

ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

19 September 2005 *

In Case T-321/04,

Air Bourbon SAS, established in Sainte-Marie, Réunion (France), represented by
S. Vaisse, lawyer,

applicant,

v

Commission of the European Communities, represented by C. Giolito and
J. Buendía Sierra, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission Decision of 16 December 2003
(C(2003) 4708 final) not to raise objections to aid N 427/2003 granted by the French
authorities to Air Austral,

* Language of the case: French.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of H. Legal, President, P. Lindh and V. Vadapalas, Judges,

Registrar: H. Jung,

makes the following

Order

Background

- ¹ On 28 November 2001, the Commission authorised, pursuant to the regional aid guidelines, a French aid scheme consisting in the grant of tax reductions to taxpayers making productive investments in the overseas departments.
- ² The object of that scheme was to encourage investment in regions faced with structural handicaps such as insularity, the restricted scope of local markets and poor productivity of businesses.

- 3 By letter of 28 July 2003, the French authorities notified the Commission of tax aid for overseas investment that they proposed to grant to the airline Air Austral.
- 4 By Decision C(2003) 4708 final of 16 December 2003 ('the Decision'), taken on completion of the preliminary investigation procedure under Article 88(3) EC, the Commission held that there were no concerns as to the compatibility of that measure with the common market and, accordingly, that there was no need to raise objections in relation to it.
- 5 The Decision was notified to the French Government on 17 December 2003.
- 6 On 12 February 2004, the Commission published in the *Official Journal of the European Union* a summary notice informing third parties, in the form of a synopsis of the principal details of the aid measure notified, that it did not raise any objections in relation to it (OJ 2004 C 38, p. 4). In that notice, the Commission stated:

'The authentic text(s) of the decision, from which all confidential information has been removed, can be found at:

http://europa.eu.int/comm/secretariat_general/sgb/state_aids.'

- 7 By letter of 7 June 2004, the applicant requested the Commission to provide it with the full text of the Decision.
- 8 By letter of 9 June 2004, received on 11 June 2004, the Commission supplied a copy of the full text of the Decision to the applicant.

Procedure

- 9 By application lodged at the Registry of the Court of First Instance on 29 July 2004, the applicant brought the present action.
- 10 By a separate document lodged at the Court Registry on 12 October 2004, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance.
- 11 On 12 November 2004, the applicant submitted its observations on that objection.
- 12 By application lodged at the Registry of the Court of First Instance on 14 December 2004, Air Austral requested leave to intervene in support of the forms of order sought by the Commission.
- 13 On 12 January 2005, the Commission submitted its observations on the application for leave to intervene.

Forms of order sought

14 The applicant claims that the Court should:

- declare the action to be admissible;
- annul the Decision;
- order the Commission and the French Republic to take the measures necessary to ensure that Air Austral repays the aid unlawfully granted;
- order the Commission to pay the costs.

15 The Commission contends that the Court should:

- dismiss the action as being inadmissible;
- order the applicant to pay the costs.

Law

Admissibility

- 16 By virtue of Article 114(1) of the Rules of Procedure, the Court may, if a party so requests, rule on the question of admissibility without considering the merits of the case. Under Article 114(3), unless the Court otherwise decides, the remainder of the proceedings is to be oral. In the present case, the Court considers that consideration of the information in the documents before it is sufficient for there to be no need to proceed to the oral stage of the proceedings.

Arguments of the parties

- 17 The Commission argues that the proceedings have been instituted out of time. The period for instituting the proceedings started on 12 February 2004, when the summary notice of the Decision was published in the *Official Journal of the European Union*. The Decision was therefore made available no later than the date on which the *Official Journal of the European Union* was published on the internet.
- 18 According to the Commission, the applicant was aware of the Decision even before that date. The fact that the Decision was served on the French Government alone does not mean that the applicant, as the principal competitor of Air Austral, would not have been fully aware of the Decision as early as 16 December 2003, as it was commented on in the press and had been the subject of a press release by the Commission on the date on which it was adopted. The applicant could not have been in ignorance of the Decision until 7 June 2004, when it requested a copy of the full text of the Decision.

