COURT OF JUSTICE
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Judgment of the General Court in Joined Cases T-34/21 | *Ryanair* v *Commission* and T-87/21 | *Condor Flugdienst* v *Commission (Lufthansa; COVID-19)*

The General Court annuls the decision of the Commission to approve the recapitalisation of Lufthansa by Germany, amounting to €6 billion euros, in the context of the COVID-19 pandemic

The Commission committed several errors, in particular, by considering that Lufthansa was unable to obtain financing on the markets for the entirety of its needs, by failing to require a mechanism incentivising Lufthansa to buy back Germany's shareholding as quickly as possible, by denying that Lufthansa held significant market power at certain airports, and by accepting various commitments that do not ensure that effective competition on the market is preserved

On 12 June 2020, the Federal Republic of Germany notified the European Commission of individual aid in the form of a recapitalisation of €6 billion euros ('the measure at issue') granted to Deutsche Lufthansa AG ('DLH'). The recapitalisation, part of a wider series of support measures for the Lufthansa Group, [1] was intended to restore the balance sheet position and liquidity of the undertakings in that group in the exceptional situation caused by the COVID-19 pandemic.

The measure at issue consisted of three different elements, namely an equity participation of approximately €300 million, a silent participation that is not convertible into shares of approximately €4.7 billion ('Silent Participation I') and a silent participation of €1 billion with the features of a convertible debt instrument ('Silent Participation II').

Without initiating the formal investigation procedure provided for in Article 108(2) TFEU, the Commission classified the measure at issue as State aid that was compatible with the internal market [2] under Article 107(3)(b) TFEU [3] and the Communication from the Commission on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak. [4]

The airlines Ryanair DAC and Condor Flugdienst GmbH ('Condor') brought two actions for annulment of that decision, which are upheld by the Tenth Chamber (Extended Composition) of the General Court on the ground that

[1] DLH is the parent company of the Lufthansa Group, which, inter alia, comprises Lufthansa Passenger Airlines, Brussels Airlines SA/NV, Austrian Airlines AG, Swiss International Air Lines Ltd and Edelweiss Air AG.

[2] Commission Decision C(2020) 4372 final of 25 June 2020 concerning State Aid SA.57153 (2020/N) – Germany – COVID-19 – Aid to Lufthansa ('the contested decision'). On 14 December 2021, the Commission adopted Decision C(2021) 9606 final, correcting the contested decision.

[3] Under Article 107(3)(b) TFEU, aid to remedy a serious disturbance in the economy of a Member State may, under certain conditions, be considered to be compatible with the internal market.

[4] Communication from the Commission of 19 March 2020 on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ 2020 C 91 I, p. 1 ; 'the Temporary Framework'), which was amended, for the first time, on 3 April 2020 (OJ 2020 C 112 I, p. 1) and, for a second time, on 8 May 2020 (OJ 2020 C 164, p. 3).

the Commission, by adopting the contested decision, infringed several conditions and requirements laid down in the Temporary Framework.

Findings of the Court

The admissibility of the actions for annulment

As regards the standing of the applicants to bring proceedings to challenge the merits of the contested decision, the General Court observes that, in accordance with the fourth paragraph of Article 263 TFEU, there are two alternative situations in which any natural or legal person may institute proceedings against an act which is not addressed to them, namely, first, if the act at issue is of direct and individual concern to them and, second, if it is a regulatory act that is of direct concern to them and does not entail implementing measures.

Since the contested decision, which is addressed to the Federal Republic of Germany, does not constitute a regulatory act, the General Court determines whether the applicants are directly and individually concerned by that decision.

As regards, first, the question of individual concern, it is apparent from the case-law that that condition may be satisfied if the applicants adduce evidence to show that the measure concerned is liable to have a substantial adverse effect on their position on the market at issue. Accordingly, Ryanair and Condor showed their status as direct competitors to the Lufthansa Group on a multitude of routes, which would all constitute relevant markets. Ryanair also highlighted its status as a direct competitor of the Lufthansa Group on the German, Belgian and Austrian markets.

