COURT OF JUSTICE
OF THE EUROPEAN UNION

PRESS RELEASE No 24/23
Luxembourg, 8 February 2023

Judgment of the General Court in Case T-522/20 | *Carpatair* v *Commission*

The General Court annuls the decision of the European Commission approving Romanian aid to Timișoara International Airport in favour of Wizz Air

The Commission committed several errors of law when examining whether those measures were selective and whether they conferred an advantage

Timișoara International Airport, located in the west of Romania, is operated by Societatea Națională 'Aeroportul Internaţional Timişoara – Traian Vuia' SA (AITTV), a joint stock company in which the Romanian State holds 80% of the shares.

In preparation for the increase in traffic that was expected to result from Romania's accession to the European Union in 2007, and in order to meet the security requirements for acceding to the Schengen area, AITTV received financing from the Romanian State for the construction of a terminal for non-Schengen flights and for security equipment.

Furthermore, in 2008, as part of a strategy intended to attract low-cost airlines and to increase the overall profitability of the airport, AITTV signed agreements with Wizz Air Hungary Légiközlekedési Zrt. ('Wizz Air'), a Hungarian low-cost airline, determining the principles of their cooperation as well as the terms and conditions for the use of the airport infrastructure and services by Wizz Air ('the 2008 agreements'). Two of those agreements were amended in 2010 by way of a new discount scheme agreed between Wizz Air and AITTV ('the 2010 amendment agreements'). Under the Aeronautical Information Publications ('AIPs') of 2007, 2008 and 2010, Wizz Air also received discounts and rebates on airport charges.

In 2010, the Romanian regional airline Carpatair SA submitted a complaint to the European Commission challenging aid granted by the Romanian authorities to Timișoara International Airport in favour of Wizz Air.

By decision of 24 February 2020 ('the contested decision'), the Commission considered, first, that the public financing provided in the period between 2007 and 2009 to AITTV for the non-Schengen terminal development, the improvement of the taxiway and the extension of the apron and the lighting equipment, constitutes State aid which is compatible with the internal market within the meaning of Article 107(3)(c) TFEU. [1] Secondly, the Commission found that the public financing of the access road and the development of the parking area in 2007 and for the security equipment in 2008, the airport charges in the 2007 AIP, 2008 AIP and 2010 AIP, and the 2008 agreements with Wizz Air, including the 2010 amendment agreements, do not constitute State aid within the meaning of Article 107(1) TFEU.

Carpatair SA brought an action for the annulment of that decision in so far as the Commission found that neither

[1] According to that provision, aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the internal market where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

the discounts and rebates on the airport charges in the 2010 AIP nor the 2008 agreements, as amended in 2010 ('the measures at issue'), constitute State aid. In upholding that action, the General Court finds that the Commission committed several errors of law in its examination of whether those measures were selective and of whether they conferred an advantage.

Findings of the Court

As a preliminary point, the Court rejects the Commission's argument that the action brought by Carpatair SA is inadmissible on the ground that the latter has neither standing to bring an action for annulment of the contested decision nor a vested and present interest in the annulment of that decision.

As regards Carpatair SA's standing to bring proceedings, the Court recalls that, under the fourth paragraph of Article 263 TFEU, any natural or legal person may bring an action against an act which is not addressed to that person if that act is of direct and individual concern to them or if the action is directed against regulatory acts which are of direct concern to them and do not entail implementing measures. In the light of that dichotomy, the Court states that the part of the contested decision relating to the airport charges constitutes a regulatory act, with the result that the action brought by Carpatair SA against that part is admissible, provided that Carpatair SA is directly affected by that part. By contrast, since the 2008 agreements and the 2010 amendment agreements must be classified as individual measures, the action brought by Carpatair SA against the part of the contested decision addressing those agreements is admissible only if Carpatair SA demonstrates that those agreements concern it not only directly, but also individually.

With regard to whether Carpatair SA is individually concerned by the part of the contested decision addressing the 2008 agreements and the 2010 amendment agreements, the Court observes that such individual concern admittedly cannot be inferred from the mere participation of that undertaking in the administrative procedure prior to the adoption of the contested decision. However, since those agreements were liable to have a substantial effect on its competitive position on the markets on which it had a competitive relationship with Wizz Air, Carpatair SA has established to the requisite legal standard that it is individually concerned. Moreover, since the assessment of whether there is a substantial effect must be made in the light of the situation at the time when the measures at issue were granted and were liable to have an effect, the arguments that Carpatair SA changed its business model and terminated its activities at Timişoara International Airport as of 2013 cannot call that conclusion into question.