- 19 The Commission states that the period for instituting proceedings starts from the date of the publication in the *Official Journal of the European Union* of decisions relating to State aid, pursuant to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1). Thus, since the summary notice clearly refers to the possibility of obtaining a copy of the authentic text of the Decision, the making available of the Decision, at the latest on the day of publication of the *Official Journal of the European Union* on the internet, is tantamount to full publication. Accordingly, the date on which time started to run in the present case was 12 February 2004, when the summary notice was published and the full text was made available on the internet. In those circumstances, the application, which was lodged on 29 July 2004, is manifestly out of time and should therefore be declared to be inadmissible.
- 20 The applicant cannot derogate from mandatory time-limits and claim the benefit of a fresh period for instituting proceedings in reliance upon its request of 7 June 2004. The Commission's letter of 9 June 2004 sending the text of the Decision to the applicant did not start a fresh period running. Moreover, the Commission was careful to point out in that letter that the text was already available on the internet.
- 21 Nor can the applicant rely on an excusable error, in the absence of conduct which, either alone or to a decisive extent, is such as to give rise to pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally experienced person. In the present case, the Commission's conduct, in implementation of a legal obligation and known to all, could not have given rise to confusion and be the cause of the error committed by the applicant.
- 22 The applicant states that the Commission's letter of 9 June 2004 forwarding the text of the Decision did not indicate that it had been the subject of a summary notice in the C series of the *Official Journal of the European Union* or that it had started time running as regards the period in which proceedings for annulment could be instituted. The Commission therefore did not consider that the notice was effective against third parties.

- 23 It argues that publication of a summary notice in the C series of the *Official Journal of the European Union* is not effective against third parties. Parties could not reasonably be required to consult the C series (Information and notices) of the *Official Journal of the European Union* on a daily basis in order to be satisfied that the Community institutions have not adopted a decision, which was neither addressed nor notified to them, liable to affect their rights and/or interests.
- 24 That is all the more the case as publication was made in the form of a very brief notice which referred only to the date of adoption of the Decision, the Member State concerned, its title, its legal basis, the budget for the aid and its objective in a few headwords. It gave no indication of the content and scope of the measure and it was necessary to consult the website.
- 25 The Council did not intend to make the publication of a summary notice of decisions of the Commission in the C series of the *Official Journal of the European Union* effective against third parties under Article 26 of Regulation No 659/1999. If the Council had considered such publication to be effective against third parties, it would not have expressly reserved, in Article 20(3) of that regulation, the right for interested parties to obtain, on request, copies of those decisions, which are notified only to the States concerned.
- 26 The applicant submits that, in the absence of full publication in the *Official Journal of the European Union* or notification, the period for instituting proceedings starts on the date on which it became aware of the content of and reasons for the measure in question, provided that a copy of it was requested within a reasonable period. In the present case, the applicant was at no time informed of the Commission's decision to act and it therefore had no reason to consult the *Official Journal of the European Union* and even less the C series.

- 27 In reply to the Commission's argument that the applicant should have become aware of the Decision by 16 December 2003, the applicant states that it was recently incorporated (in November 2002), started to trade in June 2003, had a limited number of employees (139) and had no in-house legal department.
- 28 In breach of Article 88(2) and (3) EC, the Commission failed to invite the three airlines serving the Paris to Saint-Denis (Réunion) route, which included the applicant, to submit their observations on the proposal to grant aid to Air Austral, which is, as the Commission acknowledges in the Decision, liable to affect competitors on the route in question. It follows that the applicant was legitimately unaware that the Decision was liable to affect its rights and interests.
- 29 The applicant also argues that there was nothing which obliged it to be aware of the press articles which appeared on the adoption of the Decision or of the Commission's press release.
- 30 It was only after finding that it was being severely damaged by reason of the fact that Air Austral was engaging in conduct resulting in material distortions of competition that the applicant questioned the validity of the financial assistance granted to its competitor by Semetra (a local semi-public company in which the majority of the shares are owned by the Region and Department of Réunion). That is why, as part of its inquiries, the applicant made its request on 7 June 2004.
- 31 Lastly, the applicant states that it is also entitled to rely on an excusable error which does not mean that the rules of limitation apply so as to deprive it of its right to institute proceedings.