After observing that, at the stage of examining the admissibility of an action, it is sufficient to find that the definition of the market at issue put forward by the applicants is plausible, that being without prejudice to the substantive examination of that issue, the General Court confirms that the measure at issue was liable to have a substantial effect on the competitive position of the applicants on the markets for the transport of passengers by air.

It is apparent from examining the relevant and credible data provided by the applicants, read in combination with the contested decision, that the measure at issue was not only likely to allow the Lufthansa Group to cope with the risk of an exit from the markets on which it was in direct competition with the applicants, but also to strengthen its competitive position. Accordingly, the grant of the measure at issue was prima facie capable of causing the loss of an opportunity to make a profit or a less favourable development than would have been the case for the applicants without such a measure.

As regards, second, the question of whether the applicants are directly concerned, the General Court observes that a competitor of a beneficiary of aid is directly concerned by a Commission decision authorising a Member State to pay the aid when there is no doubt as to that State's intention to do so, which was the case in this instance.

Having regard to all those factors, the General Court confirms that the applicants are entitled to challenge the contested decision on the merits by means of their actions for annulment.

The merits of the actions for annulment

Before examining the merits of the various pleas for annulment raised by the applicants, the General Court observes that the Commission is bound by the guidelines and notices that it issues in the specific area of State aid, to the extent that they do not depart from the rules in the Treaty. It is therefore for the Courts of the European Union to determine whether the Commission has observed the rules which it has adopted in that area.

The General Court states, furthermore, that in the context of the review that it conducts on complex economic assessments carried out by the Commission in the field of State aid, it is true that it is not for the General Court to substitute its own economic assessment for that of the Commission. However, the General Court must establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence

contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. In addition, the review carried out by the Courts of the European Union is comprehensive as regards the evaluations made by the Commission which do not involve complex economic assessments or as regards questions of a strictly legal nature.

A. The eligibility of DLH for the notified aid

Having made those observations, the General Court examines, first of all, the various complaints contesting the eligibility of DLH for the notified aid. In that regard, the applicants in particular alleged an infringement of point 49(c) of the Temporary Framework, which states that, in order to be eligible for a recapitalisation measure, the beneficiary must be unable to obtain financing on the markets at affordable terms.

According to the contested decision, that condition was satisfied since DLH would not have had sufficient collateral to obtain financing on the markets for the entire amount of the aid.

On that point, the General Court observes, however, that there is nothing in the contested decision to indicate that the Commission assessed the possible availability of collateral, such as DLH's unencumbered aircraft, their value and the terms for any loans that it may have been possible to obtain on the financial markets against such collateral. Furthermore, the assertion that the 'collateral' – not specified in the contested decision – would not be sufficient to cover the entire amount of the funds necessary is based on a false premiss, that the financing that can be obtained on the markets must necessarily cover all of the beneficiary's needs. Neither the wording, purpose nor context of point 49(c) of the Temporary Framework provides support for the view that the beneficiary must be incapable of finding financing on the markets for the entirety of its needs.

Since the Commission did not assess whether DLH could have raised a non-negligible part of the necessary financing on the markets, the General Court finds that the Commission failed to take account of all the relevant evidence that must be taken into consideration in order to assess the compliance of the measure at issue with point 49(c) of the Temporary Framework. Consequently, the General Court upholds the complaint made by Ryanair based on an infringement of that point, and, a fortiori, that of Condor alleging the existence of serious doubts in that regard.

B. The remuneration and exit of the State

The General Court then addresses the complaints alleging an infringement of the conditions laid down in the Temporary Framework as regards the remuneration and exit of the State.

In that regard, Ryanair in particular criticised the Commission for not providing a step-up mechanism for increasing the remuneration of the German State as regards, first, the equity participation in DLH and, second, Silent Participation II after its possible conversion into equity.

In the first place, as regards the remuneration for equity instruments, such as the equity participation, point 61 of the Temporary Framework states that any recapitalisation measure is to include a step-up mechanism increasing the remuneration of the State, to incentivise the beneficiary to buy back the State capital injections. Point 62 of the framework provides that the Commission may accept alternative mechanisms, provided that they lead overall to a similar outcome with regard to the incentive effects on the exit of the State and have a similar impact overall on the State's remuneration.