The Court also considers that Carpatair SA is directly affected by the contested decision since, first, that decision directly affects its right not to be subject on the market in question to competition distorted by the measures at issue and, secondly, the decision leaves intact the effects of the measures at issue in a purely automatic manner resulting from the EU rules alone and without the application of other intermediate rules.

Having upheld the admissibility of the action brought by Carpatair SA, the Court finds, as regards the substance, that the contested decision is vitiated by several errors of law which affect the conclusion that neither the discounts and rebates on the airport charges in the 2010 AIP nor the agreements concluded with Wizz Air in 2008, as amended in 2010, constitute State aid within the meaning of Article 107(1) TFEU, since, according to the Commission, the former are not selective in nature and the latter do not confer an economic advantage on Wizz Air.

As regards, in the first place, the selective nature of the discounts and rebates on the airport charges in the 2010 AIP, the Court recalls that, although only measures which confer an advantage selectively fall within the concept of 'State aid', it is apparent from the case-law that interventions which, prima facie, apply to undertakings in general may, in relation to their effects, be to a certain extent selective and, accordingly, be regarded as measures designed to favour certain undertakings or the production of certain goods. Such de facto selectivity can be established in cases where, although the formal criteria for the application of the measure are formulated in general and objective terms, the structure of the measure is such that its effects significantly favour a particular group of undertakings.

In the present case, the 2010 AIP set out, inter alia, three types of reductions on the airport charges applicable to all airlines using or liable to use Timişoara International Airport. The third type of reduction provided, in that context,

for discounts of 72% to 85% for aircraft having a maximum take-off weight above 70 tonnes with more than 10 000 embarked passengers per month.

Although the three types of reductions met different conditions and were not cumulative, the Commission found, on the basis of a joint assessment, that they were not selective. In that context, the Commission also did not take a position on the question whether airlines other than Wizz Air had in their fleet aircraft of the relevant sizes and sufficient frequencies which actually enabled them to benefit from the third type of reduction mentioned above. In the light of those observations, the Court concludes that, by failing to examine whether the third type of reduction, taken in isolation, favoured Wizz Air owing to the conditions governing its application, as Carpatair SA maintains, the Commission erred in law.

As regards, in the second place, the question whether an economic advantage was conferred on Wizz Air by the 2010 amendment agreements, the Court points out that that assessment is made in principle by applying the private operator in a market economy test. In order to examine whether or not the Member State or the public body concerned has adopted the conduct of a prudent private operator in a market economy, the only relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the decision to conduct the operation in question was taken. However, the conclusion reached by the Commission in the contested decision, according to which a prudent private operator in a market economy would have entered into the 2010 amendment agreements with Wizz Air, was based entirely on evidence established ex post and, in particular, on a report drawn up in 2015.

In that regard, the Court states that the view cannot be taken, merely because that 2015 report is based on the information which was available and the developments which were foreseeable at the time when the 2008 agreements were adopted, that it amounts to an ex ante analysis capable of demonstrating compliance with the private operator in a market economy test. Furthermore, although the additional economic analyses reconstructed ex post, as provided by Romania and Wizz Air in the administrative procedure, are capable of shedding light on the information existing at the time of the conclusion of the 2008 agreements and must be taken into account by the Commission, the fact remains that those analyses did not supplement evidence generated before the conclusion of those agreements, yet that was the only evidence on which the Commission based its assessment of the 2008 agreements.

Accordingly, the Court finds that the Commission failed to state grounds in law for its conclusion that the 2008 agreements and the 2010 amendment agreements had not conferred an economic advantage on Wizz Air which it would not have obtained under normal market conditions, and that they therefore did not constitute State aid.

In the light of those considerations, the Court upholds the action and annuls the contested decision in so far as it concludes that the airport charges in the 2010 AIP and the 2008 agreements, including the 2010 amendment agreements, do not constitute State aid.

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.

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.

The full text of the judgment is published on the CURIA website on the day of delivery.

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

Pictures of the delivery of the judgment are available from 'Europe by Satellite' ✆(+32) 2 2964106

Stay Connected!