Findings of the Court

- 32 In the first place, it follows from the wording itself of the fifth paragraph of Article 230 EC that the criterion of the day on which the contested decision came to the knowledge of the applicant as the start of the period for instituting proceedings is subsidiary to the criteria of publication or notification of the measure (Case C-122/95 *Germany v Council* [1998] ECR I-973, paragraph 35; Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871, paragraph 61; and Case T-190/00 *Regione Siciliana v Commission* [2003] ECR II-5015, paragraph 30).
- 33 In the present case, in implementation of the obligation imposed on it under the first sentence of Article 26(1) of Regulation No 659/1999, the Commission published in the *Official Journal of the European Union* a summary notice informing interested parties of the existence of the Decision and indicating, inter alia, the date of its adoption, the Member State concerned, the number of the aid, its title, its objective, its legal basis and the budget allocated to it. The summary notice also mentioned the possibility of obtaining a full and authentic copy of the Decision on the Commission's website and the link providing access to it.
- 34 The provision by the Commission of access to a full version of the text of a decision placed on its website, coupled with the publication of a summary notice in the *Official Journal of the European Union* allowing interested parties to identify the decision in question and informing them of the possibility of viewing it on the internet, must be considered to constitute publication within the meaning of the fifth paragraph of Article 230 EC.

- 35 The right of an interested party to obtain a copy of such a decision provided for in Article 20(3) of Regulation No 659/1999 does not undermine that conclusion.
- 36 That provision allows interested parties to obtain a copy of every decision taken under Article 4 of Regulation No 659/1999, that is to say not only decisions that a measure does not constitute aid (paragraph 2) and decisions not to raise objections (paragraph 3), which are published in the form of a summary notice, but also decisions to initiate the formal investigation procedure (paragraph 4), which are published in full. That right therefore exists independently of the publication of those decisions in the *Official Journal of the European Union* and, accordingly, independently of the time when the period for instituting proceedings starts by virtue of the fifth paragraph of Article 230 EC.
- 37 It is not disputed in the present case that the full text of the Decision was available on the internet on 12 February 2004, when the summary notice was published. Furthermore, there has been no submission on the applicant's part that it was unable, for technical or other reasons, to gain access to the full text of the Decision in that way. The starting point for the period for instituting proceedings is accordingly 12 February 2004 and the Commission was not required to indicate in its letter of 9 June 2004 that the Decision had previously been published in the form of a summary notice or that such publication started time running.
- 38 In the second place, the concept of excusable error must be interpreted narrowly and can apply only to exceptional circumstances where, in particular, the conduct of the institution concerned was, either alone or to a decisive extent, such as to give rise to understandable confusion in the mind of a person acting in good faith and exercising normal care and attention (Case T-12/90 *Bayer v Commission* [1991] ECR II-219, paragraph 29, confirmed by the Court of Justice on appeal in Case C-195/91 *P Bayer v Commission* [1994] ECR I-5619, paragraph 26).

- 39 In the present case, the applicant's factual arguments based on its recent incorporation, the limited number of its employees and the lack of an in-house legal department do not, of themselves, lead to the conclusion that there was an excusable error.
- 40 Thirdly and lastly, the effectiveness of the publication of the summary notice as regards the applicant is consistent with the need for legal certainty, which must govern any interpretation of the provisions relating to legal remedies (see, to that effect, Case 152/85 *Misset v Council* [1987] ECR 223, paragraph 11, and Joined Cases T-121/96 and T-151/96 *Mutual Aid Administration Services v Commission* [1997] ECR II-1355, paragraph 38). To treat the date of publication of the summary notice containing a reference to the website as the date on which the contested measure was published allows the precise date on which the two-month period laid down under the fifth paragraph of Article 230 EC starts to be determined with certainty.
- 41 To treat the date of publication of the summary notice containing a reference to the website as the date on which the contested measure was published also guarantees equal treatment between all third parties by ensuring that the period for instituting proceedings against decisions in State aid matters is calculated in the same way whether the decision is published in full in the *Official Journal of the European Union* or by way of a summary notice with a reference to the Commission's website.
- 42 Accordingly, as the Decision was published on 12 February 2004, the period for instituting proceedings laid down under the fifth paragraph of Article 230 EC and Article 102(1) and (2) of the Rules of Procedure expired on 6 May 2004. Therefore, the application brought on 29 July 2004 is manifestly out of time.

43 In the light of all of the above, the action must be dismissed as being inadmissible.

The application for leave to intervene

44 As the action is inadmissible, it is not necessary to adjudicate on the application by Air Austral for leave to intervene in the proceedings in support of the forms of order sought by the Commission.

Costs

45 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby orders:

1. The action is dismissed as being inadmissible.

- 2. It is not necessary to adjudicate on the application for leave to intervene submitted by Air Austral.**

- 3. The applicant is to bear the costs.**

Luxembourg, 19 September 2005.

H. Jung

Registrar

H. Legal

President