While the participation of the German State in the equity of DLH was not accompanied by any step-up mechanism within the meaning of point 61 of the Temporary Framework, the Commission found that the overall structure of the notified aid constituted an alternative step-up mechanism, within the meaning of point 62, in that it included sufficiently strong incentives for the exit of the State from DLH's capital. In support of that finding the Commission referred inter alia to the significant discount at which the Federal Republic of Germany had acquired the shares in DLH, which would provide the State with higher remuneration than that which would have resulted from the

application of a step-up mechanism.

That line of argument is, however, rejected by the General Court, which observes that the price at which the State acquires shares on entry into the capital of the beneficiary is governed by point 60 of the Temporary Framework, according to which a capital injection by the State is to be conducted at a price that does not exceed the average share price over the 15 days preceding the request for the capital injection. The subject matter and objective of that rule are different from those underlying the step-up mechanism. While the latter mechanism is intended to be an incentive to the beneficiary concerned to buy back the State's shareholding as quickly as possible, the rule concerning the purchase price of the shares is intended, in essence, to ensure that the price at which the State acquires its shares does not exceed their market price. Since the price of the shares may rise as well as fall, the purchase price is not necessarily intended to increase the incentive, over time, for the beneficiary concerned to buy back the State's shareholding.

It follows that, contrary to what was argued by the Commission, the price of the shares at the time of the entry of the German State into the capital of DLH did not constitute an alternative step-up mechanism for increasing the remuneration of that State.

In the second place, as regards Silent Participation II, which is a hybrid capital instrument, point 68 of the Temporary Framework requires that, after its conversion into equity, a step-up mechanism must be included to increase the remuneration of the State and to incentivise the beneficiaries concerned to buy back the State capital injections. According to the General Court, it is common ground that Silent Participation II, at the time of its conversion into equity, is likewise not accompanied by a step-up or similar mechanism.

Consequently, the General Court finds that the Commission infringed the Temporary Framework in that it failed to require the inclusion of a step-up mechanism to increase the remuneration of the State or a similar mechanism in the remuneration for the equity participation and for Silent Participation II, at the time of the latter's conversion into equity.

C. The existence of significant market power on the part of the Lufthansa Group on the markets at issue and the structural commitments

Lastly, the General Court examines the complaints alleging an infringement of point 72 of the Temporary Framework, which states that if the beneficiary of a COVID-19 recapitalisation measure above €250 million is an undertaking with significant market power ('SMP') on at least one of the relevant markets on which it operates, Member States must propose additional measures to preserve effective competition on those markets.

In that regard, the applicants essentially raised three sets of complaints relating to (a) the definition of the markets at issue; (b) whether the Lufthansa Group holds SMP on those markets; and (c) the effectiveness and sufficiency of the structural commitments accepted by the Commission.

a. The definition of the relevant markets

In the first place, as regards the definition of the relevant markets, the Commission held in the contested decision that the markets on which the Lufthansa Group operated were the markets for the provision of passenger air transport services to and from the airports served by that group. It thus identified the relevant markets according to the 'airport-by-airport' approach. That approach is contested by the applicants, which state that the Commission should have defined the markets for the provision of passenger air transport services as pairs of cities between a point of origin and a point of destination ('the O&D markets').

Since point 72 of the Temporary Framework does not specify the method that should be used for defining the relevant markets, the General Court observes that the recapitalisation measures falling under the Temporary Framework are intended to remedy a serious disturbance in the economy of a Member State by supporting, in particular, the viability of the undertakings affected by the COVID-19 pandemic so as to restore their capital

structure to the level existing before the pandemic. Those aid measures thus target the overall financial situation of the beneficiary and, more generally, that of the economic sector concerned.

In that context, the measure at issue sought to ensure, in essence, that the companies of the Lufthansa Group have sufficient liquidity and that the disruptions caused by the COVID-19 pandemic do not undermine their viability, and not to support the presence of that group on a particular route. Consequently, the Commission was right to state that the measure at issue was aimed at preserving the overall ability of the Lufthansa Group to operate air transport services and that, as a result, it was not appropriate to analyse the impact of the measure at issue on each O&D market taken in isolation.

