air transport **constituted State aid granted not to the operators of the main Sardinian airports (Alghero, Cagliari-Elmas and Olbia), but to the airlines concerned**.

In 2010, a regional law,[2] notified by Italy to the Commission pursuant to Article 108(3) TFEU, authorised the financing of the island's airports with a view to the development of air transport, inter alia through the de-seasonalisation of air routes to and from Sardinia. That regional law was implemented by a series of measures adopted by the executive of the Region (the regional law and the adopted measures are hereinafter referred to together as the 'measures at issue').

The measures at issue provided inter alia for the conclusion of commercial agreements between the airport operators and the airlines with a view to improving the island's air service and promoting it as a touristic destination. They determined, moreover, the conditions and arrangements of reimbursement, by the Region, to the airport operators of the sums paid by those operators to the airlines under those agreements.

On 29 July 2016, the Commission adopted a decision declaring the aid scheme put in place by the measures at issue partly incompatible with the internal market and ordering the recovery of the aid concerned from the airlines considered as beneficiaries. In support of their actions for annulment, the airlines put forward several pleas alleging, inter alia, errors of law relating to the concept of State aid, the possibility of justifying the aid at issue and the order to recover the aid at issue.

So far as concerns, first of all, the component elements of State aid, the Court held, in the first place, that the Commission had rightly found **that the airlines were beneficiaries of the aid scheme at issue owing to the grant of an advantage through State resources by payments imputable to the Region**.

[1] Commission Decision (EU) 2017/1861 of 29 July 2016 on State aid SA33983 (2013/C) (ex 2012/NN) (ex 2011/N) — Italy — Compensation to Sardinian airports for public service obligations (SGEI) (OJ 2017 L 268, p. 1).
[2] Legge regionale n° 10/2010 – Misure per lo sviluppo del trasporto aereo (Regional Law No 10 — Measures for the development of air transport) (Bollettino ufficiale della Regione Autonoma della Sardegna No 12, of 16 April 2010).

In that regard, the Court, first, confirmed that **the payments made by the airport operators to the airlines, under the concluded agreements, represented a mobilisation of State resources**, in so far as the funds transferred by the Region to the airport operators had been used to effect the payments at issue. In supporting that conclusion, the Court analysed the **arrangements prescribed for the reimbursement by the Region of the payments made by the airport operators to the airlines under the concluded agreements**. The Court thereby noted the existence of a supervision mechanism which made the reimbursement – in instalments – of the funds incurred conditional on the presentation of accounting and supporting reports establishing the conformity of the agreements, under which the payments had been made, with the objectives pursued by the regional law as well as their proper implementation. The Court inferred from this that the prohibition of State aid could apply to the payments made by the airport operators to the airlines under the measures at issue.

The Court, second, underlined, with regard to the imputability to the Region of the payments made by the airport operators to the benefit of the airlines, that the degree of control exerted by the State over the grant of an advantage must also be taken into account in order to ascertain the involvement of the public authorities in its adoption, failing which the advantage granted cannot be imputed to them. Examining the contested decision in the light of those criteria, the Court then found that, in the case at hand, **the degree of control exerted by the Region over the grant of the funds to the airlines demonstrates its involvement in making funds available**. Indeed, the measures at issue had enabled the Region to monitor closely the airport operators that had decided to request the financing measures provided for under the aid scheme at issue. That monitoring manifested in the prior approval of their plans of activities or in the requisite conditions for reimbursement of the sums transferred to the airlines. According to the Court, the exertion of such control by the Region proves that the financing measures at issue were imputable to it. Consequently, the Court approved the Commission's finding that **the airport operators could be considered as intermediaries between the Region and the airlines**, since they had transferred in full the funds received from the Region to the airlines and had thus acted in accordance with the instructions received from the Region through the plans of activities approved by that region.

Third, the Court approved the Commission's conclusion that **the airport operators were not beneficiaries of the aid scheme at issue**. Consequently, it also held that the Commission had been right not to examine the transactions between the airlines and the airport operators in the light of the market economy operator test. Indeed, those operators, which were not owned by the Region, were essentially limited to implementing the aid scheme at issue established by the Region. So far as concerns, on the other hand, the application of that test to the decisions of the Region, the Court found that that region had not acted as an investor, given that it had put in place the aid scheme at issue solely with a view to the island's economic development. In so far as the Region had acted as an acquirer of air traffic increase and marketing services, the Court emphasised that the existence of an advantage constituting aid can be excluded not on account of the existence of reciprocal commitments, but on account of the services at issue having been acquired in compliance with the public procurement rules laid down by EU law or, at least, after organising an open and transparent tender procedure guaranteeing observance of the principle of equal treatment between providers and the acquisition of services at market prices. In the case at hand, however, the calls for expressions of interest published prior to **the conclusion of agreements with the airlines were not regarded by the Court as equivalent to tender procedures, in the absence in particular of any selection according to precise criteria** amongst the airlines that had responded to the calls.

Fourth, the Court found that the Commission had been entitled to categorise the measures at issue as a 'State aid scheme', enabling it, including in order to reduce its administrative burden, to confine itself to examining the general characteristics of those measures, without having to carry out an individualised examination of each of the payments made under that scheme. In that regard, the absence of formal identification of the airlines as final and real beneficiaries of the aid at issue in Law No 10/2010 – which designated on the contrary the airport operators as the beneficiaries – was no obstacle to the categorisation of the mechanism as an 'aid scheme', as the Commission could rely on all the elements of the mechanism put in place to support its conclusion.

In the second place, the Court dismissed the complaints of the airlines relating to the absence of distortion of competition and of effect on trade between Member States. In Case T-716/17, it inter alia precluded the airline from being able to invoke successfully the limited amount of the payment it received from the operator of Cagliari-Elmas airport. Indeed, the line of argument according to which the existence of aid ought to have been examined at the level of such an operator had already been rejected as unfounded. Responding, moreover, to the complaint that the Commission should have examined whether the payment at issue constituted *de minimis* aid, the Court recalled that, in the examination of an aid scheme, the Commission may confine itself to examining the characteristics of the scheme in question, without being required to carry out an analysis of the aid granted in individual cases under such a scheme, such that **it is for the national authorities to look at the individual situation of each undertaking concerned by a recovery transaction**. The Court accordingly concluded that **the Commission had not been obliged to examine whether the payment at issue was *de minimis* in nature**. In Case T-607/17, the Court, furthermore, approved the Commission's opting not to apply, in the contested decision, Regulation No 360/2012.[3] The airline did not establish, in that case, the existence of clearly-defined public service obligations in relation to each of the air routes for which it had received financing under the measures at issue.

Last, the Court held, in Cases T-8/18 and T-607/17, that the Commission had not misconstrued the principle of legitimate expectations in ordering the recovery of the amounts received by the airlines in performance of the contracts concluded with the airport operators under the measures at issue. It noted, in that regard, that **the airlines could not have any legitimate expectation as to the legality of the aid**, in so far as it was illegal due to having been implemented without awaiting the Commission's pronouncement on the measures that had been notified to it. Nor could they have any legitimate expectation as to the commercial nature of their contractual relations with the airport operators, since they could not disregard the financing mechanisms provided for in the regional law, which had been the subject of an official publication at the national level, and, therefore, the State origin of the funds concerned.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

The full text of the judgments T-607/17, T-716/17 and T-8/18 are published on the CURIA website on the day of delivery

Press contact: Jacques René Zammit ☎ (+352) 4303 3355

[3] Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest (OJ 2012 L 114, p. 8).