The arguments put forward by the applicants based on the approach followed in the area of merger control, in which the relevant markets are defined according to the O&D approach, likewise fail to convince, since that analogy does not take sufficient account of the specific features of the Temporary Framework and the measure at issue, which does not have a direct link with particular O&D markets rather than others.

Consequently, for the purpose of applying point 72 of the Temporary Framework, the Commission was entitled, without making a manifest error of assessment, to define the markets at issue according to the 'airport-by-airport' approach.

In addition, the General Court rejects the complaints made by Ryanair, in the alternative, that the Commission erred in its application of the 'airport-by-airport' approach by limiting its examination solely to the airports in the European Union where the Lufthansa Group had a base. On that point, the General Court observes that inasmuch as Ryanair has not demonstrated to the requisite legal standard that the Lufthansa Group was likely to have SMP at the airports at which it had no base, the Commission was entitled to exclude those airports from its analysis. Furthermore, in questions of State aid, the Commission has no jurisdiction to examine whether the Lufthansa Group holds SMP at an airport located outside the European Union.

b. Whether the Lufthansa Group holds SMP at the relevant airports

With all of the applicants' arguments concerning the definition of the relevant markets having been rejected as unfounded, the General Court analyses, in the second place, the complaints related to whether the Lufthansa Group holds SMP at the airports examined by the Commission.

Since the concept of 'SMP' is not defined in the Temporary Framework, nor more generally in the field of State aid, the General Court begins by observing that that concept must be regarded, in essence, as equivalent to that of a dominant position under competition law. According to settled case-law, such a dominant position is defined as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.

In the contested decision, as corrected, the Commission based its analysis of whether the Lufthansa Group held SMP at the 10 airports examined [5] on the slot holdings possessed by that group at those airports, the level of congestion there, and the number of slots held by competitors; it also took into account the number of aircraft based by that group and its competitors at some of the airports.

In that regard, the General Court finds that those criteria, which relate in essence to airport capacity and concern access by airlines to airport infrastructure, do not provide direct information about the market shares of the Lufthansa Group on the market for the provision of passenger air transport services at the airports examined. However, given that the relationship between the market shares of the latter undertaking and of its competitors is relevant evidence of the existence of SMP, the Commission could not ignore factors providing information on that issue, such as the number of flights and seats offered to and from the airports concerned. It follows that, by failing

[5] Namely Berlin Tegel, Brussels, Düsseldorf, Frankfurt, Hamburg, Munich, Palma de Mallorca, Stuttgart, Vienna and Hannover airports.

to take into consideration all the factors that were relevant for assessing the market power of the Lufthansa Group at the airports concerned, the Commission made a manifest error of assessment.

Furthermore, and in any event, the Commission also made a manifest error of assessment by finding, on the basis solely of the criteria that it examined, that the Lufthansa Group enjoyed SMP at Frankfurt and Munich airports during the 2019 summer and the 2019/2020 winter seasons, but that such was not the case as regards the other relevant airports. In that regard, the General Court observes that an overall assessment of the criteria analysed by the Commission for Düsseldorf and Vienna airports during the 2019 summer season demonstrates the existence of a very high slot holding on the part of the Lufthansa Group at Düsseldorf Airport and a high slot holding at Vienna Airport, including during peak hours; a very high congestion rate at those two airports, characterised by almost complete congestion during peak hours; and the weak position of the group's competitors. Consequently, on the basis of those criteria alone, the Commission could not properly find that the Lufthansa Group did not hold SMP at Düsseldorf and Vienna airports, at least during the 2019 summer season. Furthermore, and in any event, the data which led the Commission to find that the Lufthansa Group held SMP at Frankfurt and Munich airports were not materially different from those concerning Düsseldorf and Vienna airports, at least as regards the 2019 summer season. On that basis, the General Court upholds the complaints put forward by the applicants.

c. The structural commitments

In the third place, the General Court examines the complaints contesting several aspects of the structural commitments accepted by the Commission under point 72 of the Temporary Framework, in order to preserve effective competition at Frankfurt and Munich airports.

Under point 72, the Member States may, in proposing such measures, offer structural or behavioural commitments foreseen in the Notice on remedies. [6] In accordance with that notice, the commitments proposed have to eliminate the competition concerns entirely, be comprehensive and effective from all points of view and, furthermore, must be capable of being implemented effectively within a short period of time. In that context, the Commission must in particular consider all relevant factors relating to the proposed remedy itself, including the type, scale and scope of the remedy proposed, judged by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other players on the market.

It is necessary also to take account of the specific features of the law on State aid and, more particularly, the Temporary Framework, of which the requirement related to additional measures is part. Given that the objective of the aid granted in accordance with that framework is to ensure the operational continuity of viable undertakings during the COVID-19 pandemic, the commitments set out in point 72 thereof must be designed so as to ensure that, after the aid has been granted, the beneficiary will not become more powerful on the market than it was before the COVID-19 outbreak and that effective competition on the markets concerned will be maintained.

In the present case, the contested decision envisaged, as measures proposed by the Federal Republic of Germany under point 72 of the Temporary Framework, in particular, the divestiture by DLH of 24 slots a day at each of Frankfurt and Munich airports as well as additional assets, as required by the Slot Coordinator to allow for the transfer of slots.

In that regard, the applicants contested, inter alia, the procedure for the divestiture of the slots approved in the contested decision, which was intended to take place in two stages. In the first stage, the slots were to be offered 'to new entrants' only. If, after a specific period exceeding several seasons, the slots were not divested to a new entrant, they would, in a second stage, be made available to carriers which already have a base at those two airports.

Referring to the Commission's duty to consider all the relevant factors relating to the proposed commitments, judged by reference to the structure and particular characteristics of the market at issue, including the position of

[6] Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ 2008 C 267, p.1).

the parties and other players on the market, the General Court finds that the Commission failed to examine whether it was appropriate to exclude the competitors already based at Frankfurt and Munich airports from the first stage of the procedure. In the contested decision, the Commission did not put forward any reason capable of demonstrating that that exclusion was likely to maintain effective competition on the relevant markets and that it was necessary for that purpose.

In the present case, such an examination was all the more necessary since the structure of the market at Frankfurt and Munich airports was characterised, according to the contested decision itself, by the much greater weight of the Lufthansa Group in comparison with that of its closest competitors, which already had a base at those airports, such that their exclusion from the first stage of the procedure risked having the effect of further fragmenting competition at those airports. Furthermore, the fact that the closest competitors of the Lufthansa Group, which, owing to their presence at Frankfurt and Munich airports could be better placed to acquire the slot portfolio at issue and increase the competitive pressure, may become eligible during the second stage of the procedure does not call that finding into question, since their eligibility depends on the failure of the first stage.

In the light of the foregoing, the General Court finds that by excluding the competitors that already have a base at Frankfurt and Munich airports from the first stage of the slot divestiture procedure, the Commission failed to examine all the relevant factors relating to the proposed commitment, and therefore made a manifest error of assessment.

As regards the divestiture of DLH's slots at Frankfurt and Munich airports, Condor, in addition, alleged that the Commission infringed its obligation to state reasons in that it did not explain how the requirement to pay for the divestiture of the slots at issue, as set out in the contested decision, rather than requiring their transfer free of charge is, first, in compliance with the applicable rules and, second, makes the commitments sufficiently attractive to a potential purchaser.

On that point, the General Court observes that the requirement that the divestiture of slots should be remunerated was of decisive importance in the scheme of the contested decision, with the result that the Commission was obliged to state the reasons why it considered that that requirement complied with the applicable rules. Given the absence of any indication as to the reasons which led the Commission to find that the slot divestiture at issue should be carried out in return for remuneration and not carried out free of charge, and that that requirement would not have the effect of reducing the attractiveness of those slots and, therefore, the effectiveness of the related commitments, the General Court finds that the Commission failed to fulfil its obligation to state reasons for the contested decision.

In the light of all of the foregoing, the General Court finds that the contested decision, as corrected, is vitiated by several errors and irregularities and, in consequence, it annuls that 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.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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

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